

## Chhuttan And Ors. vs Ali Husain on 3 October, 1955

**Equivalent citations: AIR1956ALL452, 1956CRILJ955, AIR 1956 ALLAHABAD 452**

ORDER

Roy, J.

1. Ali Husain and others started proceedings under Section 145, Criminal P. C. against Chuttan Khan and others in the Court of the City Magistrate of Rampur. The dispute related to a plot of land bearing No. 1153/1, situate in village Chamrawwa, in Tahsil Rampur.

Ali Husain claimed that this plot of land was the common graveyard of the village and that all the residents of the village inclusive of Ali Husain had been exercising their right of burial in it and that Babban Khan, Ejaz Husain, Dilawar and Chuttan have been threatening to take unlawful possession of it under colour of some lease. The opposite parties set up a lease of 7-3-1953 in their favour and contended that the land had been allotted to them.

The learned City Magistrate called for a report from the police and on 6-10-1953, passed a preliminary order stating that from the report of the police he was satisfied that a dispute likely to cause a breach of the peace existed regarding the graveyard land in village Chamrawwa and he directed the parties to put in their written statements of claim and further directed that the land be attached. After the parties had put in their written statements and had adduced evidence in support of their respective claims the learned City Magistrate by an order dated 27-4-1954, observed as follows:--

"After giving my most anxious consideration to the entire evidence on record and also keeping in view the foregoing discussions, I have come to the conclusion that the land is a graveyard used as such by the village community at large including Ali Hasan and others. This is in fact a case Under Section 147, Cr. P. C. and I, therefore, convert my order Under Section 145(1), Cr. P. C. dated 6-10-1953 to one Under Section 147(1), Cr. P. C. and implementing my finding that the right of user of the land in dispute as graveyard exists, I order prohibiting any interference with the exercise of such right Under Section 147(2) Cr. P. C. The land in dispute shall, therefore, be released by the Police in favour of the village people for its exclusive use as graveyard and for no other purpose".

2. From that order an application in revision was filed before the Sessions Judge of Rampur, but the application was rejected on 6-7-1954. Chuttan Khan, Dilawar, Ejaz Husain and Babban Khan have, therefore, filed this application in revision in this Court.

3. Two points have been raised before me by learned counsel for the applicants. Firstly, that proceedings under Section 145, Criminal P. C. could not have been converted into proceedings under Section 147 of the Code, especially when the notice that was issued was not under Section 147.

Secondly, that the proviso to Section 147(2) of the Code has not been complied with and it has not been shown as to when was this right of burial exercised on the last occasion. Reliance has been placed by learned counsel for the applicants upon certain decisions of the Patna, Lahore and Calcutta High Courts, reported in 'Subramania Pillai v. Sannasia Pillai', 2 Ind Cas 310 (Mad) (A), 'Turabali Khan v. Shromani Gurdwara Parbandhak Committee', 1933 Lah 145 (AIR V20) (B), 'Babu Khan v. Raj Kishore Pershad Narayan Singh', 1919 Pat 477 (AIR V6) (C), 'Sirkawalsingh v. Bhujasingh', 1924 Pat 784 (AIR V11) (D) and 'Haradhone Mukerjee v. Brojendranath', 1937 Cal 513 (AIR V24) (E).

The view of this Court and of the Nagpur High Court on this question has, however, been different. In 'Gajrajsingh v. Emperor', 1936 All 320 (AIR V23) (F), it was held by this Court that where the initial notice, the written statements and the subsequent proceedings including the operative order are all substantially covered by Section 147, Criminal P. C., the fact that a wrong section, namely Section 145, has been quoted by the Magistrate will not alter the real character of the proceedings. The present case is on all fours with 'Gajrajsingh v. Emperor (F)', cited above with this redeeming feature that in the present case the learned Magistrate, when he detected his error, corrected it at the time of the pronouncement of the judgment.

A Division Bench of the Calcutta High Court held in 'Anath Bandhu v. Wahid Ali Pramanik', 1925 Cal 1022 (AIR V12) (G) that where the proceedings are instituted under Section 145 on the basis . of a police report which states that there is an imminent risk of the breach of the peace, but the Magistrate afterwards discovers that the question at issue is not one of possession under Section 145 but is one as to rights falling under S, 147 he can convert the proceedings into proceedings under Section 147.

4. The Nagpur High Court in 'King-Emperor v. Abdullah', 1949 Nag 275 (AIR V36) (H) followed the view of this Court reported in 1936 All 320 (AIR V23) (F) and the view of the Calcutta High Court reported in 1925 Cal 1022 (AIR V12.) (G). It further followed a decision of the Bombay High Court in 'In re Amarsang Shivsangi', 1924 Bom 452 (AIR V11) (I) and another decision of the Patna High Court in 'Kunjo Mandal v. Sarju Ram', 1939 Pat 20G (AIR V26) (J) and dissented from the view of the Lahore High Court in 1933 Lah 145 (AIR V20) (B), and it came to the conclusion that under Section 147, Criminal P. C. the mode of enquiry is the same as for Section 145, that the facts that notice issued was one under Section 145 and that the preliminary order passed was one under Section 145 would not invalidate the proceedings under Section 147 and that the order of the Magistrate passed under Section 145 can be replaced by an order under Section 147 prohibiting any interference with the exercise of the right of user of the land in question by the villagers even at the stage of revision in the High Court.

Having regard to the facts and circumstances of the present case, and having regard also to the view held by this Court it cannot be urged with any force of reasoning that since the Magistrate in his

initial order under Section 145, Criminal P. C. mentioned that that was the section under which he wished to proceed, he was prevented from converting the proceedings into one under Section 147 of the Code at the time when judgment was pronounced by him, especially where the initial notice, the written statements and the subsequent proceedings including the operative order are all substantially covered by Section 147, Criminal P. C.

5. On the second point formulated above, there was the evidence of Ali Husain in cross-examination that some three years ago his son aged two years or two-and-a-half years was buried in this very graveyard. Evidence was also given on behalf of Ali Husain to the effect that this plot of land is the common graveyard of the residents of that village and various other burials had been made there from time to time.

It has been contended on behalf of the applicants that since Ali Husain did not say that the last grave that was made in this graveyard was the grave of his son some three years ago, there was no proper compliance with the requirements of the proviso to Section 147 (2) of the Code. I am unable to agree with this contention. The evidence that was led was perfectly clear and cogent and it did show as to when the right was last exercised. The order of the learned Magistrate was, therefore perfectly just and reasonable and cannot be interfered with.

6. The application in revision is therefore rejected.