

## **Tahawwar Husain vs State Through Jagannath And Anr. on 6 November, 1952**

**Equivalent citations: AIR1953ALL440, AIR 1953 ALLAHABAD 440**

ORDER

Beg, J.

1. This is a reference by the learned Sessions Judge Farrukhabad, recommending that an order of Sri P. P. Sriyastava, Sub-Divisional Magistrate, Kanauj, dismissing an application under Section 147 of the Code of Criminal Procedure in default be set aside.
2. The reference in question has arisen out of a petition made by one Tahawwar Husain under Section 147 of the Code of Criminal Procedure. Tahawwar Husain is a contractor on behalf of the Farrukhabad District Board of the Kusumkhore Ghat ferry on the river Ganges. The limits of the said ferry are specified in the provincial gazette of the year 1883. The district of Farrukhabad is separated from the district of Hardoi on the north by the river Ganges. A new ferry called the Sarhiapur Ghat ferry was established to the east of the Kusumkhore Ghat ferry by notification in the U. P. Gazette dated 16-11-1946 and its limits, too, were specified. A contract in respect of the new ferry was obtained by one Noor Mohammad from the District Board, Hardoi. This Noor Mohammad and another person named Jagannath, who was a partner of Noor Mohammad, figure as second parties in this application.
3. The petitioner Tahawwar Husain alleged in his application that the second parties were plying boats within the limits of his ferry thereby encroaching upon his rights. He further alleged that they were interfering with the use of his ferry in such a manner as to practically dispossess him of the said ferry, its landing place and the part of the flowing current within its limits. It was also alleged by him that the second parties were illegally and mischievously stopping passengers from boarding the petitioner's boats, and were threatening to assault the petitioner's boatmen thereby causing a serious apprehension of a breach of the peace.
4. The Magistrate called for a report from the station officer. On receipt of the said report, he passed an order that he was satisfied that there was an apprehension of a breach of the peace regarding the use of the Kusumkhore Ghat ferry. He accordingly issued notice under Section 147, Criminal P. C. to the parties to file their written statements.
5. There were no less than 31 dates of hearing in the said case and the petitioner appeared on no fewer than 25. He was, however, absent on 30-9-1950, when the order in question dismissing the

petition in default was passed.

6. According to the allegations of the petitioner, the second parties had got him arrested by the police on 30-9-1950, and, therefore, he could not appear. Aggrieved with the order of the Magistrate dismissing his application for default he filed a revision before the learned Sessions Judge who has referred this case to the High Court with the above mentioned recommendation.

7. The sole question for decision before me is whether, it is open to a Magistrate enquiring into a case under Section 147, Criminal P. C. to dismiss in default an application made under that section. Sub-clause (1), Section 147, Criminal P. C. lays down that the procedure to be followed for proceedings under Section 147 is to be the same as that followed in proceedings under Section 145, Cr. P. C. and the provisions of Section 145, Cr. P. C., shall, as far as may be, apply to proceedings under Section 147 of the Code.

Section 145 of the Code lays down that :

"(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) .....

(3) .....

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject :

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under Subsection (1) shall be final.

(6) If the Magistrate decides that one of the parties was or should under the first proviso to Sub-section (4) be treated as being in such possession of the said subject,

he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of possession until such eviction, and when he proceeds under the first proviso to Sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

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8. The extracts from Section 145, Criminal P.C. quoted above show that the legislature has laid down a comprehensive procedure to be followed in such cases. There is no provision at all therein for the dismissal of such an application in default. On the other hand, it is laid down there that if once the Magistrate comes to the conclusion that there is a likelihood or apprehension of a breach of the peace it is the bounden duty of the Magistrate to issue notice to the parties, to call upon them to file their written statements and to take such evidence as they adduce in support of their cases. It is also open to the Magistrate to summon such evidence 'suo motu' as he considers necessary to enable him to arrive at a conclusion regarding the factum of possession. Sections 145 and 147, Criminal P.C., find place in Chapter XII of the Criminal P.C., the heading of which is "Disputes as to Immoveable Property". The object of these proceedings is to enable the Magistrate to come to a conclusion regarding the factum of possession in order to avoid a breach of the peace. Once a Magistrate has given a finding that there is an apprehension of a breach of the peace it is his responsibility to see that the proceedings are continued till they are concluded in the manner prescribed by that section.

The Magistrate has to continue the said proceedings unless and until he comes to the conclusion that the danger of a breach of the peace has disappeared and in that case only he can cancel his order and stay further proceedings. Thus there are only two courses open to the Magistrate. He has either to pass a final order in the case under Sub-clause (6) or cancel the said proceedings under Sub-clause (5) of Section 145 of the Code. It is also significant that the Code nowhere specifies that the procedure prescribed either for the trial of summons or of warrant cases is to be followed in such proceedings. Even the death of a party does not result in the termination of the proceedings which are to continue in spite of it. Thus Sub-clause (7) of Section 145, Criminal P.C. provides that when any party to such proceedings dies, the Magistrate should cause the legal representatives of the deceased party to be impleaded in the proceedings and to continue the inquiry. The procedure of dismissing such an application for default does not seem to be contemplated anywhere in the Code. On the other hand, there are definite and, clear indications to the contrary.

9. Under the circumstances, the order dismissing the aforesaid application for default is unwarranted, and cannot be sustained. I accordingly accept the recommendation made by the learned Sessions Judge, set aside the order passed by the Magistrate and direct the Magistrate to

restore the case and proceed with it from the stage at which it was dismissed.