1909

GHAFUR-UD-DIN v. HAMID HUSAIN.

of Civil Procedure, 1882, and this suit was maintainable against the defendant. We accordingly allow the appeal, and, as the suit was dismissed upon a preliminary ground and the decision of the Court below on that ground is erroneous, we remand the case to that Court under order 41, rule 23, of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and to dispose of it on the merits. Costs here and hitherto will follow the event.

Appeal allowed and cause remanded.

1909
November 11.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

GANGA SARAN SINGH AND OTHERS v. BHAGWAT PRASAD.*

Criminal Procedure Code, sections 145, 439 *—Defect in form of written order—Jurisdiction—Revision.*

Where in proceedings under Chapter XII of the Code of Criminal Procedure the initial order was defective in that it did not set forth the grounds for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace: but on the other hand both parties were fully cognizant of the matter in dispute and there was in fact danger of a breach of the peace, the High Court declined in revision to interfere with the Magistrate's order.

THIS was an application for revision of an order purporting to have been passed under section 145 of the Code of Criminal Procedure by a Magistrate of the first class. The facts of the case appear from the following judgment of Tudball, J., before whom the case was first argued.

"This application for revision arises out of proceedings purporting to have been taken by a Magistrate under section 145, Criminal Procedure Code, in respect to certain lands. The sole point urged is that the Magistrate did not record an order in writing under section 145 of the Code, stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the plots in question.

"The history of the case is briefly as follows:—The land in dispute was a fixed rate tenure partly cultivated by sub-tenants. On 30th March, 1905, Chattardhari Singh and Bhagwat Prasad Singh obtained a decree against the applicants Ganga Saran Singh, etc. In execution thereof this land was put to sale and purchased by the decree-holders on 25th March, 1908, and on 12th July, 1908, the Amin put them into actual possession of the lands not in the hands of sub-tenants and into symbolical possession of such as was held by such sub-tenants.

* Criminal Revision No. 338 of 1909, against the order of W. T. M. Wright, Magistrate, first class, of Mirzapur, dated the 26th of April 1909.

Objection was taken to this, but was rejected by the Subordinate Judge, whose order was upheld on appeal. On August 5th, 1908, one Abheraj Singh who was a sub-tenant of 4 bighas out of one of the plots began to plough up a portion of the land, which formed no part of his sub-tenure but was part of the land, actual possession of which had been given to the auction-purchasers. This led to a riot between Chattardhari's party and that of Ganga Saran Singh, in which Abheraj Singh and another were killed. Chattardhari and his brother and others were tried and convicted, but Chattardhari was acquitted on appeal. After his acquittal Chattardhari preferred a complaint of criminal trespass against Ganga Saran Singh and his party in respect of the occurrence of August 5th, 1908, while Krishna Prasad Singh, one of the present applicants, preferred a complaint against the patwari. While the former of these two complaints was still pending, the time had arrived for the rabi crops sown on the land to be cut. Both sides applied to the Magistrate; each stated that the other was prepared to use force and that there was every likelihood of a breach of the peace. On this the Magistrate issued an order (in which however he omitted to set forth the material facts of the case) ostensibly under section 144 of the Code. This was on the 4th March, 1909. The order runs as follows:—'Notice to issue to parties under section 144. If the crops are ripe, the police will have them reaped with the consent of the parties.' On the 10th March, 1909, Chattardhari's complaint came on for hearing. It had often been adjourned, and though he and the accused attended, he again produced no evidence. The Magistrate therefore dismissed the complaint and then started proceedings under section 145 of the Code with the following order:—'To-day case No. 4, *Bhagwat Prasad* v. *Ganga Saran Singh and others*, under section 447, Indian Penal Code, was put up for hearing at Khajwa. The complainant has appeared without his witnesses. The accused are present. Since the case has often been adjourned, I dismiss it, and as in connection with this case, an injunction has been issued to the parties in regard to the crops of the cultivated area, it is proper to take action under section 145, Criminal Procedure Code. It is therefore ordered that notice be issued under section 145, Criminal Procedure Code, against those persons to whom notice was issued under section 144.'

"As an order under section 145 of the Code, this appears to be defective. I can only infer from it that the Magistrate was satisfied that a breach of the peace was likely, by reason of the information given to him by the parties, on which he had deemed it necessary to take action under section 144. This I gather from his reference to the proceedings taken by him ostensibly under that section and by his reference to Chattardhari's complaint which he dismissed on 10th March, 1909. A reference to the former of the above two records shows that he had received information from both parties that a breach of the peace was likely owing to the dispute concerning this land. His satisfaction as to the existence of the dispute and that it was likely to cause a breach of the peace may be gathered from the fact that in his order he states that it is proper that action should be taken under section 145. The order, however, is clearly not properly drafted. It ought to have set forth his reasons for being satisfied. It is not necessary, however, in my opinion that it should be absolutely self-contained, provided that the parties have full

