Abdul Wahab Khan vs Mohd. Hamid Ullah on 12 December, 1950

Equivalent citations: AIR1951ALL238, AIR 1951 ALLAHABAD 238

JUDGMENT

C.J. Agarwala, J.

1. Mohammad Hamiduallah made an appln. under Section 145, Criminal P. C. complaining that Abdul Wahab Khan was trying to close the door of his (Mohammad Hamidullah's) house opening into a lane as also a drain passing through the lane & joining the municipal drain by constructing a wall across the door. Ho alleged that he had been using the lane for passage through the door for the last 20 years & that the action of the opposite party was likely to cause a breach of the peace. The appln., though ostensibly made under Section 145, was in reality under Section 147, Criminal P.C.

2. The Mag. issued notice to the opposite party who replied that he was the owner of the lane on which the appct. claimed a right of way. According to him, the appct. had opened the door in question a short time ago during his absence from Allahabad. He denied the existence of the drain & the right of way claimed by Mohammad Hamiduallah.

3. The Mag. found that the open land had been used as a lane by the inmates of Mohammad Hamiduallah's house for several years past & that the opposite party had recently Started the construction of the wall in front of the disputed door. He also found that there was a dram on the disputed land through which water of Hamiduallah's house flowed. He, therefore, held that the appct. had a right of way over the land through the door & also a right to flow water through the drain on the land into the municipal drain. He passed the following order:

> 'I hereby order that the opposite party will remove the wall erected in front of the western door of the appct. within ten days of this order. It is hereby declared under Section 145/147, Criminal P. C. that the appct. has got a right to pass over the disputed land which has been attached from the western sidedoor to the main road He has also got the right to keep his drain flowing from the disputed land up to the Municipal drain. The opposite party is forbidden to interfere with the exercise of these rights by the appct. or pain of prosecution under Section 188, Penal Code "
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> Against this order the opposite party made an appln. in revn. to the Ses. J. of Allahabad, who being of the opinion that Section 147, Criminal P. C. did not authorize a Mag. to pass a mandatory order directing the removal of a wall, made this reference, with the recommendation that the mandatory portion of the Mag.'s directions (ordering the appct. to demolish a wall be quashed. The matter first came up before the Hon'ble the Chief Justice who, in view of the conflicting authorities upon the question, referred the case to a Bench which again in its turn considered

that the case might be heard by a larger Bench. The reference is accordingly before us for disposal.

4. Under Section 147, Criminal P. C., when there is a dispute likely to cause a breach of the peace regarding any alleged right of user of any kind, whether easementary or otherwise, the Mag. is directed to make an inquiry into the dispute in the manner provided in Section 145 & if it appears to such Mag. that such right exists, he may make an order "prohibiting any interference with the exercise of such right."

5. The words prohibiting any interference with the exercise of such right in Clause 2 & 3 of Section 147 have been substituted in place of the words 'permitting such thing to be done, or directing Such thing not to be done' by the Amending Act of 1923. Before the amendment, it was held that a Mag. had jurisdiction to order the removal of an obstruction for the purpose of permitting the exercise of the right, vide Pasupati Natn v. Nando Lal, 5 C. W. N. 67 : (28 Cal. 734). Lalit Chandra v. Tarini Prasad, 5 C. W. N. 335; Ambica Prasad v. Gur Sahai, 39 Cal. 560 : (13 Cr. L. J. 184).

6. Has the change in the language taken away the power of the Mug. to issue such an order ?

7. To my mind the change in the phraseology of the section id merely verbal & does not affect the powers of the Mag. in this regard. The wording of the section had to be altered in order to bring Sub-sections (2) & (3) into harmony with the changes introduced in Sub-section (1).

