Krushna Mohan And Ors. vs Sudhakar Das And Ors. on 6 April, 1953

Equivalent citations: AIR1953ORI281, AIR 1953 ORISSA 281

JUDGMENT

Narasimham, J.

1. This is a revision petition against an order dated 8-2-52 passed by Mlv. S. Ali, a 1st Class Magistrate of Cuttack, in a proceeding under Section 145, Criminal P. C. The petitioners were the second party in that proceeding, the opposite party being the first party. The proceeding was initiated by the Subdivisional Magistrate on 11-1-50 on the basis of a police report and the usual notices to both parties were directed to issue. On 15-3-50 both parties appeared before the Court and the first party filed their written statement on the same date whereas the second party filed their written statement on 6-4-50. The case was then transferred to the file of Sri N. N. Mitra, Magistrate 1st Class for disposal. After some adjournments the case was fixed for hearing on 10-3-51 on which date the first party were absent. The learned Magistrate then passed the following order :

> "10-3-51. The 1st party is absent. There is no hazira. No lawyer appears. There is no response in spite of repeated call. The 2nd party to commence his evidence. The 2nd party is examined. On the evidence adduced by the 2nd party, 1 declare his possession of the disputed property and he will continue his possession till he is evicted in due course of law and I forbid hereby all disturbances to his possession by the 1st party. The Advocate's fee is Rs. 15/-, in addition to the costs incurred on record."

On the very same date, however, soon after the aforesaid order was passed the first party filed a petition for setting aside the 'ex parte' order and the learned Magistrate then passed the following order :

> "Later. Perused the petition. The 1st party did not choose to come to the box and no hazira was filed. It is difficult to know if he sent for his advocate and was waiting for him. sometimes the Pleaders and Advocates do not turn up for non-payment of their fees. However, when immediately the order was passed, the party Pravat Kumar appeared, the ex parte order is revised and the case restored on payment of Rs. 15/- as costs to the opposite party. Issue notice and put up on 9-4-51."

Then after several adjournments the case was taken up on 25-6-51. On that date the first party were present with their witnesses; but the second party were absent, when the case was taken up at about 1 p.m. neither party nor their lawyers responded to the call. The Court, therefore, directed that the

case should be put up on 26-6-51 for 'ex parte' order. On 28-6-51 the learned Magistrate revised the order dated 25-6-51 and directed that the case should be heard on merits on payment of Rs. 10/- as costs by the second party.

Then on 21-8-51 one witness of the first party was examined and cross-examined by the second party and the case was adjourned to 4-9-51. After two further adjournments when the case was taken up on 24-9-51 the second party filed a petition stating that the Magistrate had no jurisdiction to review or revise his final order under Section 145, Criminal P. C. passed on 10-3-51. After several adjournments this question of law was taken up for hearing by Mlv. S. Ali, the successor of Sri N. N. Mitra, who on 8-2-52 passed an order rejecting the petition and holding that whatever error might have been committed by Sri N. N. Mitra in reviewing his first order dated 10-3-51 the second party by cross-examining the witness examined by the first party on 21-8-51 had practically waived their objection. This revision petition has been filed against this order.

2. Thus the sole question for decision in this revision petition is whether an 'ex parte' order passed by a Magistrate under Sub-section (6) of Section 145, Criminal P. C. after the valid service of notices on both parties as required by Sub-section (1) of that section can be revised by him subsequently. The answer to this question will depend on two considerations. Firstly, if that order is a 'judgment' within the meaning of Section 359. Criminal P. C. the Court has obviously no jurisdiction to revise the order. Secondly, even if it be held to be not a 'judgment' within the meaning of Section 339, Criminal P. C. has the Court inherent powers to review and revise its order under Sub-section (6) of Section 145, Criminal P. C. on the ground that it was passed 'ex parte'.

3. In an unreported Single Bench decision of this Court -- 'Crl. Revn. No. 449 of 1950 (Orissa) (A)', it was held that though an order under Section 145(6), Criminal P. C. was not a 'judgment' in the sense in which the expression was used in the Criminal Procedure Code as meaning a conviction or an acquittal, yet it was a 'judgment' for the purpose of Section 369, Criminal P. C. and could not, therefore, be reviewed or revised by the same Magistrate. With great respect I am unable to accept this view. Section 369, Criminal P. C. occurs in Chap. 26, Criminal P. C. and if the other sections of that Chapter are carefully scrutinised it would be clear that the 'judgment' as contemplated in that Chapter is a 'judgment1 of conviction or acquittal in a criminal trial in which there is an accused person. The only exception that has been made is in respect of orders passed under Section 118 or Section 123(3), Cr. P.C. which have been specially deemed to be 'judgments' by the express provisions of Sub-section (6) of Section 367, Criminal P. C. That sub-section was added to that section by an amendment made in 1922 in view of the observations in -- 'In re Ramasamy Chetty', 27 Mad 510 (B) and -- 'Venkatachennaya v. Emperor', AIR 1920 Mad 337 (PB) (C).

