Maqsood Khan vs State, Through Mohd. Raza Khan And Ors. on 23 April, 1954

Equivalent citations: AIR1955ALL257, 1955CRILJ750, AIR 1955 ALLAHABAD 257

ORDER

Beg, J.

1. This is a reference by the learned Sessions Judge, Rae Bareli recommending that an order passed by Sri V. P. Sharma, S. D. M., Rae Bareli under Section 145 of the Code of Criminal Procedure should be set aside.

It would appear that one Maqsood Khan made an application on 20-2-1952 under Section 145 of the Code of Criminal Procedure on the allegations that he was in possession of plots Nos. 6091, 1430, 1631, 1761, .1438, 650, 1795, 332, 436 and 565 situate in tahsil Mahrajgang district Rae Bareli, that he held a patta of these plots, that he had deposited the Bhumidhari dues in respect of the said plots and that the opposite parties were turbulent persons who had forcibly cut down the 'sarson' crop grown by the applicant. The opposite parties in this application were Mohamad Raza Khan and 9 others.

The applicant Maqsood Khan is the son of Ishaq Khan and the grandson of one Dildar Khan. Mohammad Raza Khan one of the opposite parties is a brother of Ishaq Khan who is another son of Dildar Khan.

After the usual preliminary order was passed under Section 145, Sub-clause (1) of the Code of Criminal Procedure, the Magistrate entered on the enquiry as to the possession of the property. He called for the written statements of the parties, recorded the evidence produced by both the parties and on 28-8-1953 he passed the final order in the case.

This order runs as follows:

> "It appearing to me, from the report of S. O. Mahrajgang dated 24-5-1952 that a dispute likely to induce a breach of peace, existed between Maqsood Khan resident of village Rastamau on one side and Mohd. Raza Khan and nine others all residents of village Rastamau on the other concerning certain plots of land detailed in the application situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said land, and being satisfied by due enquiry had thereupon, without reference to the merits of the claim of either of the said parties to the legal

> right of possession, that the claim of actual possession by Mohd. Raza Khan opposite party is true;
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> I do decide and declare that he is in posses sion of the said plots of land and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of his possession in the meantime.
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> Given under my hand and seal of the Court this 28th day of August, 1953."

The above is a reproduction of the entire final order passed by the Magistrate in the said case.

Dissatisfied with this order Maqsood Khan the applicant went up in revision before the learned Sessions Judge, Rae Bareli, who has referred the case to this Court with the above mentioned recommendation.

2 Having heard the learned counsel for the parties, I am of opinion that this reference must be accepted.

A comparison of the above order with the Form No. 22 given in Schedule 5 of the Code of Criminal Procedure shows that in this case the Magistrate has done nothing except copying out the stereotyped form prescribed in Schedule 5 for passing a declaratory order under Section 145 of the Code of Criminal Procedure.

Section 145, sub-cl. 4 of the Code of Criminal Procedure lays down the procedure to be follow ed by the Magistrate, after passing the prelimi nary order. Section 145, sub-cl. 4 provides as follows:

> "The Magistrate shall then, without reference to the merits or 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."

(The two provisos appended to the Sub-section are not relevant for the purposes of the present discussion and are, therefore, omitted).

The main point to remember in connection with the above provision of law is that the Magistrate is not only required to receive 'all the evidence produced by the parties but also to 'consider the' effect of such evidence and after taking such further evidence, if any, which he thinks necessary, he is further required if possible, to "decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

A perusal of the order of the Magistrate mentioned above & the manner in which he proceeded to write his order shows that the Magistrate concerned has not tried to comply with the above

mentioned requirements of this Sub-clause. There is nothing in his order to indicate that he applied his mind to the case with a view to consider the effect of evidence produced in the case. In fact, the order makes no reference to any evidence whatsoever.

The fact is that a good amount of evidence was produced by both the parties. Four witnesses were produced by the applicant Maqsood Khan. In addition to it a lease deed as well as a gift deed in his favour executed by Dildar Khan on 11-9-1951 and 17-10-1951, respectively were produced in the case. A Khetauni' of the year 1358F. showing the name of Dildar Khan as 'sir' holder Was also produced on behalf of Maqsood Khan. On the other hand, on behalf of Mohammad Raza Khan and others 4 witnesses were produced. A khasra of the year 1359 F. showing the name of Mohammad Raza Khan in possession of the property in dispute Was also produced.