8. It is admitted that, when the interference is merely verbal or is made in person by the opposite party or his servants or agents, the Mag. has jurisdiction to remove it. Because the personal interference can be removed from the scene by arresting the opposite party or his servants or agents. But it is suggested that if the interference is not personal but is done through the instrumentality of a physical obstruction like a wall or a hedge or even some other flimzy construction, the Mag. is powerless, because the section does not give him the power to order the removal of the obstruction. To my mind this interpretation of the section is too narrow & is calculated to defeat the very object of the section. The Mag. is empowered to prohibit an interference. It must be presumed that the power conferred on the Mag. is an effective power & not a nominal one. Interference may be of short duration or continuous. The Mag. must have the power to prevent the interference whether it is continuous or temporary. If it is continuous, he cannot effectively exercise his power of preventing the interference, unlese he has the power of removing the continuing interference, like a wall etc. To say that he has no power to remove the obstruction is to deny him the power of preventing the obstruction.

9. It is well settled that a power to effectuate & certain object which the Legislature has in view must be construed as implying the existence of all such ancillary powers as are necessary for carrying out the intention of the Legislature & effectuating the object in view.

10. "One of the first principles of law" says Craies in his Statute Law, Edn. 4, p 222.

> "With regard to the effect of an enabling Act is that if the Legislature enables something to be done, it gives power at the same time, by necessary implication to do everything which is indispensable for the purpose of carrying out the purpose in view, 'on the principle' as Parke, B., said in Clarence Ry Co. v. Great North of England Etc. Ry. Co (1845) 13 M. & W. 706 at p 721 : (153 E. R. 295) 'that ubi aliquid conceditur, conceditur etiam id sine quo res ipsa non esse potest,'"

As Fry J., said in Yarmouth Corporation, v. Simmons, (1879) 10 ch. D. 518 at p. 527 : (47 L. J. Ch. 792).

> "When the Legislature clearly & distinctly authorise the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right."

See also Raju v. Emperor, A. I. R. (15) 1928 Lah 462 : 10 Lah. 1 : (29 Cr. L. J. 669) & Emperor v. Sukhdeo, A. I. R. (17) 1930 Lah. 465 : 11 Lah. 539: (31 Cr. L. J. 482).

11. Form No. XXIV of Schedule v appertaining to Section 147 supports this view. The material portion of the form is as follows:

> "I do order that the said claimant or claimants or any one in their interest, shall not take (or retain) possession of the said land (or water to the exclusion of the enjoyment of the right of use aforesaid, until he (or they) shall obtain the decree or order of a competent Ct. adjudging him (or them) to be entitled to exclusive possession."
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> The words 'shall not 'retain' possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid," clearly indicate that if the opposite-party had a ready taken possession of the land to the exclusion of the enjoyment of the right, he shall desist from retaining such possession. Implicit in its language is an order of a mandatory nature, namely, an order:
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> "If you have already taken possession to exclude the enjoyment of the other side, give up the exclusive possession so that the appct. may enjoy the right of user."

When the opposite party has taken possession of the land to the exclusion of the enjoyment of the right of the appct. by building a wall he could be compelled to give up this exclusive enjoyment, only by the removal of the wall & in no other, way.

12. It has been suggested that a comparison of the language need in Section 133 where a Mag. is authorised to order the removal of the construction, suggests that in Section 147 the Legislature had no such intention. Section 133 deals with cases of removal of an unlawful obstruction or nuisance whereas Section 147 deals with the case of removal of interference with the right of user. The language of Section 147 therefore had to be in general words, conveying the idea of prohibition or

interference with the right of user. Of course, it would have been better if the Legislature in so many words had conferred upon the Mag. the power of removal of obstruction. If the Legislature had done so, there would have been no necessity of interpreting the section. The need arises as the language is not specifically clear.

13. The authorities on the point are not uniform. In none of the cases, in which a contrary view has been expressed, was the doctrine of implied powers examined. They are, therefore, not of much help.

