SAURASHTRA HIGH COURT

Polubha Vajubha

Vs

Tapu Ruda

Criminal Revn. No. 26 of 1955

(Shah, C.J. and Baxi, J.)

14.10.1955

JUDGMENT

Shah, C.J.

1.This revision application arises out of proceedings instituted by the opponent Tapu Ruda under Section 145, Criminal Procedure Code and is directed against an order of the Taluka Magistrate of Talaja attaching the land in dispute and appointing an interim receiver thereof. The Sessions Judge having declined to interfere with the Magistrate"s order, the applicants have come up in revision.

2. The Magistrate"s order is assailed before us on two grounds; first that the Magistrate was not specially empowered with the jurisdiction to dry cases under Section 145, Criminal Procedure Code, and secondly that the Magistrate had failed to record a preliminary order under Sub-Section (1) of Section 145 of the Code and there was nothing to show that he had been satisfied that a dispute likely to cause a breach, of the peace exists. Regarding the first contention, Sub-Section (1) of Section 145, Criminal Procedure Code has been amended by S. 31, Saurashtra. Separation of Judicial and Executive Functions Act (Act No. 4 of 1952), and for the words "or Magistrate of the first class" the words "or any other Executive Magistrate specially empowered by the State Government in this behalf" are substituted. Then by a Notification No. H/Spl/25-2, dated 14-5-53 published in the Saurashtra Government Gazette Part IV of 22-5-1953 at pages 554 and 555, in exercise of the powers conferred by S. 37, Criminal Procedure Code as amended by the Saurashtra Act 4 of 1952 all Taluka Magistrates were invested with additional powers under the Code, one of these powers being the power to make an order in cases under Section 145 and S. 147, Criminal Procedure Code. By Section 6 of the Act 4 of 1952, besides the High Court and the Courts constituted under any law other than the Criminal Procedure Code for the time being in force, certain classes of Criminal Courts were constituted and one of these were Courts of Executive Magistrates Taluka Magistrates being included in this category. The question which arises is whether by the Notification in question the Taluka Magistrates are specially invested with powers to hear cases under Section 145 of the Code. Section 39 of the Code deals, inter alia, with conferment of powers and says that in conferring powers under the Code the State Government may empower persons specially by name or in virtue of their office or classes of officials generally by their official titles. The Section thus contemplates conferment of powers

"specially" or "generally", but so far as the former is concerned, the essence of the matter is that the empowering specially is of persons whether it be done by their name or in virtue of their office. On the other hand, the empowering generally is of classes of officials by their official titles. The language of the Section thus plainly indicates that special empowering can take place only where persons are empowered and that where a class of officials is invested with powers, for instance, for trying certain offences, the empowering is general. In the present case the Notification empowers all Taluka Magistrates with the powers specified therein and evidently therefore it is general empowering of a class of officials by their official titles and is not special empowering.

3. In - *"Mahomad Kasim v. Emperor[1]",* on facts somewhat similar, it was held that the empowering was a general empowering and the Second Class Magistrate had no jurisdiction to try the case. It was a case under the Opium Act, 1878, and Section 3 thereof defined a Magistrate as a Presidency Magistrate, a Magistrate of the First Class or when specially empowered by the Local Government to try cases under the Act a Second Class Magistrate. By a Notification the Government empowered all Magistrates of the second class to try cases under the Act, and the question arose whether this was an act specially empowering the Magistrates of the second class. After referring to the provisions of Section 39 of the Code Spencer, J. said :

> "When therefore a class of officials is invested with powers to try certain offences, it would appear that they are "generally" empowered. The word "generally" is in contrast to the word "specially", which is used in speaking of individuals". Sheshagiri Aiyar, J. stated in the same case :
> "Moreover the notification of 1880 cannot have the effect of enlarging the powers of all Second, Class Magistrates appointed since the date of its publication."

That also indicates that the empowering would, in such a case, be a general empowering.

4. This decision was referred to in - "*Alaga Pillai v. Emperor[2]",* and the principle thereof was approved, but on the facts of that case it was held that inasmuch as the Second Class Magistrate of Thirumangalam was mentioned in the list appended to the Government Notification, it meant special empowering of the person holding that office in virtue of his office Within the meaning of S. 39, Criminal Procedure Code and it therefore satisfied the requirements referred to in "*Mahomad Kasim v. Emperor* (A)".

> "Mahomad Kasim"s case" was also referred to in - "*Emperor v. Savalaram Kashinath[3]",* That was a case of empowering Assistant or Deputy Superintendents of Police of six specified places including Poona City, by virtue of their office, to issue warrants under Section 6, Bombay Prevention of Gambling Act. This was done by a Notification of August, 1928 and later by
> Amending Act 1 of 1936, the old Section 6 was
> replaced by an entirely new Section and the relevant change was made that the word "empowered" was altered to "specially empowered." The question was what was meant by "specially empowered."

