The Indian Law Reports

REVISIONAL CRIMINAL

Before Gurdev Singh and H. R. Khanna, JJ.

AJAIB SINGH AND ANOTHER,—*Petitioners.*

v.

AMAR SINGH AND OTHERS,—*Respondents.*

Criminal Revision No. 584 of 1962.

1963

May, 31st.

Code of Criminal Procedure Act (V of 1898)—S. 145 (1) and (3)—Omission to pass formal order under sub-section (1) and to get it published under sub-section (3)—Effect of—Jurisdiction of the magistrate—Whether affected — S. 537—Whether cures the defect.

Held, that the essential condition for the exercise of jurisdiction by a Magistrate under section 145 of the Code of Criminal Procedure is that information should be laid before him that a dispute likely to cause a breach of the peace exists concerning any land or water or boundaries thereof within the local limits of his jurisdiction, and he should proceed in the matter. Once he is so satisfied on the basis of the information received by him, he is seized of jurisdiction, and the further question as to whether he passes a formal order under sub-section (1) of section 145 or gets the same published as required by sub-section (3) of the section are matters relating to the mode of procedure. The Magistrate having become seized of the jurisdiction cannot be divested of the same because in the exercise of that jurisdiction he does not pass an order in conformity with law. His jurisdiction does not depend upon the correctness or otherwise of the order made by him. A Court has jurisdiction to pass a right order as well as a wrong order, and defects in an order would only go to show that the order is erroneous and not in confirmity with

law but it would not make the order as one without jurisdiction. There is an essential difference between lack of jurisdiction and irregular exercise of jurisdiction and the two cannot be equated to each other or treated on the same footing. Procedural mistakes do not affect the jurisdiction of the Court unless the matter is "something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice."

Held, that the omission of the Magistrate to pass an order in accordance with sub-section (1) of section 145 of the Code of Criminal Procedure is an irregularity which can be cured under section-537 of the Code unless it can be shown that it has caused prejudice to any party.

Case law discussed.

Case referred by the Hon'ble Mr. Justice H. R. Khanna, on 11th October, 1962 for decision of an important question of law involved in this case. The case was finally decided by a division bench consisting of the Hon'ble Mr. Justice Gurdev Singh and the Hon'ble Mr. Justice H. R. Khanna, on 31st May, 1963.

Case reported under section 438, Cr. P. C., by Shri Gurnam Singh, Additional Sessions Judge, Ludhiana, with his letter No. 77/R.K.G., dated 10th May, 1962, for revision of the order of Shri L. C. Kapur, Magistrate 1st Class, Ludhiana, dated 28th September, 1961.

Y. P. GANDHI, ADVOCATE, for the Petitioners.

N. N. GOSWAMI AND NARINDER SINGH, ADVOCATES, for the Respondents.

JUDGMENT

Khanna, J.

KHANNA, J.—This case was referred to a Division Bench by my order dated October 11, 1962, because there was a conflict on the point as to what is the effect of non-compliance with the provisions of sub-section (1) of section 145, Criminal Procedure Code (hereinafter referred to as the Code) by a Magistrate.

The facts giving rise to the present case are that on 5th June, 1961, Sub-Inspector in charge of police station Sahnewal reported that there was a dispute regarding land between Ajaib Singh, Harbans Singh and Satwant Singh on one side and Amar Singh, Pritam Singh, Surjan Singh and Rattan Singh on the other. The cause of the dispute was that Jaswant Singh, son of Ajaib Singh, had sold his one-fourth share in the land which had been given to him by his father to Rattan Singh, without mentioning field numbers of the land. According to the police, the land in dispute was cultivated by Amar Singh, Pritam Singh and Surjan Singh and they were not willing to give share of the produce to Ajaib Singh who claimed the land to be his own. The learned Magistrate on receipt of the report passed an order to the following effect—

> "The calendar has been produced today. It should be registered. Notice should issue to the parties for 4th July, 1961, for filing their documentary evidence and affidavits and for producing persons on whose statements they rely."