It would appear that but for the express insertion in Sub-section (6) of Section 367, Criminal P. C. an order under Section 118 or Section 123(3), Criminal P. C. may not be a 'judgment' for the purpose of Chap. 26. Security proceedings under Chap. 8, Criminal P. C. are very much akin to a criminal trial inasmuch as the liberty of a person is involved and the person bound over may be called an "accused person" without too much strain on the language. But orders in proceedings under Section 133, Criminal P. C. (Chap. 10) or in proceedings under Section 145, Criminal P. C. and allied sections (Chap, 12) can hardly be called 'judgments' within the meaning of Section 369, Criminal P. C.

because they are essentially in the nature of quasi-civil proceedings. If the Legislature thought that in Section 369, Criminal P. C. the expression 'judgment' should include all final orders passed under the various sections of the Criminal Procedure Code they would surely have inserted a deeming clause in that section especially when they inserted Sub-section (6) in Section 367 in respect of orders under 8s. 118 and 123(3), Criminal P. C. I am, therefore, of the view that an order under Section 145(6), Criminal P. C. whether passed 'ex parte' or after hearing the parties is not a 'judgment' within the meaning of Section 369, Criminal P. C. There is a recent decision of the Madras High Court reported in -- 'Surya Rao v. Sathlraju', AIR 1948 Mad 510 (D) in support of this view. In that decision the learned Judge followed the legal maxim 'expressio unius est exclusio alterius' in construing Sub-section (6) of Section 367 and held that an order under Section 145, Criminal P. C. was not a 'judgment' within the meaning of Section 367, Criminal P. C. Section 369 occurs in the same Chapter as Section 367 and I am unable to find anything in the context or any other weighty reason for giving different meanings to that expression in Sections 367 and 369. In -- 'Bhagubhai Ranchhodas v. Bai Arvinda', AIR 1937 Cal 334 (E), it was held that an order under Section 488, Criminal P. C. was not a 'judgment' within the meaning of Section 369, Criminal P. C. I am aware of a recent decision of the Allahabad High Court reported in -- 'Ramcherey v. Ram Priya Das', AIR 1951 All 435 (P) where it was held that a final order under Section 136, Criminal P. C. was a 'judgment' within the meaning of Section 369. But the reasons for taking that view have not been given in that decision and with great respect I would prefer the reasons given In -- 'AIR 1948 Mad 510 (D)'.

Thus there is sufficient authority for the view at every final order that is passed under the provisions of the Criminal Procedure Code after hearing the parties and receiving all such evidence as may be produced and considering the effect of such evidence would not necessarily be a 'judgment' within the meaning of Section 369, Criminal P. C. That section, in terms, applies only to those judgments delivered in Criminal trials, the only exception being in respect of orders under the security sections of the Code (Chap. 7) where the person to be bound over is practically in the position of an accused in a criminal trial.

4. The next Question is whether a Magistrate has inherent powers to set aside an 'ex parte' order for adequate reasons. It is true that the Criminal Procedure Code does not contain any express provision like Section 151, Civil P. C. recognising the existence of inherent powers in subordinate. Courts. Section 561A is limited, in terms, to the inherent powers of a High Court. But there is sufficient authority for the view that even subordinate Criminal Courts have inherent powers of a limited extent. Thus in -- 'Achambit v. Mahatab Singh', AIR 1915 Cal 119 (G), an order of acquittal passed by a Magistrate under Section 247, Criminal P. C. was subsequently set aside by the same Magistrate on the ground that it was a nullity and the High Court held that the Magistrate acted within his jurisdiction. Similarly, in -- 'Lalit Mohan v. Noni Lal', AIR 1923 Cal 662 (H), an order directing the issue of process under Section 204, Criminal P. C. was subsequently cancelled by the same Magistrate who directed a local enquiry under Section 202, Criminal P. C. and the High Court held that inasmuch as the said order was not a 'judgment' within the meaning of Section 369, Criminal P. C. "there is nothing in the Code which forbids a Magistrate to reconsider an order of this kind on sufficient grounds."

These two decisions were relied upon by the Patna High Court in -- 'Asst. Govt Advocate v. Upendra Nath', AIR 1931 Pat 81 (I) in support of the view that even subordinate Criminal Courts have some sort of inherent powers.

