

# MYSORE HIGH COURT

K. Ganesh

Vs

K. Venkataswara Iyer

Criminal Revn. Petn. No. 142 of 1963, Nanjangud, in Cri. Misc. No. 4 of 1963

(K.S. Hegde, J.)

27.06.1963

## JUDGMENT

### **K.S. Hegde, J.**

1. This revision petition arises from a decision of the learned Special First Class Magistrate, Nanjangud, in Criminal Miscellaneous Case No. 4 of 1963. That was a proceeding under Section 145 of the Code of Criminal Procedure. The Court below has issued a preliminary order under Section 145(1) Criminal Procedure Code. The legality of this order is challenged in those proceedings.
2. On the facts admitted by the respondent herein, his petition under Section 145, Criminal Procedure Code as well as his verification statement, no case is made out under Section 145, Criminal Procedure Code. Even according to the respondent the 3rd member of the second party (3rd petitioner herein) is in actual possession of the. properties in dispute. The respondent's grievance is that though the third petitioner has taken on lease those properties from him he has now colluded with the first petitioner herein and is likely to attorn to him. In this case, no police report was called for before taking the case on file. On the uncorroborated statement of the respondent the Court below was pleased to act under Section 145(1) of the Criminal Procedure Code.
3. The two questions that arise for decision are; (1) Was the learned Magistrate justified in coming to the conclusion that there was any likelihood of breach of the peace on the sole basis of the statement of the respondent who is admittedly an interested party, and (2) On the facts alleged by the respondent, can proceedings under Section 145, Criminal Procedure Code be taken ?
4. Before taking action under Section 145, Criminal Procedure Code the Magistrate must be satisfied that a dispute likely to cause breach of the peace exists concerning any land or water or boundaries thereof within the local limits of his jurisdiction and in his preliminary order, he must state the grounds of his being so satisfied. Law and order are primarily the concern of the police. Therefore, it is but natural that before initiating a proceeding under Section 145 a Magistrate should be either moved by the police or, if moved by a private party, he should call for a report

from the police as regards the likelihood of the breach of the peace. It may be that in certain exceptional circumstances he may act on other information but that information must come to him from disinterested source. It is the experience of Courts that oftentimes civil disputes are tried to be agitated by having recourse to proceedings under Chapter XII of the Code of Criminal Procedure. This tendency is wide-spread. Therefore, it is all the more necessary for the Magistrate to be clearly satisfied about the existence of a dispute likely to cause breach of the peace before initiating proceedings under any of the provisions of the Chapter XII of the Criminal Procedure Code. In the instant case, barring the interested testimony of the respondent there was no information before the Magistrate to conclude that there was any dispute likely to cause breach of the peace. That being so, he should not have issued preliminary order. My view in this regard receives support from the decision of the Calcutta High Court in the matter of *Obhoy Chandra Mookerjee v. Mohamed Sabir*<sup>1</sup>, wherein a Bench of that Court laid down that it is the duty of the Magistrate before taking proceedings under Section 145, Criminal Procedure Code to satisfy himself whether there is any dispute likely to cause breach of the peace and that the suggested apprehension of the breach of the peace is not merely colourable and made to induce him to deal with matters properly cognizable by the civil Court. Therein the learned Judges set aside the order of the Magistrate solely on the ground that as regards the existence of the alleged dispute likely to cause breach of the peace there was only the testimony of the petitioner before the Magistrate. Similar is the view taken by a Bench of Madras High Court in *Tirumalaraja Bahadur v. Lodd Govind Doss*<sup>2</sup>, That decision laid down that in order that a Magistrate may have jurisdiction to act under Section 145, Criminal Procedure Code he must be satisfied from a police report or other information that a dispute likely to cause breach of the peace exists concerning any land, etc., where there is no police report, the statements of interested parties ought (not ?) to be acted upon unless they are corroborated by the testimony of less interested persons; the opposite party also ought to be given an opportunity of cross-examining the party making such statements, before the Magistrate takes any action on them.

5. For the reasons mentioned above, I am of the opinion that the learned Magistrate erred in initiating the proceedings under Section 145 solely on the basis of the interested testimony of the respondent.