14. In Hari Mati Dasi v. Hari Dasi Dasi,, A. I. R. (12) 1925 Cal. 991 : (26 Cr. L. J. 1265) form, No. XXIV was utilized as supporting the contrary view. I do not consider that the interpretation put upon the 'Form' was a correct one. It was further suggested in the case that, if the order of the Mag. directing the removal of the wall were to stand the opposite party was to bring a suit for a declaration to build the wall after demolishing it in obedience to the order of the Mag , which would be a suit of a somewhat novel character, in which, even if successful, the pltf. can get no relief for the loss caused. I do not know as to why the pltf. cannot bring a suit for the declaration suggested, although it would be enough for him to sue for a declaration that the other side has no right to use the land for the purpose claimed by him, & for a declaration that he has no right to interfere with the construction of the wall. In such a suit, if the wall had already been demolished, the pltf. can sue for damages, because the demolition was obtained by the other side without any right ; so that no harm is done if the Mag. is given the power to order the removal of the construction.

15. This case was followed in Calcutta in Tarini Mohan v. Dwarka Nath, A. I. R (21) 1964 Cal. 556 : (35 Cr. L. J. 1093), and Hardhone v. Brojendra Nath , A. I. R. (24) 1937 Cal. 513 : (38 Cr. L. J. 1071). The Madras H. C. in Venkanna v. Venkata Surya Neeladri Rao, A. I. R. (17) 1930 Mad. 865 : (32 Cr. L. J. 215) & Thoongavadan v. Perumal Goundan, A. I. R. (28) 1941 Mad. 752 : (42 Cr. L. J. 780) took a different view & held that the language of Section 147 was capable of being construed as giving the Ct. the power to order the removal of an obstruction This view was followed by the Calcutta H. C. in two cases, Khajer Naskar v. Tabrej Ali, A. I. R. (20) 1933 Cal. 752 : (34 Cr. L. J. 1230) & Badridas v. Sohan Lal, A.I.R. (27) 1940 Cal. 545 : (42 Cr. L. J. 94). But in Hem Chandra v. Abdur Rahman, A. I. R. (29) 1942 Cal. 244 : (I. L. R. (1942) 2 Cal. 75 F.B.), that Ct went back to the view taken in Hari Mati Dasi v. Hari Dasi, A. I. R. (12) 1925 Cal. 991 : (26 Cr. L. J. 1265).

16. In the F. B. case of Hem Chandra v. Abdur Rahman, I. L. R. (1942) 2 Cal. 75 : (A. I. R. (29)1942 Cal. 244 (F.B.)), Derbyshire C. J. with whom other Judges agreed; observed :

> "It is one thing to make an order prohibiting the doing of an act; it is another to order the doing of an act. The sub-section allows the former, but it does not allow the hitter."

No doubt, if a person is ordered not to do a cartain thing, it will not ordinarily impose upon him A duty to do a certain positive act. But there is an exception even to this rule. An order may be negative in form, but it may be of such a nature that it can be complied with only if the person restrained does something positive. Of course, if that positive thing which must be done in order to

comply with the negative order be of such a nature that it is not within his power to do, he will not be held guilty of a breach of the order. But if the doing of something positive be within his power, & if without doing it, the order cannot be complied with, he. is bound to do the positive act. For instance, if the order is 'do not retain possession of a certain house after a certain date.' this order can be complied with only if the house is vacated by that date. So also I think if a person has taken exclusive possession of a piece of land & obstructed the user of the same by another person by erecting an obstruction & the order is 'do not retain possession of the land to the exclusion of the user of it by the other party', there is no other way of complying with the order except by the removal of the obstruction.

17. The Nagpur H. C. has followed the latest Calcutta view, vide King Emperor v. Abdullah, A. I. R. (36) 1949 Nag 275 : I. L. R. 1949 Nag. 388 ; (50 Cr. L. J. 693) and Osman Ali Mohmood Ali v, Emperor, A. I. R. (25) 1938 Nag. 297 :I. L. R. 1938 Nag. 580 : (39 Cr. L. J. 584).