The parties thereafter filed copies of Khasra Girdawari and affidavits. During the course of proceedings, an application was filed that the produce of the land was likely to decay. It was then ordered that the produce be disposed of and the sale-proceeds be deposited in the treasury. The produce was thereafter sold for Rs. 1,150 and the amount was deposited in the treasury. The learned Magistrate after hearing counsel for the parties passed an order that Amar Singh, Pritam Singh and Surjan Singh were in cultivating possession of the land in dispute and they be kept in possession of that land till they were ousted by due process of law. The dispute was further stated to be between Ajaib Singh and Harbans Singh on one side

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and Rattan Singh on the other with regard to the share of the produce. The question whether Amar Singh and his co-tenants held the tenancy under Rattan Singh or under Ajaib Singh was held to be a matter to be decided by civil Court. Ajaib Singh and Harbans Singh then filed a revision against the order of the learned Magistrate. The learned Additional Sessions Judge observed that the trial Magistrate had not complied with sub-section (1) of section 145 of the Code because he had not written anything regarding his satisfaction that a dispute existed which was likely to cause a breach of peace concerning the land and had not mentioned the grounds on the basis of which he was so satisfied. It was further observed that the trial Magistrate had not complied with the provisions of sub-section (3) of section 145 about the publication and service of the order under sub-section (1) of section 145. The order of the trial Magistrate was also held to be bad because, according to the learned Additional Sessions Judge, the Magistrate had not decided as to which party had been in possession of the land on the date of the preliminary order and whether there had been any dispossession of that party. Recommendation was accordingly made that the order of the trial Magistrate be set aside and the case remanded for disposal in accordance with law.

When the matter came up before me it was pointed out that there was a conflict of view on the point as to what was the effect of non-compliance with sub-section (1) of section 145. I accordingly referred the matter to a larger bench.

We have heard Mr. Gandhi on behalf of Ajaib Singh and other petitioners and Mr. Goswami on behalf of Amar Singh and other respondents as also Mr. Narinder Singh on behalf of the State. Section 145 deals with disputes about immovable property likely to cause breach of peace. Sub-section (1) of

section 145 prescribes the procedure to be adopted when information regarding such a dispute is given to a Magistrate 1st Class or a higher Magistrate and is to the following effect—

> "145. (1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the facts of actual possession of the subject of dispute and further requiring them to put in such documents, or to adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims."

Sub-section (2) defines the expression "land or water". Sub-section (3), which again has a bearing on the present case, is to the following effect—

> "145. (3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute."

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Sub-section (4) enjoins upon the Magistrate to hold an inquiry as to which of the the parties was in possession of the property on the date of the order mentioned in sub-section (1). It is also provided that if any party has, within two months next before the date of such order, been forcibly and wrongfully dispossessed, the Magistrate may treat that party to be in possession at such date. Power has also been given in case of emergency to attach the property in dispute. Sub-section (5) provides for the cancellation of an order by a Magistrate in case it is shown to him that dispute no longer exists. Sub-section (6) provides that if the Magistrate decides that one of the parties was in possession of the property in dispute, he should issue an order declaring such party to be entitled to the possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction. The Magistrate has also to restore possession to that party. We are not for the purposes of the present case concerned with the remaining sub-sections of section 145 of the Code.

Sub-section (1) of section 145, which has been reproduced above, shows that a Magistrate while initiating proceedings under section 145 is to be satisfied from a police report or other information that a dispute likely to cause breach of peace exists concerning any land or water or boundary thereof within the limits of his jurisdiction and that he should make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person and put in their written statements as also documentary and other evidence. In the instant case, information was no doubt conveyed to the learned Magistrate by a report in writing, dated 5th June, 1961, made by Sub-Inspector in charge of police station Sahnewal that there existed a dispute about the land in dispute

