

(1957) 02 GAU CK 0003

Gauhati High Court

Case No: None

Debendra Kumar Das

APPELLANT

Vs

Satish Chandra Das

RESPONDENT

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**Date of Decision:** Feb. 26, 1957**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 107, 147, 147(1), 435, 438

**Citation:** AIR 1958 Guw 112 : (1958) CriLJ 1131**Hon'ble Judges:** Sarjoo Prasad, C.J; Haliram Deka, J**Bench:** Division Bench

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**Judgement**

@JUDGMENTTAG-ORDER

Deka, J.

This is a reference by the Additional Sessions Judge, Lower Assam Districts recommending that a certain order passed by the trial Magistrate u/s 147, Cr.PC should be set aside. The main ground for recommending Setting aside the order is that proper procedure had not been followed by the learned Magistrate in the matter of drawing up the proceeding u/s 147, Cr.PC and in the matter of issue of notice to the parties concerned as provided u/s 147(1).

The second and subsidiary ground is that the order as passed by the learned Magistrate is conflicting in its very nature since he has not directed removal of the fencing though the right of passage is found in favour of the first party and the second party is asked not to obstruct.

2. The facts relating to this case come within a very short compass. One Satish Chandra Das (first party) purchased some lands covered by dag No. 242 and has been living there for about seven years past and has been using a path over the common boundary of dags Nos. 243 and 244 which belonged to Debendra Kumar Das and, others (second party) as an outlet to the municipal road.

It is alleged that on 3-11-1953 or thereabout, there was a quarrel between the parties over the path and the second party destroyed the path and proceeding u/s 107, Cr.PC was taken before the Additional District Magistrate and the second party was warned not to commit any breach of the peace by doing any illegal act.

In spite of that the second party is alleged to have raised a fencing on the path and on an application being made to that effect by the first party, the learned Additional District Magistrate by his order dated 10-11-53 directed that a proceeding should be drawn up u/s 147, Cr.PC and pending the disposal of the same, the second party was to show cause why the fencing should not be removed forthwith. The matter was then transferred to a first class Magistrate Mr. Hazarika, who on receipt of the record issued notice on the second party, as indicated in the order of the learned Additional District Magistrate of that date but failed to draw up any formal proceeding.

The learned Magistrate asked the second party to show cause. After the second party showed cause, a date was fixed for recording the evidence of the parties, and finally the case was transferred to Mr. S. Sarkar who disposed of the case, though evidence was recorded on the part of the either party by some other Magistrates through whom the case passed. Mr. Sarkar by his order dated 15-10-54 found in favour of the first party and directed the second party to refrain from obstructing the passage of the first party over the path in question but refused to pass any order for removal of the fencing that had been already erected.

3. Against this order, the second party filed an application u/s 435, Cr.PC and the learned Additional Judge u/s 438, Cr.PC has made this reference, as indicated above.

4. Mr. P. Chaudhuri appearing on behalf of the second party in support of the reference contended (1) that the drawing up of the proceeding itself was illegal, since there was no material on record to prove that there was any likelihood of the breach of the peace as is the first condition for drawing up a proceeding u/s 147, Cr. P. C (2) the procedure as prescribed u/s 147(1), Cr.PC was not followed inasmuch as parties were not asked to show cause, and (3) there was no finding to the effect as is required, under proviso to Section 147, Cr.PC that the first party had exercised the rights within three months next before the institution of the enquiry.

5. We have heard the learned Advocate for the first party as well who contends that even though there might be certain irregularity in the proceeding, there has been no prejudice to the second party in any form and as such the order of the learned Magistrate should not be interfered with.

6. Though there is some substance in the contention of Mr. P. Choudhuri to the effect that the materials are not adequate on the record to show that the Magistrate was satisfied as to the existence of a likelihood of the breach of the peace as is required u/s 147, Criminal Procedure Code, the whole context would throw some light as to the quarrelsome attitude between the parties and the police report to

which our attention has been drawn, reflects some amount of intransigence on the part of the second party in the matter of keeping peace.

If this point had alone been there, we might not have taken this contention very seriously. But the second point has more force and it appears that not only no formal order was passed drawing up a proceeding u/s 147, Criminal Procedure Code with details as to the path over which rights are claimed by the first party and denied by the second party, but no notice was directed to be issued on the parties asking them to state their respective cases as contemplated u/s 147, Criminal Procedure Code.

It appears to us that the second party was treated more or less like an accused and by the notice that was served on him shows that he was asked to show cause why he should not remove the fencing as if it was issued on an assumption that the first party's case was already made out.

Both the parties should have been asked to put in written statements of their respective claims and the Magistrate should peruse them. That is what the section requires. Therefore in the absence of any such statement, it was not possible for the second party to know what the first party's case exactly was nor did the Magistrate have the benefit of looking into the first party's claim. The right of way had to be established by the first party against the second party. The nature of the right of way had to be inquired into, namely as to whether a passage was allowed by way of courtesy or by sufferance or the party claiming the right had acquired the same as an easement or otherwise and was in enjoyment thereof.

Therefore it was an important point which the trial court had to ascertain to the extent it was possible. The finding of the learned Magistrate was in this respect not quite clear, because he does not say how the first party acquired the right. We think that the order passed by the learned Magistrate in this case in favour of the first party was not quite justified, in view of the fact that proper procedure was not followed.

7. In regard to the third contention, namely, as to the form in which the order has been passed by the learned Magistrate, we are not quite satisfied with the order. No sooner a court passes an order which is meant to be carried out, the law gives the court sufficient power to take such measures as may give the order a validity not only in the eye of law but that it may be also effective; and useful to the party in whose favour it has been passed.

In other words, if a right of way is found in favour of the first party, the fencing or any other obstruction raised has to be removed by the order of the court, otherwise, the order becomes ineffective. This view finds favour with the Allahabad High Court Ref. (Abdul Wahab Khan v. Mohd. Hamid Ullah AIR 1951 All 235 (A).)

8. We, however, do not express any opinion as to the merits of the case and what we propose is that the matter should go back to the trial court and the court after drawing up proper proceedings in the case in case there is a likelihood of the breach of the peace, should proceed in the manner as provided u/s 147, Cr.PC We need further point out that the court should come to a finding apart from the right of way, as to whether the right had been exercised within three months next before the institution of the inquiry.

9. Accordingly we accept the reference and direct that the case should go back to the court of the Deputy Commissioner concerned who will authorise a Magistrate with competent jurisdiction to dispose of the same, according to law, and expeditiously.

10. Let the records go down immediately.

Sarjoo Prosad, C.J.

11. I agree.