6. This takes me to the next point. As mentioned earlier, according to the case put forward by the respondent, he is not in actual possession of the properties detailed in the petition. He only claims to be the landlord of those properties. In other words, he merely claims constructive possession (actual possession ?) being with the third petitioner. In an enquiry under Section 145, Criminal Procedure Code what the Magistrate has to decide is the question of 'actual possession' of the properties in dispute. This is made obvious by the language employed in Section 145(1), Criminal Procedure Code. That section says that the parties should be called upon to put in written statements of their respective claims 'as regards the facts of actual possession of the subject of dispute and' further requiring them to put in such documents or to adduce, by putting 'in affidavits' the evidence of such persons as they rely upon in support of such claims".

<sup>1</sup> ILR 10 Cal78

<sup>2</sup> ILR 29 Mad 561

(underlining (here in ' ') is mine). To put it in other words in a proceeding under Section 145, Criminal Procedure Code what the Magistrate is concerned is the question of actual possession of the property in dispute and not its ownership. In *Ranga Razu v. Sreenivasa*

*Jagannatharao*,<sup>3</sup> Pand Rang Rao, J. dealing with a case under Section 145, Criminal Procedure Code laid down :

"The words 'actual possession' in Section 145 mean actual physical possession even though wrongful. The words are sufficiently clear and can only mean possession in fact as distinguished from possession implied by law or constructive possession. Where the possession that is claimed by a party to proceedings under Section 145 is the possession of his tenants, i.e., constructive possession and not actual possession, he cannot be said to be in possession of the land within the meaning of Section 145." (As summarised in the head note).

It may be noted that in the present case even according to the showing of the respondent the person who is in actual possession of the properties in dispute is not siding him. It may be that he has improperly changed sides. But that is not a point that can be decided in the present proceedings. If there is no dispute as regards actual possession, then no proceeding under Section 145, Criminal Procedure Code can be taken.

7. Let me refer to two more decided cases on the point under consideration. The Calcutta High Court in *Karnadhar Ray v. Sailendranath Ghosh*<sup>4</sup>, made it clear that what is relevant in a proceeding under Section 145, Criminal Procedure Code is the actual possession and not constructive possession. Similar is the view taken by the Old Mysore High Court in *Subba Rao v. Venkatrao*<sup>5</sup>,

8. In support of his contention that a constructive possession claimed by a landlord can also be gone into in a proceeding under Section 145, Criminal Procedure Code. Sri Nagaraja Rao the learned counsel for the respondent, read to me the decision in *Venugopal Mudaliar v. Neelakanta Mudaliar*<sup>6</sup>, I do not think that this decision is apposite for our present purpose. All that is laid down in that decision is that as between a landlord and tenant the rule that the possession of the tenant is the possession of the landlord does not apply but as between the rival landlords or between the landlord and the tenant of another landlord, the rule will apply for purpose of a declaration under Section 145. It is unnecessary to consider in this case how far this decision lays down the law correctly. The next decision read to me by Sri Nagaraja Rao is the one reported in *Sarbananda Basil Mozumdar v. Pran Sankar Roy Chowdhuri*<sup>7</sup>, In that decision it was laid down that even disputes between two persons claiming to have right to collect rent from the tenant who is in actual possession of the properties in dispute can be gone into in a proceeding under Section 145, Criminal Procedure Code. With great respect to the learned Judge who decided that case, I am of the opinion that that decision does not lay down the law correctly. The ratio of that decision does not accord with the other decisions of the Calcutta High Court to some of which I have already made reference.

<sup>3</sup> AIR 1938 Mad 654

<sup>5</sup> AIR 1953 Mys27

<sup>7</sup> ILR 15 Cal 527

<sup>4</sup> ILR (1948) 1 Cal 150

<sup>6</sup> AIR 1945 Mad 255

9. For the reasons mentioned above, the preliminary order passed by the learned Special First Class Magistrate, Nanjangud, in Criminal Miscellaneous Case No. 4 of 1963 is quashed.

Order quashed.