But it was emphasised that 'inherent power cannot be Invoked on a point where the Code has made express provision'. In -- 'Nalluswami Reddi v. Nallammal', AIR 1943 Mad 392 (J) also it was recognised that though Courts subordinate to the High Court have no Inherent jurisdiction to review their judgments they have such inherent powers in a few circumstances such as where there has been abuse of the process of Court or fraud played upon the Court. In a Calcutta case reported in -- 'Kali Charan v. Abdul Laskar', AIR 1920 Cal 541 (2) (K), the High Court held that where an 'ex parte' order under Section 145(6), Criminal P. C. was passed by a Magistrate without due service of the preliminary notice required by Sub-section (1) of that section on one of the parties the Magistrate ought to have revised that order on the application of the party and examined the question as to whether there was, in fact, due service of notice on that party. I would, therefore, take the view that even subordinate Criminal Courts have limited inherent powers and in exercise of those powers, they may review and revise their orders for the ends of justice except in those cases where the Code itself either expressly or by necessary implication prohibits such review or revision and confers on the order some kind of finality until it is set aside by the superior Courts in appeal or revision.

5. In those cases where an order under the Criminal Procedure Code is not a 'judgment' it does not necessarily follow that the order may always be reviewed or revised by the Court which passed it. For that purpose one must scrutinise the relevant sections of the Code under which the order is passed and ascertain if the context indicates that the order is intended to be final until it is set aside in appeal or revision. Thus an order under Section 488, Criminal P. C. is always open to review or revision by the same Magistrate in view of the implications of Section 489 (2), Criminal P. C. as held by the Calcutta High Court in -- 'AIR 1937 Cal. 334 (E)'. An order under Sub-section (6) of Section 145, Criminal P. C., however, stands on a different footing. That sub-section expressly says that the Magistrate 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."

The words underlined (here in single quotation) indicate that the order is intended to be final so far as the Magistrate is concerned subject of course to revision. There is no provision either in Section 145, Criminal P. c. or in the succeeding sections of that Chapter (Chap. 12) from which it could be inferred even by necessary implication that the Magistrate could review or alter his order. Hence a Magistrate cannot invoke his inherent jurisdiction to revise his orders under Section 145(6), Criminal P. C. not because such an order is a 'judgment' within the meaning of Section 369, Criminal P. C. but because Sub-section (6) of Section 145 in express terms confers finality on that order. This seems to be the main reason why it has been consistently held by all High Courts that an order under Section 145 (6), Criminal P. C. cannot be reviewed or revised by the same Magistrate or by his successor in office see -- 'Parbati Charan v. Sajjad Ahmad', 35 Cal 350 (L); -- 'U Thi Ha v. Maung Ngai', Am 1935 Bang 447 (M); -- 'Lachmi Singh v. Bhusi Siugh', AIR 1917 Pat 110 (N); -- 'Lallan Misir v. Ram Rachchha', AIR 1926 All 242 (O); -- 'Narayan v. Chandrabhaga', AIR 1925 Nag 457 (P).

6. An exception has, however, been made where an order under Section 145(6), Criminal P. C. is itself a nullity due to the failure to serve the required preliminary notices under Sub-section (1) of Section 145 on all the parties. This seems to be the principle underlying the Division Bench decision of the Calcutta High Court reported in -- 'AIR 1920 Cal 541 (2) (K)'. The same principle was applied in -- 'AIR 1915 Cal 119 (G)', in respect of an order of acquittal passed under Section 247, Criminal P. C. without jurisdiction. Hence in deciding whether a Magistrate can invoke his inherent jurisdiction to ignore an order under Section 145(6), Criminal P. C. (whether passed ex parte or on contest) the main question to consider is whether that order is a nullity as having been passed without jurisdiction or not. If it is a nullity the Magistrate may invoke his inherent powers and ignore the same; but he cannot revise it merely because he considers that a party who had due notice of the proceedings and was absent on the date fixed for hearing, satisfied him that there were sufficient reasons for his absence on that date. Invoking of inherent powers for that purpose would amount to a contravention of the express provision of Sub-section (6) of Section 145 which gives finality to such orders.

7. Applying the aforesaid principles to the facts of this case it is clear that when Sri N. N. Mitra on 10-3-51 passed an order under Sub-section (6) of Section 145, Criminal P. C. declaring the second party's possession of the disputed property until they were evicted in due course of law and forbidding disturbance of such possession he had no jurisdiction to subsequently revise that order. The first party were duly served with notice required by Sub-section (1) of Section 145, they had entered appearance and filed their written statement on the previous dates. No other question affecting the jurisdiction of the Magistrate to pass the order on 10-3-51 has been raised before us. Hence I would hold that the subsequent orders of the Magistrate revising the proceeding and allowing the parties to lead evidence are all without jurisdiction. It is true that on 21-8-51 the second party cross-examined the witness of the first party; but such conduct on their part would not amount to a waiver and preclude them from challenging the validity of the order passed by the Magistrate setting aside his ex parte order dated 10-3-51. Where an order is without jurisdiction no question of waiver arises.

8. I would, therefore, allow the revision petition holding that the only valid order at present existing in the proceeding under Section 145, Criminal P. C. is the order dated 10-3-51 declaring the second party to be in possession of the disputed property. All subsequent orders should be held to be invalid and inoperative.

Mohapatra, J.

9. I agree.