18. The Patna H. C. has, however, expressed, the opinion that the Mag. had jurisdiction to restrain a party from preventing the appct. from himself removing the obstruction, which in fact means that the Ct. had jurisdiction to so frame its order as to compel the removal of the obstruction, vide Ram Dhan v. Barhamdeo Lal, A.I.R, (16) 1929 Pat. 351 : (121 I. C. 461)

19. The Lahore H. C. has also taken the same view in Ghumanda Singh v. Emperor, A. I. R. (28) 1941 Lah. 210 : (42 Cr. L. J. 651).

20. So far as this Ct. is concerned only two cases have been brought to our notice -- Gajraj Singh v. Emperor, 1936 A. L. J. 746 : (A. I. R (23), 1936 ALL. 320 : 37 Cr. L. J. 705) and Ram Chand V. Emperor, A. I. R. (34) 1947 ALL. 302: (48 Cr. L. J. 1).

21. In Gajraj Singh's case, 1936 A. L, J. 746 : (A. I. R. (23) 1936 ALL. 320 : 37 Cr. L. J. 705); Niamatullah J. was of opinion that the order for the removal of an obstruction was justified by the provisions of Section 147, Criminal P. C. The matter was however, not discussed at any length.

22. In Ram Chand v. Emperor, A. I. R. (34) 1947 ALL. 302 : (48 Cr. L. J. 1), the learned Judges observed:

> "The principle, & indeed the sole object of a proceeding under Chap. 12, Criminal P. C., which includes Section. 147, is to prevent a breach of the peace. When the exercise of the alleged tight has been totally prevented, no question of a breach of the peace in consequence of the exercise of that right can possibly arise & in those circumstances we think it is not within the jurisdiction of a Mag. under Section 147, Sub-section (2) to pass an order to the effect that the permanent obstruction should be removed. In those circumstances the matter really resolves itself into a civil dispute between the parties & they should be left to pursue their remedy in the Civil Ct. Once it is found that, there can be no danger of a breach of the peace, there is in our judgment no justification for an order under Section 147, Sub-section (2), Criminal P.C."

With the greatest respect, I find myself unable to accept the proposition that once by force or stealth one party has put an obstruction in the right of user of a piece of land of another party, there remains no danger of a breach of the peace. The obstruction & the dispute about the exercise of the right are the main points of contentions between the parties. Those contentions may possibly remain as long as the obstructions & denial of the right of the user remain. The danger of breach of peace arises because of one party commencing a construction obstructing the right of user claimed by the other party. It is not necessary that the danger should automatically cease as soon as the construction is completed. Indeed in many a case the danger arises after the construction has been completed by force or in secret. If the Ct. really finds that the danger has in fact subsided it is a different matter. In that case a Mag. has no jurisdiction to issue any order. But the fact that the obstruction has been placed in the way of the exercise of the user, does not in all cases remove the danger of the breach of the peace. There is a danger because one party may try to remove the obstruction himself by force & the other party by force may want to prevent the removal. It is for this reason that the Mag. is empowered to inquire into the matter in order to prevent a breach of the peace, & to prevent the side which is acting contrary to the right found to exist in the other. Under Section 147 a Mag. is empowered to act not only when there is a danger of the breach of the peace "in consequence of the exercise of the right" as stated by the learned Judges but also when there has been placed an obstruction in the exercise of the right. Both these positions are covered by the words "dispute regarding any alleged right of user" in Section 147. A comparison with the provisions of Section 145 the procedure of which is required to be followed in proceedings under Section 147 will make the point clear. Under that section, even if one party has taken unlawful possession of a property for less than two months, there may be "a dispute likely to cause the breach of the peace concerning any land" & the Mag. will then have the power to remove the person in unlawful possession. Thus, it is recognised by that section that there may be a danger of the breach of the peace when there is a dispute about the land which is in the exclusive possession & enjoyment of the other side. Under Section 147 instead of the dispute being with regard to land the dispute is with regard to the right of user over such land. Simply because one party has put himself in exclusive possession & excluded the other party from the enjoyment of the right of user over the land, it cannot be said that the danger of breach of the peace must cease to exist in all cases. If that were so there would have been no necessity of including in Form No. 24 of Schedule. V of the Criminal P. C., a direction to the effect that a party "shall not retain possession of the land to the exclusion of the enjoyment of the right of the user" of the other party. The learned Judges did not notice the wordings of this form nor was the doctrine of implied powers discussed by them.