between Ajaib Singh and others on one side and Amar Singh and others on the opposite side. The learned Magistrate on the basis of that report merely passed an order calling upon the parties to appear before him on July 7, 1961 and to file their written statements and documentary and other evidence, but he did not in that order also state that he was satisfied that a dispute likely to cause breach of peace existed concerning land. There was thus an infraction of the provisions of sub-section (1) of section 145. There was, further, non-compliance with sub-section (3) because no order as contemplated under sub-section (1) was served on the parties or was affixed on a conspicuous place at or near the land in dispute. Mr. Gandhi has argued that a formal order under sub-section (1) of section 145 was necessary to give jurisdiction to the trial Magistrate and his omission to pass such an order was fatal to further proceedings. A large number of authorities have been cited by Mr. Gandhi in this connection. The earliest Punjab authority cited in this connection is *Abdulla Khan* v. *Gunda* (1), the head-note of which reads as under—

> "Proceedings under section 145 of the Code of Criminal Procedure are without jurisdiction unless the procedure prescribed therefor is strictly adhered to. Where, therefore, the copy of the initiatory order was neither served on the parties nor affixed at or near the subject of dispute and all the parties interested were not heard or evidence taken: held that the proceedings must be set aside."

In *Mst. Budhan* v. *Ram Rakha Mal* (2), it was observed that the failure of the Magistrate to pass

(1) 7 P.R. 1907 (Criminal).
(2) 169 P.L.R. 1915.

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preliminary order in writing under section 145 of the Code and to serve the same made his final order under section 145 as one without jurisdiction. *Abdulla Khan's case* was referred to in *Hakam* v. *Ralia Ram* (3), and it was observed as under:—

> "It is clear, therefore, that the omission to pass an order under sub-section (1) is not a mere technical defect. Where the Magistrate has not made the initial order prescribed by that sub-section, and has also not made at any subsequent stage of the proceedings an order which essentially complies with the requirements of that sub-section, the proceedings are in my opinion without jurisdiction and cannot be regarded as proceedings under section 145 of the Criminal Procedure Code."

The above mentioned case was followed in *Dhani Ram* v. *Kali Ram* (4), *Emperor* v. *Sis Ram* (5) and *Chanan Singh* v. *Emperor* (6). A similar view was taken in *Siri Ram* v. *State* (7), and the relevant headnotes read as under:—

> "(a) Before a preliminary order can issue under section 145(1) the Magistrate has to satisfy himself from a police report or other information that a dispute likely to cause a breach of the peace exists concerning the land, etc., and after doing so, he is to make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned, to attend his Court and to put in written statements

(3) A.I.R. 1924 Lahore 91.
(4) A.I.R. 1927 Lahore 805.
(5) A.I.R. 1930 Lahore 895.
(6) A.I.R. 1938 Lah. 345.
(7) A.I.R. 1958 Punj. 47.

of their respective claims. The Legislature has put in the forefront the satisfaction of the Magistrate as to the likelihood of the existence of a breach of the peace. These provisions are mandatory. Omission to observe them vitiates the entire proceedings as these are the pre-requisites or *sine qua non* for instituting proceedings under Chapter 12 of the Code. The omission also occasions a failure of justice, as mentioned in section 537, Cr. P.C.

(b) If there is no preliminary order within the contemplation of sub-section (1) of section 145 then the requirements of sub-section (3) cannot be satisfied. Even if it be assumed that such order could be deemed to be in accordance with sub-section (1), even then where that order has not been served and published in accordance with the provisions of sub-section (3), the proceedings must be held as without jurisdiction."

In *Berisal Singh* v. *Matadin* (8), it was observed that the foundation of proceedings under section 145 of the Code is a preliminary order under sub-section (1). A similar view was taken in *Ramchandra* v. *Bharion* (9). In *Pakamaraja Naicker* v. *Chidambara Nadar* (10), it was held that the omission to issue an order under sub-section (1) of section 145 vitiates the entire proceedings of the Magistrate under section 145. Similar view was taken in *Nga Po Tin* v. *Nga*

(8) A.I.R. 1953 Raj. 119.
(9) A.I.R. 1954 Raj. 51.
(10) A.I.R. 1955 Mad. 229.

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Po Soung (11), *Doctor A. Meah* v. *Steel Brothers and Co. Ltd.*, (12), *Ch. Abdul Aziz Khan* v. *Badri* (13), and *Ahsan Sofi* v. *Sona Mir* (14).

