Ali Shabber And Ors. vs Haider Husain on 2 April, 1952

Equivalent citations: AIR1953ALL49, AIR 1953 ALLAHABAD 49

JUDGMENT

Kidwai, J.

1. On 2nd August 1950, Haider Husain applied under Section 145, Criminal P. C. claiming that plot No. 639 of village Manni Khera was included in a wakf Alalaulad executed by his father Mujtaba Husain, was looking after the wakf properties and that the opposite parties in the case, namely Ali, Nazoo, Bhabhooti and Hoshey had raised a dispute with regard to the possession of the plot by cutting some trees and uprooting the mash crop. He, therefore, prayed for action under Section 145, Criminal P. C. A Police report was called for and in it it is stated that there was dispute with regard to the property in question and some reports have been made with regard to the matter. A breach of the peace might possibly occur and an eye was kept upon the situation. It was prayed that attachment of the property might be ordered. On 7th August 1950, the Magistrate passed a preliminary order under Section 145, Clause (1), Criminal P. C., and directed the property to be attached.

2. "Written statements were filed by the parties on 21st and 23rd August 1950. In the written statement filed by Ali Shabbar and others it was alleged that plot No. 639 was the guava grove of Mt. Habibunnissa, mother of Ali Shabbar and Mt. Hakimunnissa, his aunt, who were in possession through Ali Shabbar as their Karpardaz. It was further stated that they had been in possession for a long time peacefully and without any apprehension of a breach of the peace. With regard to the other opposite parties, it was alleged that they had purchased the fruits of the grove or had acted as labourers on behalf of Mt. Habibunnissa and Mt. Hakimunnissa.

3. After this the parties produced their evidence and the learned Magistrate Judge on a consideration of all the evidence came to the conclusion that the possession of Haider Husain was established and he directed the opposite parties namely AH Shabbar and others not to interfere with their possession except by due process of law.

4. Ali Shabbar and others applied in revision but the learned Sessions Judge of Unnao dismissed the application. Two points were argued before him, namely:

> (1) that the preliminary order holding that there was an apprehension of a breach of the peace was not well-founded and (2) that the principal party, namely Mt. Hakimunnissa and Mt. Habibunnissa not having been impleaded the whole proceedings were vitiated.

5. Ali Shabbar and others have now come up in revision to this Court and the same two points have been urged on their behalf. With regard to the first point the Magistrate bad before him the application of Haider Husain and the police report. The police report clearly showed that a dispute did exist with regard to the property. Of course it could not be said with certainty that that dispute was bound to result in a breach of the peace but the report made it clear that the police had to be on the alert and keep an eye on the situation because of the existence of the dispute. If from this the Magistrate inferred that the dispute was of such a nature as was likely to cause a breach of the peace it cannot be said that he acted wrongly and that his order became one without jurisdiction. In Ram Saroop v. Mt. Darsano Koer, A. I. R. 1920 Pat. 499, the police report did not show any apprehension of a breach of the peace, That cannot be said to be the police report in the present case.

6. The decisions of the Allahabad High Court are to the effect that if there is material on the record and it is shown that the Magistrate has applied his mind to that material then even the absence of a preliminary order is not fatal to the case. In the present case there is material on the record and a preliminary order has been passed indicating that the Magistrate has applied his. mind to the case. It cannot be said that the material was not sufficient to justify an inference to which he has arrived. In these circumstances it must be held that the preliminary order is not vitiated.

7. In the written statement it was alleged no doubt by Ali Shabbar and others that their possession had been peaceful and without force. They also produced evidence to that effect. The learned Magistrate has considered the evidence in his order and he had not felt inclined on the basis of that evidence which he has disbelieved to come to the conclusion that there was no apprehension of a breach of the peace or that his preliminary order should be cancelled under Section 145, Clause (5), Criminal P. C. The judgment shows that, it is not a case in which a Magistrate has failed to consider this aspect of the matter. He has in fact referred to the evidence produced by Ali Shabbar to show that there was no quarrel (as indicating no breach of the peace) with regard to the disputed land but he does not believe the statements of these two witnesses and the reason for this is obvious, namely that each of the parties claim to have sown the mash and to be entitled to reap it. In these circumstances it cannot be said that the conclusion at which the Magistrate arrived in the matter of whether there was an apprehension of a breach of the peace is incorrect.