23. It has been urged by the Govt. Advocate that no positive order can be passed under Section 147 & that the order must be negative in form as is given in Form No. 24. No doubt, under Section 147 the jurisdiction of a Mag. is confined only to the passing of prohibitory orders which are generally in a negative form & he has no power to issue every kind of positive orders to secure the exercise of the right of user by one party. But in order to make a prohibitory order effective, as has already been discussed, the Mag. has power to pass an order for the removal of an obstruction, if without its removal the prohibitory order cannot be effectively enforced. Thus a Mag. has no power to order a party to rebuild a drain where he has demolished one. But he has power to order the removal of an obstruction, like a wall, so that the exercise of the right of user by the other party may not be interrupted.

24. It has been suggested that no explicit order for the removal of an obstruction should be passed & that the only order that should be passed should be one prohibiting the appct. from interfering with the opposite party's right of user & thereby leaving the question of the removal of the wall to implication only. I emphatically disagree with this view. What the Ct. has power to do implicitly, it must have power to do explicitly & indeed, in my view, it is much better that the Ct. passes an explicit order rather than to leave it to implication. Form No. 24 & other Forms given in the Criminal P. C. are not meant to be exhaustive. They are liable to be altered & amended according to the exigencies of a particular case.

25. It must, however, be emphasised that where constructions of a costly nature have been made, for instance, a whole house has been constructed & not merely a wall, the Mag. would be well advised not to exercise his powers under Section 147 but to leave the parties to seek their remedy in a civil Ct.

26. Again, where an obstruction has been in existence for a sufficiently long time & without there having occurred a breach of the peace, the Ct. will be justified in granting some time to the party against whom an order under Section 147 is being made, to enable him to seek his remedy in the civil Ct.

27. I would, therefore, reject this reference but would order that the order of the Mag. shall not be executed for two months & that the appct. may within this period seek his remedy in a civil Ct.

Malik, C.J.

28. I generally agree with what my brother Agarwala has said in his judgment. I would, however, like to guard myself against being understood to mean that, under Section 147, Criminal P. C., Mags, have jurisdiction to issue orders even in the nature of mandatory injunctions. It must be borne in mind that Section 147 & similar other sections were not intended to give to the Mags, power to decide disputes relating to rights of the parties. The sole object behind these sections is to prevent breaches of the peace, & if a Mag. finds that there is a likelihood of the breach of the peace & that is due prima facie to the wrongful act of a person, he can direct that person to desist from doing the wrongful act. In directing him to desist from doing a wrongful act, everything incidental thereto must be included, that is, if it is necessary for the wrong-doer to remove himself or remove any obstruction that he has placed in the way of the enjoyment of the right of the other side, he must also remove that. In passing such orders the Mags, must, however, bear in mind that their jurisdiction under these sections is confined only to preventing breaches of she peace & they are not expected to hold complicated enquiries as to title & try to adjust the same. Their orders are intended to be only of a temporary nature till the rights of the parties are finally determined by competent Cts. So far as I can see from the judgments of the lower Cts. no substantial construction had been built. Some sort of a mud wall was being put up to block the way when the opposite party filed his appln. under Section 147.

29. In the circumstances I agree in the order proposed.

Mushtaq Ahmad, J.

30. I also agree subject to the safeguard mentioned by the Hon. C. J. in his separate order.

31. By the Court. -- This reference is rejected but it is ordered that the order of the Mag. shall not be executed for two months & the appct. may within this period seek his remedy in a civil Ct. of competent jurisdiction.