As against the above, our attention has been drawn to *Muhammad Sharif* v. *Dhanpat Rai* (15), the relevant head-note of which reads as under:—

> "An omission to record a preliminary order before issue of summons to the opposite party or to affix a copy of it to a conspicuous place at or near the subject of dispute, as required by clauses (1) and (3), section 145, is not fatal to the jurisdiction of the Court to proceed with the case under section 145, when an order directing the parties to put in written statements has been once recorded in the presence of the parties and they have understood the nature of the proceedings".

This case was followed in *Sajad Hussain* v. *Nanak Chand* (16), where Shadi Lal, J., (as he then was) observed that the mere omission to record the preliminary order under section 145 is not a fatal defect if no prejudice has been caused thereby. This view was followed in another case, *Nur Bakhsh* v. *Emperor* (17). The matter again rose in *Rattan* v. *Tika* (18), and the head-note is as under:—

> "Failure to make an initial order as required by sub-section (1) of section 145, failure

(11) A.I.R. 1923 Rang. 211.
(12) A.I.R. 1938 Rang. 229
(13) A.I.R. 1948 Oudh. 184.
(14) A.I.R. 1958 J. & K. 17 (F.B.)
(15) A.I.R. 1914 Lah. 295.
(16) A.I.R. 1917 Lah. 35(2).
(17) A.I.R. 1917 Lah. 35 (1).
(18) A.I.R. 1939 Lah. 233.

to serve notice on opposite party according to law or to affix copy of order of Magistrate to some conspicuous place at or near the subject of dispute or even failure of a Magistrate to record a finding in the final order that there is danger of breach of peace about the land are all defects which section 537 can cure and are not, therefore, sufficient to vitiate proceedings under section 145 if the parties are not thereby prejudiced in any manner."

In *P. Swaminatha Pillai* v. *S. Raghvachariar* (19), it was held that where there was material before a Magistrate showing likelihood of breach of peace, his omission to make mention of that material in the order while initiating proceedings under section 145 was an irregularity in procedure and was not fatal to the proceedings. The matter came up before a Full Bench of Allahabad High Court in *Kapur Chand* v. *Suraj Parsad* (20), and it was observed as under:—

"Now, if we read section 145 in the light afforded by the sections quoted above, we see that if the Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists, he is seized of jurisdiction to take action and he is empowered by the Code to act in a particular way. If this view be correct, the jurisdiction of the Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate does not depend on how he proceeds. There are two things:

(19) A.I.R. 1947 Mad. 161.
(20) AI..R. 1933 All. 264 (F.B.).

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one is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective. If this view be right, the omission on the part of the Magistrate to follow certain directions contained in the Code, although some of these directions may be more important than others, cannot be said to deprive him of jurisdiction."

It was further held that the failure of the Magistrate to comply with the provisions of sub-section (1) of section 145 of the Code was a defect curable under section 537 of the Code as it had caused no prejudice.

The above Full Bench case was followed in *Ram Piari* v. *Dankua* (21), *Narsingh Padam Saran Shah* v. *Suraj Kishore Devi* (22), and *Parmatama* v. *State* (23).

In a Full Bench case decided by the Calcutta High Court *Sukh Lal Sheikh* v. *Tara Chand Ta* (24), it was held that the provision as to the publication of a copy of the order in sub-section (3) of section 145 of the Code, after the Magistrate had drawn up the initiatory order under sub-section (1) of section 145 of the Code was directory and the omission of the Magistrate to get a copy of such order published did not deprive him of jurisdiction and was a mere irregularity in procedure. Maclean, C. J., (with whom three other Judges agreed) concurred in the main in the reasoning

(21) A.I.R. 1949 All. 402.
(22) A.I.R. 1951 All. 826.
(23) A.I.R. 1954 All. 24.
(24) I.L.R. 33 Cal. 68.

and conclusion of the referring Judges in the reference. In the reference, it was observed as under:—