Lokur, J. dissented from the decision in –

> "*Emperor v. Udho Chandumal*[4]", in which the words "specially empowered" were interpreted as meaning specially empowered by name and not by virtue of their office and he held that the special empowering may be either by name or by virtue of the office, and in support thereof he referred to S. 15, Bombay General Clauses Act, 1904 (equivalent to Section 14 of the Saurashtra Acts (Interpretation), (Act 10 of 1952) which says that where by any Bombay Act, a power to appoint any person to fill any office, or execute any function is concerned, then, unless it is otherwise expressly provided, any such appointment, if it is made after the commencement of this Act, may be made either by name or by virtue of office. The learned Judge referred to S. 39, Criminal Procedure Code and said :
> "This throws a flood of light on what is meant by "Specially empowering" persons. It emphasises the distinction between "specially empowering" and "generally empowering". When a class of officials is invested with powers to try certain offences or to do certain functions, it would appear that they are "generally empowered", but if any persons are so empowered by name or in virtue of their offices, they are said to be "specially empowered". This distinction was clearly pointed out in 1915 Mad 1159 (AIR V 2), where S. 3, Opium Act, 1878 had to be interpreted."

5. The learned Assistant Government Pleader has relied on - "*State v. Judhabir Chetri*[5]", Where the notification empowered all Magistrates of the first class in the State of Assam to exercise powers under Section 17, Assam Opium Prohibition Act of 1947, and the question was whether the empowerment was special empowerment as required by Section 16 of the said Act. Referring to "1915 Mad 1159 (AIR V 2) (A) Thadani, C.J. held that the error in the conclusion of the learned Judges of the Madras High Court was the result of supposing that First Class Magistrates constituted a class of officials, and in the learned Judge"s opinion First Class Magistrate did not constitute a class of officials, but they were persons holding an office. He referred to S. 6, Criminal Procedure Code, which enumerates the classes of Courts and to the heading of Chap. II, which is "The constitution of Criminal Courts and Offices." The learned Judge said that the terms "Court" and "Magistrate" are synonymous terms, and the word "office" in the heading of the Chapter means, the office of a Judge or a Magistrate. The learned Judge also referred to the definition of a "Magistrate" in Section 3 Clause (31), General Clauses Act, and stated that if the word 'persons' in Section 39 of the Code was substituted by the word 'Magistrates', the meaning would be clear. He interpreted the words "classes of officials generally by their official titles" in Section 39 to mean officials like Secretaries. Under Secretaries and Deputy
Secretaries to Government and said that the expression "class of officials" must not be confused with "first class Magistrates", who are not a class of officials but Courts or offices in the same way as a Judge is not an official but an office, and that a Judge did not bear an official title in the sense that a head of Government Department bears the official title of Secretary to Government. With all respect, we are unable to agree with this view of the Assam High Court. It is true that the heading of Chap. II of the Criminal Procedure Code is "The constitution of powers of Criminal Courts and Offices" and the word 'office' in the heading means the office of a Judge or a

Magistrate. Even so, it does not necessarily exclude the concept of a Judge or a Magistrate being an official; and this view is fortified by the heading of Chap. III of the Code, which is "Powers of Courts." Part A of the Chapter speaks of description of offences cognizable by each Court; Part B deals with sentences which may be passed by Courts of various Classes; Part C speaks of Ordinary and Additional Powers; and Part D speaks of conferment, continuance and cancellation of Powers. Now these powers are all powers of the Courts and in fact Chap. Ill deals with that subject itself.

