A

RAJPATI

v.

BACHAN & ANR.

B

July 28, 1980

[S. MURTAZA FAZAL ALI AND A. P. SEN, JJ.]

Criminal Procedure Code, Section 145—Recording in the final order that it was breach of peace is not necessary, once such a recording has been made in C *the preliminary order—Omission to do so is an error of procedure falling within the domain of a curable irregularity.*

Allowing the appeal by special leave, the Court,

HELD: (1) A finding of existence of breach of the peace is not necessary at the time when a final order is passed nor is there any provision in the Code of Criminal Procedure requiring such a finding in the final order. Once a D preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceeding unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of sub-section (5) of s. 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under sub-s. (6) of s. 145. Further, it is well E settled that under s. 145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order, the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. [94C-F]

R. H. Bhutani v. *Miss Mani J. Desai & Ors.*, [1969] 1 S.C.R. 80, followed.

F *Hari Ram & Ors.* v. *Banwari Lal & Ors.*, A.I.R. 1967 Punjab 378; *Ramarao* v. *Shivram & Ors.*, A.I.R. 1954 Hyderabad p. 93, approved.

(2) Mere absence of a finding of the existence of breach of the peace by the Magistrate in the final order in the circumstances of the case cannot be such a manifest defect so as to attract the extraordinary jurisdiction of the High Court under Section 482 of the Criminal Procedure Code. [94B]

G (3) At the worst the omission on the part of the Magistrate to mention in his final order that there was breach of the peace could be said to be an error of procedure clearly falling within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show, in the instant case, that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. [95B-C]

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 474 of 1980.

Appeal by Special Leave from the Judgment and Order dated 26-9-1979 of the Allahabad High Court in Crl. Misc. Case No. 356/79. A

Pramod Swarup for the Appellant.

R. D. Upadhyaya and *M. M. L. Srivastava* for the Respondent No. 1. B

The Judgment of the Court was delivered by

FAZAL ALI, J.—This appeal by special leave involves a short point of law. Proceedings under s. 145 was started by the Magistrate against the respondents on the basis of a police report. After passing a preliminary order on the 29th July, 1976 (wherein the Magistrate had recorded reasons for his being satisfied that a breach of the peace existed), the Magistrate called upon the parties to file their written statements and then after a full enquiry as provided by s. 145 the Magistrate passed the final order on 17th July, 1978 declaring the appellant to be in possession of the land in dispute. Against this order, the respondents moved the High Court under s. 482 Cr.P.C. for quashing the order of the Magistrate. The High Court found that as there was no clear finding by the Magistrate in the final order that there was an apprehension of breach of the peace, therefore, the final order was bad and the High Court accordingly allowed the petition and remitted the case to the Magistrate. C D

We have heard counsel for the parties and in our opinion the High Court erred in holding that the final order of the Magistrate was vitiated in absence of a finding that breach of the peace existed at the time the order was passed. It is not disputed that in the preliminary order there was a clear finding by the Magistrate that apprehension of breach of the peace did exist which was sufficient to give jurisdiction to the Magistrate to initiate the proceedings. When the parties filed their written statements, they did not state that no dispute between the parties existed but whereas one party said that there was no apprehension of breach from their side, the other side took the stand that there was an apprehension of breach of the peace. E F

Thus, the stand taken by the two parties was contradictory; hence it must be taken for granted that the apprehension of breach of peace continued to exist and it was not a case where it could be said that no dispute existed, as contemplated under s. 145(5) Cr.P.C. G

After considering the record and evidence produced by the parties, the Magistrate passed the final order in favour of the appellant. H

The High Court thought that it was absolutely essential for the Magistrate to give a finding that a breach of peace existed even in

A the final order. It may have been proper if the Magistrate had given a finding on this aspect of the matter also but in the circumstances, it can be safely presumed that apprehension of breach of peace existed and such a finding was implicit in the final order passed by the Magistrate so it was not necessary for the Magistrate to repeat what he had said in the preliminary order in the final order also. Moreover, B mere absence of finding by the Magistrate in the final order in the circumstances as mentioned above cannot be such a manifest defect so as to attract the extraordinary jurisdiction of the High Court under s. 482 of Cr.P.C.

It is, therefore, manifest that a finding of existence of breach of C the peace is not necessary at the time when a final order is passed nor is there any provision in the Code of Criminal Procedure requiring such a finding in the final order. Once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceedings unless there is clear evidence D to show that the dispute has ceased to exist so as to bring the case within the ambit of sub-section (5) of s. 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under sub-s. (6) of s. 145. As already indicated the contradictory stands taken by the parties clearly show that there was no question of the E dispute having ended so as to lead to cancellation of the order under sub-section (5) of s. 145 nor was such a case set up by any party before the Magistrate or before the High Court. Further, it is well settled that under s. 145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his F satisfaction in the preliminary order, the High Court in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. In *R. H. Bhutani* v. *Miss Mani J. Desai & Ors.*(1), this Court pointed out as follows:

> "The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute regarding an immovable G property exists and that such dispute is likely to cause breach of peace. *But once he is satisfied on these two conditions, the section requires him to pass a preliminary order under sub-s.* (1) *and thereafter to make an enquiry under sub-s.* (4) *and pass a final order under sub-s.* (6). *It is not necessary that at the time of* H *passing the final order the apprehension of breach of peace should continue or exist.* The enquiry under s. 145 is limited to the

(1) [1969] 1 S.C.R. 80.

question to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties... The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate."

(Emphasisours)

In *Hari Ram & Ors.* v. *Banwari Lal & Ors.*(1) it was held that once a Magistrate finds that there is a breach of peace it is not necessary that the dispute should continue to exist at other stages of the proceedings also. In this connection, the High Court observed as follows:

"Of course, Magistrate can under sub-section (1) of s. 145, Criminal Procedure Code, assume jurisdiction only if he is satisfied that at the time of passing the preliminary order a dispute likely to cause a breach of the peace exists concerning any land etc. Once that is done the Magistrate is thereafter expected to call upon the parties concerned in such dispute to attend his court in person or by pleader and put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. The enquiry, therefore, after the initial satisfaction of the Magistrate and after the assumption of jurisdiction by him, has to be directed only as respects the fact of actual possession. *At that time he has not to record a finding again about the existence of a dispute likely to cause a breach of the peace.*"

(Emphasisours)

To the same effect is a decision of the Hyderabad High Court in *Ramarao* v. *Shivram & Ors.*(2) where Srinivasachari J. observed as follows:—

"As regards this contention I am of opinion that once the Magistrate has given a finding to the effect that there is apprehension of breach of peace and that he has jurisdiction to take proceedings under s. 145, Cr.P.C., he can continue the proceedings. *It is not necessary that at each stage he should be satisfied that there exists an imminent apprehension of breach of peace.*"

(Emphasisours)

(1) A.I.R. 1967 Punj. 378.

(2) A.I.R. 1954 Hyderabad 93.

A We find ourselves in complete agreement with the observations made by the Punjab and Hyderabad High Courts, extracted above, which lay down the correct law on the subject.

Assuming, however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of B the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient tc vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. It was therefore not correct on the part of the C High Court to have interfered with the order of the Magistrate on a purely technical ground when the aggrieved party had a clear remedy in the civil court.

For these reasons therefore, we are satisfied that the order passed by the High Court is legally erroneous and cannot be allowed to stand. D The appeal is accordingly allowed. The order of the High Court is set aside and the order of the Magistrate is confirmed.

V. D. K. *Appeal allowed.*