> "Question of jurisdiction may consequently arise in one of three ways, that is, either in relation to the subject-matter, or in relation to the parties, or in relation to the question submitted for the decision of the Court. Another class of questions may, however, arise, namely, whether a Court, in the exercise of the jurisdiction which it possesses, has acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously not to the existence of the jurisdiction, but to the exercise of it in an irregular or an illegal manner. We are not prepared to accept the view that a non-compliance with every rule of procedure destroys the jurisdiction of the Court. Such non-compliance may in some cases amount to nothing more than an irregularity, and consequently be insufficient to invalidate the proceedings, until it is shown that any party has been prejudiced by reason thereof. In other cases, such non-compliance may amount to an illegality and thus destroy the validity of the whole proceedings."

In another Full Bench case decided by the Calcutta High Court *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (25), it was held that initiatory order under section 145(1) of the Code was not defective because it did not state in express terms the grounds upon which the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed, when such grounds appeared in the police report on which the order was founded and to which it made reference

(25) I.L.R. 33 Cal. 352.

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in express terms. Maclean, C.J., who wrote the main judgment of the Full Bench, approved of the reasons and conclusions of the referring Judges. The referring Judges in the course of the reference dealt with the question of jurisdiction, and observed as under:—

> "It is clear that, in order to give jurisdiction to a Magistrate to take proceedings under section 145, it is essential that he should be satisfied that a dispute likely to cause a breach of the peace exists, and such dispute must refer to land or water or the boundaries thereof lying within his local jurisdiction. If these elements exist, the Magistrate is entitled to exercise his jurisdiction, and the first step is the recording of the initial order, the contents of which are specified in the first clause of section 145. If the order does not strictly comply with the requirements of the section, because it does contain a statement of the grounds upon which the Magistrate is satisfied, it is no doubt defective, but we are unable to appreciate the grounds upon which it is contended that such defective order is one made without jurisdiction. This argument appears to us to be based upon the fallacy that a Court has jurisdiction only to make a correct order, and when it happens to make an order which is incorrect or defective, it acts without jurisdiction; such a view can hardly be maintained after the decision of the Judicial Committee in the case of *Malkarjun* v. *Narhari* (26)."

I have given the matter my earnest consideration and am of the view that the essential condition for

(26) I.L.R. 25 Bom. 37.

the exercise of jurisdiction by a Magistrate under section 145 of the Code is that information should be laid before him that a dispute likely to cause a breach of the peace exists concerning any land or water or boundaries thereof within the local limits of his jurisdiction, and he should be satisfied on the basis of that information that he should proceed in the matter. Once he is so satisfied on the basis of the information received by him, he is seized of jurisdiction, and the further question as to whether he passes a formal order under sub-section (1) of section 145 or gets the same published as required by sub-section (3) of the section are matters relating to the mode of procedure. The Magistrate having become seized of the jurisdiction cannot be divested of the same because in the exercise of that jurisdiction he does not pass an order in conformity with law. The exercise of jurisdiction under section 145 depends upon the satisfaction of a Magistrate on the basis of the report received by him that a dispute likely to cause breach of the peace exists in respect of immovable property and not upon the correctness or otherwise of the order made by him. As observed in *Khosh Mohamed Sirkar* v. *Nazir Mahomed* (*supra*) (25), there is a fallacy in the argument that a Court has jurisdiction only to make a correct order and when it happens to make an order which is incorrect or defective it acts without jurisdiction. The correct approach in the matter is that laid down by the Full Bench of the Allahabad High Court in *Kapur Chand v. Suraj Prasad* (20), (*supra*) that the jurisdiction of a Magistrate arises from the fact that he has received certain information and that he is satisfied as to the truth of that information. The jurisdiction of the Magistrate does not depend upon how he proceeds. A Court has jurisdiction to pass a right order as well as a wrong order, and defects in an order would only go to show that the order is