In addition two judgments of the Panchayati Adalat which show that the transfers made by Dildar in favour of Maqsood, Khan were fictitious and that the Panchayat had refused to make mutation of the property in favour of Maqsood Khan on that ground, were also produced. The order of the Magistrate is conspicuous by the absence of any reference to any of the pieces of evidence mentioned above.

I am of opinion that the provisions of Section 145, Sub-clause 4 in this regard are mandatory and it is the imperative duty of the Magistrate to write such an order as to make it appear to the re-visional court that he has made a genuine attempt to comply with the provisions of law in this regard. In this case the Magistrate concerned appears merely to have acted as an automaton. He appears to have simply filled up the blanks in the form and passed the final order without applying his mind either to the evidence or to the facts and circumstances of the case. At any rate the order does not show that he had made an attempt to comply with the, requirements of law.

3. On behalf of the opposite parties Mohammad Baza Khan and others my attention has been invited to Section 555 of the Criminal P. C. which provides as follows:

> "Subject to the power, conferred by Section 544 and by Article 227 of the Constitution the forms set forth in the fifth schedule with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient."

Relying on this section it is argued that once the Magistrate has used the form of the nature prescribed in Schedule 5, he, should be deemed to have complied with the requirements of the law and the order cannot be assailed on the ground of non-compliance with Section 145, Sub-clause 4.

It is as if the form prescribes a magical formula whose repetition in writing has the effect of making the order immune from all criticism and liberating the court from all shackles imposed upon it by the provisions of Section 145 (4).' To my mind, the effect of putting this interpretation would be disastrous. In some cases under Section 145 voluminous evidence -- both oral and documentary -- is adduced by parties. If this view of law is accepted, it will be open to the Magistrate to disregard all evidence, and, by merely filling up the prescribed form, secure for his order, however perverse and

unreasonable, an exemption from all scrutiny and criticism by the higher court. A result so unfortunate should be avoided at all costs.

In my opinion an order under Section 145 of the Code of Criminal Procedure consists of two portions. In the first portion the Magistrate refers to the evidence of the parties, considers the evidence and decides which of the parties was in his opinion in possession of the property in dispute on the relevant date. All this is done under Section 145(4) of the Criminal Procedure Code. Having done it, the Magistrate if he has been able to come to a "definite conclusion as to which party was in possession, declares that the said party should be allowed to remain in possession until evicted in due course by a court of law. This is what may be termed as the operative or declaratory portion of the order and is recorded under Section 145(6) of the Code of Criminal Procedure. The form in question, namely. Form No. 22 in Sch. V refers only to the terms in which the latter portion of the order is to be clothed and not the former. This is borne out by the heading of the form itself which would show that it relates to the portion "declaring the party to retain possession of the land in dispute".

In any case, I am of opinion that the fact that the Legislature has prescribed a form under Section 555 of the Code of Criminal Procedure has not the effect of over-riding the express provisions of law laid down in Section 145(4) of the Code of Criminal Procedure. It is significant that the form also refers to the "grounds duly recorded" by the Magistrate. These words are omitted from the final order, hence the order impugned fails to comply even with the meagre requirements of the prescribed form and cannot be said to be a com-

plete enunciation of the prescribed formula for which such potent effects are claimed. The order in question, in my opinion is defective and cannot be sustained.

4. It may be mentioned that the recommendation of the learned Sessions Judge is that "the order be set aside and that the applicant (Maqsood Khan) be ordered to put in possession of the plots, or, in the alternative, the case be remanded to the S. D. M. Maharajganj for decision after considering the evidence produced by the parties."

Having heard the parties at length I think that it is preferable to accept the second alternative. The Magistrate concerned should not be influenced in any way by any expression of opinion on the merits of the case by the higher Court.

5. I accordingly set aside the order of the Magistrate and remand the case to Sub-Divisional Magistrate Maharajganj for a fresh decision of it after considering the evidence produced by the parties.