8. The Second question is as to the parties, Haider Husain is not a servant of Mujtaba Husain. He is a karpardaz acting for his father who, owing to the necessity of carrying on his profession at Basti, could not look after the property. The father was not in Unnao arid could not make the application at the time when the apprehension of a breach of the peace occurred. Haider Husain who was present, and who is one of the beneficiaries under the wakf took immediate action. His father appeared as a witness and accepted his action. He claimed for a declaration of the possession of his father as Mutwalli. His complaint was against Ali Shabbar who, according to him, was creating a dispute. At the stage of the preliminary order, therefore, notice could only go to Ali Shabbar and the other persons mentioned in the application and not to anybody else since there was no allegation that anybody else was interested or was creating a dispute. When the written statement was filed by Ali Shabbar, he asserted that his possession was as karpardaz of his mother and aunt and he further prayed that his possession as such karpardaz should be maintained. He even stated that the sale of the fruits and so on had been actually effected by him on behalf of his mother and aunt. The written

statement was filed after the preliminary order had been issued and there was no occasion to implead anybody after this date though under the provision of Section 145, Clause (4) a Magistrate could come to the conclusion that neither of the parties to the dispute was in possession of the property and the came to that conclusion naturally he would not release the property in favour of either of the parties. This is perfectly clear from the words of Sub-section (4) and Sub-section (6.) of Section 145. The rights, therefore, of the mother of Ali Shabbar and his aunt are not affected by these proceedings nor is their possession, if they had any, affected. The applicant made a request for action only against those persons who were actually disturbing his possession and creating trouble. He was not concerned in the present case nor is the Magistrate concerned with title to the property : the only concern of the Magistrate and of the complainant is as to possession and persons who disturbed that possession.

The complainant does not accept the position that anybody else but Ali Shabbar has disturbed his possession and the written statement of Ali Shabbar indicates that in fact it is he who claims to be in possession though he ascribes that possession to his mother and aunt whose karpardaz he claims to be. The order that has eventually been passed is that Ali Shabbar and the other opposite-parties could not interfere with the possession of the applicants. This Order does not even purport to affect the rights of persons who are not parties to these proceedings. If Ali Shabbar is not in fact in possession he could have no grievance against this order and it is inexplicable why he has come in this revision. If Mt. Habibunnissa and Mt. Hakimunnissa have any right either of title or of possession, it is up to them to assort it. They have taken no action in this matter at all and when eventually an application was made for impleading them at a later stage that was also made by Ali Shabbar and not by them. In Peare Lal v. Emperor, A. I. R. 1934 ALL. 853, it was laid down that the proceedings held in the absence of the real masters were unsatisfactory and the proceedings were set aside with the direction that notice should issue to the masters and thereafter the provisions of Section 145, Criminal P. C. should be complied with. I have read this judgment carefully but I cannot find anything in it to indicate under which provision of Section 145 it was open to the Court to issue a notice to a person against whom the preliminary order was not directed, nor can I understand how the preliminary order could be directed against a person who was not mentioned in the case to which reference was made. In that case the name of the master was really mentioned and what was said in the report was that one Sheo Prasad, Manager of the Estate of Sahu Har Prasad, had laid foundation to a breach of the peace. Thus, it was made clear in that case in the application for action under Section 145, Criminal P. C. itself that the gentleman who had disturbed the possession claimed to be acting as the Manager of another person and the Magistrate was, therefore, aware that the real parties to the dispute were other people and not the Manager. In that case, therefore, the preliminary order itself should have been issued to Sahu Har Prasad and not to his Manager but in the present case the application for action under Section 145, Criminal P. C. gives no indication whatsoever of Ali Shabbar being the Manager or acting for anybody else and therefore at the time of the preliminary order the Court could not issue notice to anybody but him. Having regard to the above facts there is no defect in the order passed by the learned Magistrate and this application is dismissed.