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erroneous and not in confirmity with law but it would not also make the order to be one without jurisdiction. There is an essential difference between lack of jurisdiction and irregular exercise of jurisdiction and the two cannot be equated to each other or treated on the same footing. Proceedings under section 145 taken without even police report or other information being laid before Magistrate about dispute regarding immovable property likely to cause breach of peace are without jurisdiction, but if such report or information is laid before the Magistrate and he proceeds on its basis without passing a formal order under subsection (1) of section 145, he exercises jurisdiction in an irregular way. Procedural mistake would not affect the jurisdiction of the Court unless the matter is, to use the words of the Supreme Court in *Willie Slaney* v. *State of Madhya Pradesh* (27), "something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice." In this case Bose, J. (with whom S.R. Das C.J., concurred) observed as under:—

> "The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice.
>
> If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a

(27) A.I.R. 1956 S.C. 116.

full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, more in-consequential errors and omissions in the trial are regarded as venial by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

Under the Code, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity, they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice."

It was further observed—

"Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.

These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that

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kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once.

Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of cases, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

The distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to substantial denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'."

In the instant case, the report under section 145 of the Code made by the Sub-Inspector in charge of police station Sahnewal was put up before the Magistrate. The report, it appears, was accompanied by the application of Ajaib Singh petitioner in which it was stated that the opposite party was forcibly trying to take the crop of the land. Although the learned Magistrate did not pass an express order stating that he was satisfied about the existence of the dispute relating to land likely to cause breach of the peace, the fact that he made an order on the report of the Sub-Inspector itself that notice should issue to the

parties for the 4th of July, 1961, that they should furnish documentary and other evidence, goes to show that the learned Magistrate was satisfied that the dispute was likey to cause breach of the peace. The Magistrate was thus seized of jurisdiction, and his failure to pass an order in accordance with sub-section (1) of section 145 would not take away his jurisdiction in the matter. Likewise, the failure of the learned Magistrate to get the order published as required by sub-section (3) of section 145 would not divest him of the jurisdiction to proceed in the matter. The object of publication is to inform all the parties concerned to appear before the Magistrate and file statements in support of their claim lest any order is made without affording them an opportunity of being heard. It is not disputed that notice on the parties concerned in the present case was issued and that they were heard in the matter before the final order was passed. There is nothing to show that any party which had an interest in the matter remained unaware of the proceedings because of the omission of publication. In the circumstances, the failure to publish the order would amount to a mere irregularity and it would not vitiate the proceedings.

The next question which arises for consideration is as to what is the effect of the failure of the Magistrate to comply with the provisions of sub-section (1) of section 145 of the Code. I have already observed above that it would not affect the jurisdiction of the Magistrate but would amount to a procedural defect. This is also not one of those matters which are abhorrent to natural justice. In the circumstances, the matter would resolve itself, in the language of the Supreme Court in *Willie Slaney's case,* to a question of prejudice. In this context, it would be useful to refer to another case *Gurbachan Singh* v. *State of Punjab* (28), wherein the observations made in

(28) A.I.R. 1957 S.C. 623

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Willie Slaney's case were followed, and it was observed as under:—

> "In judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

Keeping the above principle in view, I am of the opinion that it cannot be said that any prejudice was caused to the petitioners because of the failure of the learned Magistrate to pass an order under sub-section (1) of section 145. The parties to the present case filed affidavits and copies of Khasra Girdawaris in support of their claims, and it is obvious that they knew as to what was the nature of the proceedings. Notice served upon them also expressly mentioned section 145. So far as Ajaib Singh and other petitioners are concerned, it hardly lies in their mouth to say that there was no dispute causing apprehension of breach of the peace because Ajaib Singh petitioner had himself first moved the village Panchayat by means of an application wherein there was reference to the forcible taking of the crop by the opposite party. Ajaib Singh was then directed by the Panchayat to move the police. He, accordingly, made a report about it to the police. It is significant to observe that in the grounds of revision filed in the Court of Session there was no reference to the failure of the Magistrate to pass preliminary order under sub-section (1) of section 145 and the consequent vitiating of the proceedings. In case the petitioners had been prejudiced

because of the failure of the Magistrate to pass that order, this would have found a prominent mention in the grounds of revision.