In spite of it, we find in Section 39 of the Code the words "classes of officials generally by their official titles." "Officials" in the sense in which that expression is interpreted by Thadani, C.J. in '1953, Assam 35 (AIR V 40) (E)' have really no place in the scheme of Chap. III of the Code, and with all respect to the learned Chief Justice we are unable to agree with that interpretation, which refers to Secretaries, Under Secretaries and Deputy Secretaries to Government or to other Heads of Government Departments. Chapter III of the Code does not envisage empowering such officials with powers under the Code. Considering that this Chapter is concerned with, powers of Courts and that the powers conferred thereby are on the Courts, we think the proper construction of the expression 'officials' in Section 39 would be to equate it with Courts and not to interpret it as meaning officials of Government. 'Officials' should rather be given its normal meaning viz. persons holding an office; and that office here is the office of a Judge or a Magistrate. The contract in Section 39 is really between empowering persons on the one hand and empowering classes (of officials) on the other hand, the underlying idea being that it is Courts which are to be empowered. What the Section provides is that where persons (that is to say Magistrates or Judges) are to be empowered the empowering shall be by name or in virtue of their office and this empowering will be special empowering, as against general empowering, which empowering is to be of the whole class of officials (who would also be Magistrates or Judges) by their official titles. Special empowering in its essence means empowering of persons, and that is to be done either by name or in virtue of the office. We do not therefore agree that this special empowering can be of Judges or Magistrates only and that general empowering can be of officials ether than Judges or Magistrates. Section 39 does not envisage any distinction of this nature; it contemplates empowering of Courts, meaning Judges or Magistrates either specially or generally. With respect, we agree with the view taken by the Madras High Court in '1915 Mad 1159 (AIR V 2) (A)' followed in '1924 Mad 356 (AIR V 11)' (B).

6. The Assam decision has been followed in - '*Vijayan v. State*'[6], Referring to 'Mahomad Kasim's case, Koshi, C.J. has said that the Madras High Court has gone back upon the view expressed in '*Mahomad Kasim's case' in the latter case of*'[7] But
this is not correct, and on the contrary the principle of 'Mahomad Kasim's case' is adopted in 'Allaya Pillai's case'. In any case, for the aforesaid reasons, we do not agree with the decision of Travencore-Cochin High Court also. In - '*Sunder Lal v. Emperor*'[8], referred to in the above case, Kendall, J. merely mentioned an earlier Bench decision of the Allahabad High Court without giving the citation and we are not in a position to know of the reasoning employed by the Division Bench of that Court in the said earlier case. Agreeing with 'Mahomad Kasim's case, therefore, we hold that the powers conferred by the Notification in the present case on all Taluka Magistrates does not amount to specially empowering them within the meaning of S. 39, Criminal Procedure Code, and therefore the Taluka Magistrate of Talaja was not empowered to hold proceedings under Section 145, Criminal Procedure Code, and that the order made by him was without jurisdiction.

7. Turning to the second objection, it is contended for the applicants that the omission to make a preliminary order under Section 145(1) of the Code vitiates the subsequent proceedings and that the order attaching the land and appointing a receiver thereof is therefore bad in law. Now there are certain decisions which support this view but there are also decisions which hold a contrary view, and as to this latter, reference may be made to - '*Wazir Mahton v. Badri Mahton*[9]' and - '*Ratan v. Tika*'[10], But apart from authority, it seems to us that the view that the absence of a preliminary order renders all subsequent proceedings void and without jurisdiction is not correct on principle, because if the Magistrate is once seized of the jurisdiction then the omission to comply with the procedure prescribed for the exercise of that jurisdiction will not vitiate the proceedings altogether. In other words the jurisdiction of a Magistrate does not depend upon how he proceeds. As is pointed out in - '*Abdul Rahman v. Emperor*'[11], an omission or irregularity in a matter of procedure in the absence of any suggestion or any failure of justice having been occasioned thereby is not sufficient to invalidate the proceedings. Reference may also be made to - '*H.N. Rishbud v. State of Delhi*[12]', No doubt, that was a case of a defect or irregularity of investigation, but the principle would also apply to the facts of the present case, and following the dictum of the Supreme Court we hold that where the cognisance of the case has once been taken and the case has proceeded to termination the failure to draw up a formal preliminary order under Section 145(1), Criminal Procedure Code does not vitiate the result unless miscarriage of justice has been caused thereby. There is no suggestion of any miscarriage of justice or prejudice in the present case. As it is, there was ample material on the record to justify the Magistrate in making the impugned order. This contention must accordingly be rejected.

8. Since, however, we hold with the applicants on the first point, we set aside the order of the learned Magistrate and quash the proceedings held by him as being without jurisdiction.

Baxi, J.

9. I agree.
Order set aside.

Cases Referred.

[1]1915 Mad 1159 (AIR V 2)
[2]1924 Mad 256 (AIR V 11)
[3]1948 Bom 156 (AIR V 35) (C)
[4]1943 Sind 107 (AIR V 30)
[5]1953 Ass 35 (AIR V 40) (FB) (E)
[6]1953 Trav-Co. 402 (AIR V 40) (F)
[7]1924 Mad 256 (AIR V 11) (B)
[8]1933 All 676 (AIR V 20)
[9]1950 Pat 372 (AIR V 37)
[10]1939 Lah 233 (AIR V 26) (I)
[11]1927 P.C. 44 (AIR V 14)
[12]1955 SC 196 ((S) AIR V 42) (K)