1909

GANGA SARAN SINGH v. BHAGWAT PRASAD.

information of the reasons which have induced the Magistrate to take action and are able to make their defences properly. It seems to me clear that the only object of causing the Magistrate to set forth his reasons is to enable the parties to know what case they have to meet. In this present case, the applicants themselves (and to their knowledge their opponents also) had informed the Magistrate that the dispute which had already led to one riot was likely to lead to another breach of the peace. The Magistrate in the end maintained the other side in possession, and so the applicants who have not been in the slightest degree prejudiced by the Magistrate's omission to record his reasons in full, have come here on revision. They urge that by reason of this omission it must be taken that the Magistrate acted without jurisdiction. Stress is laid on the ruling in *Nittya Nand Roy* v. *Paresh Nath Sen* (1) wherein it was held that where the Magistrate omits in his initial order under this section to state the grounds of his satisfaction, the final order is without jurisdiction. Attention is also called to the decision of the learned Chief Justice in *Darab Kuar* v. *Fateh Chand* (2). In the latter case there was much more than a mere omission to record the reasons of the Magistrate's satisfaction. The latter officer in no way followed the procedure laid down in Chapter XII, and this Court held that his whole action was illegal and without jurisdiction, not being based on any law in existence. It might possibly, however, be inferred from the judgment that the learned Chief Justice would have held the final order to be without jurisdiction even if only the initial order were defective, though this is by no means clear. In *Har Prasad* v. *Pudurang* (3) RICHARDS, J., held that though the initial order did not set forth the Magistrate's reasons as explicitly as it might have done, still there had been a substantial compliance with the requirements of the law, and he refused to interfere. That case was in other respects distinguishable from that of *Darab Kuar* v. *Fateh Chand*. In *Bihari Lal* v. *Chhajju* (4), KNOX, J., held that where there was no order setting forth the Magistrate's reasons for being satisfied that a dispute likely to cause a breach of the peace existed, the proceedings were not such as are justified by Chapter XII of the Code. In the case of *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (5), the full Bench of the Calcutta High Court held that where an initial order made by a Magistrate under section 145 (1), Criminal Procedure Code, is not self-contained and does not expressly state the grounds of his satisfaction that a dispute likely to cause a breach of the peace exists, but refers to a police report in which such grounds are set forth, and on which the order is based, such order is not defective. The Full Bench, however, did not decide the second question which was referred to it by RAMPINI and MOOKERJEE, JJ. That question ran as follows :—'Whether when an initial order made by a Magistrate under section 145 (1) of the Criminal Procedure Code does not contain a statement of the grounds, such order ought to be treated as made without jurisdiction or as an illegal order which vitiates the whole of the subsequent proceedings and renders void the final order under clause (*b*) of that section, or whether such a

(1) (1905) I. L. R., 33, Calc., 771.
(2) Weekly Notes, 1907, p. 51, foot-note.
(3) Weekly Notes, 1905, p. 260.
(4) (1905) 2 A. L. J., 272.
(5) (1905) I. L. R., 33 Calc., 352.

defective order is an irregularity in the exercise of jurisdiction by the Magistrate not necessarily vitiating the subsequent proceedings but justifying the interference of this Court, if it is shown that either party has been prejudiced by reason thereof.' It is this same question which in my opinion arises in the present case also for decision. In his initial order the Magistrate has merely referred to the order purporting to have been passed under section 144 and then says that it is proper to take proceedings under section 145. There is no doubt that the previous history of the case and the complaints made by both parties gave him good information and that he had every reason to be satisfied of the existence of a dispute likely to cause another breach of the peace. RAMPINI and MOOKERJEE, JJ., in their referring order remarked:—"We are consequently unable to hold that the omission to state the grounds in the initial order makes it an order without jurisdiction so as to invalidate the whole proceedings.' Their reasons are set forth on pages 356 to 358 of the report. It is unnecessary for me to repeat them. Their reasons appear to me to be good law and for those same reasons I should hold that in the present case the Magistrate's final order was not without jurisdiction and that the applicants have not been in any way prejudiced. The question, however, is one of some importance and the trend of opinion so far as it has been expressed in decisions of this Court appears to be the opposite way. I therefore deem it advisable to refer this case for the decision of a Bench of two Judges and I accordingly refer it."

The case was accordingly placed before a Division Bench and re-argued.

Mr. *M. L. Agarwala*, for the applicants.

Mr. *B. E. O'Conor*, for the opposite party.

KNOX and KARAMAT HUSAIN, JJ.—In this case there was a written order and though it may be a defective one still both sides were fully cognizant, as appears from the written replies they filed, of the matter in dispute. There was also no doubt a danger of the breach of the peace. This being so, we do not deem it expedient to exercise our power in revision, and therefore dismiss the application.

[See also Weekly Notes, 1907, pp. 50 and 265—ED.]