Mr. Gandhi has also referred to clause (j) of section 530 of the Code wherein it is stated that if any Magistrate not empowered by law in this behalf makes an order under Chapter XII, which contains section 145, his proceedings shall be void. According to Mr. Gandhi, the trial Magistrate in the present case could be deemed to be "empowered by law" only if he had passed an order under sub-section (1) of section 145. This contention is devoid of force because reference to the observations under sections 529 and 530 of the Code by Chitaley (Fifth Edition) goes to show that the word "empowered" refers to the ordinary or additional powers conferred upon Magistrates under sections 36 and 37 and Schedules III and IV of the Code. These observations are based upon authorities and correctly represent the law in the matter. An argument similar to that of Mr. Gandhi was advanced in *Khosh Mahomed Sirkar* v. *Nazir Mahomed* (Supra) (25), and it was observed as under:—

> "It is suggested, indeed, by the learned Vakil for the petitioner that, if the initial order is defective, the final order becomes void by reason of section 530, clause (j) of the Criminal Procedure Code, which provides that, if any Magistrate, not being empowered by law in this behalf, makes an order under Chapter XII (which includes section 145), his proceedings shall be void. This argument seems to us to be obviously unsound, for, as was pointed out in the case of *Raj Mohan Roy* v. *Prosunno Chandra Chatterji* (29), section 530, clause (j), refers to a case where a Magistrate is not

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competent by virtue of the position he holds or powers vested in him, to try a case of the character referred to in section 145. On the whole, therefore, we are inclined to take the view that the omission to state the grounds in the initial order does not make the order one without jurisdiction, nor does it amount to an illegality which vitiates the whole proceedings, but such omission is an irregularity for which this Court may be rightly invited to set aside the proceedings, if it is shown that it has operated to the prejudice of any of the parties."

I would, therefore, hold that the omission of the Magistrate to pass an order in accordance with sub-section (1) of section 145 of the Code is an irregularity which can be cured under section 537 of the Code unless it can be shown that it has caused prejudice to any party, of which there is no proof in the present case. The learned Additional Sessions Judge has also recommended for setting aside the order of the Magistrate on the ground that the latter had not decided as to which party had been in possession of the land. On reference to the order of the learned Magistrate, I find that there was a finding to the effect that Amar Singh, Pritam Singh and Surjan Singh were in cultivating possession of the land. It cannot, therefore, be said that there was no finding about the possession. I also see no ground to interfere in revision with the finding of the learned Magistrate in this respect.

I accordingly decline to accept the recommendation of the learned Additional Sessions Judge and dismiss the revision petition.

Gurdev Singh, J.

GURDEV SINGH, J.—I agree. There is no justification for interference with the order of the Magistrate, and

this revision petition must be dismissed. The provisions of sub-section (1) of section 145 of the Criminal Procedure Code are mandatory, and they must be strictly complied with. The learned Magistrate has not only to satisfy himself that a dispute relating to immovable property exists between the parties, and it is likely to result in breach of peace, but he has also to record reasons for his satisfaction. Failure to comply with these requirements is no doubt a serious defect, but it is not a defect of jurisdiction as held by my learned brother Khanna, J., after elaborate discussion of the relevant authorities. It only amounts to an illegality. Where despite a defective preliminary order the proceedings are permitted to continue resulting in a final order, it will be a matter for the Court of revision to consider whether a case for interference with the final order has or has not been made out.

In the instant case, despite the fact that the Magistrate does not appear to have applied his mind to the requirements of sub-section (1) of section 145 of the Criminal Procedure Code and his preliminary order, dated 28th September, 1961, was not in accordance with the requirements of law, I do not think any case for interference with the final order has been made out. It is sufficient to point out that the proceedings were initiated by the petitioner himself who had specifically complained that a dispute relating to property existed between the parties and it was likely to lead to breach of peace. He cannot now turn round and assail the final order on the ground that there was no likelihood of breach of peace. In my opinion no case for interference by this Court under section 439 of the Criminal Procedure Code has been made out, and the petition must, accordingly, be dismissed.

K.S.K.