CRIMINAL REVISION.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

IN RE PANDURANG GOVIND PUJARI AND OTHERS.*

1900. *August* 23.

Criminal Procedure Code (Act V of 1898), Secs. 145 and 526—Transfer of a case—Criminal case—Bias of Judge—Magistrate's powers under Sec. 145—Breach of peace—Rights of the parties.

The provisions of section 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under section 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of section 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime.

Under section 145 of the Code a Magistrate is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the fact of possession at the date of the order requiring the parties to put in their statements.

The parties cannot be called upon to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties.

THIS was an application under section 526 of the Criminal Procedure Code (Act V of 1898) for the transfer of a case from the Court of the First Class Magistrate at Pandharpur.

The applicants were the *Sevadharis* (temple servants) of the temple of Shri Pandurang at Pandharpur[1]. The *Badves*, who opposed the application, were the chief priests, managers, and trustees of the said temple.

A dispute arose between the *Badves* on the one hand and the *Sevadharis* on the other, about the right of performing the *Alankar Puja* (decoration rites) at the temple.

Thereupon one Dnyneshwar Dadaji Badve made a complaint to the District Magistrate of Sholápur, complaining that the *Benares*, a class of *Sevadharis*, had obstructed him in the performance of the said *puja*.

On this complaint the District Magistrate passed an *ex parte* order on the 10th of October, 1899, to the following effect:—

* Criminal Application for Revision, No. 144 of 1900.

(1) See I. L. R. 24 Bom., 527.

1900.

IN RE PANDURANG GOVIND.

"There appears to be a dispute about the *Alankar Puja*. But looking to the past practice, the *Badves* alone have the right to perform the service, and the High Court of Bombay has also decided that *Badves* alone should perform this *puja*. The *Benares* and the other *Sevadharis* have no right at all to perform this service. For this reason, if the *Sevadharis* or other persons obstruct the *Badves* at the time of this service, the police should remove the obstruction, and, if necessary, those who cause the obstruction should be expelled from the temple during this service."

This order was set aside by the High Court on the 22nd January, 1900, on the ground of defect in procedure, and the District Magistrate was directed to re-hear the case after giving due notice to all persons interested in the matter.

After the remand the District Magistrate transferred the case for inquiry to the First Class Magistrate at Pandharpur.

On the 12th May, 1900, the Magistrate purporting to act under section 145 of the Criminal Procedure Code (Act V of 1898) issued an order to the *Badves* as well as to all classes of *Sevadharis* requiring them to file written statements of their respective rights and duties at the performance of the *Alankar Puja*.

Thereupon the present application was made to the High Court by the *Sevadharis* for the transfer of the case from the Court of the First Class Magistrate to another Court, on the following grounds, viz. :—

"(1) That the First Class Magistrate at Pandharpur being a *yejman* or patron of one of the *Badves*, there was a likelihood of his dealing with the case with a real bias in their favour.

"(2) That the Magistrate had already expressed his opinion in favour of the *Badves* and against the *Sevadharis* about their respective rights and duties at the temple, especially in connection with the *Alankar Puja*, in a report submitted by him to the District Magistrate of Sholápur on 5th May, 1893.

"(3) That the Magistrate having thus prejudged the merits of the case was disqualified from trying the case."

Upon this application the High Court issued notices to the District Magistrate and the *Badves* to show cause why the case should not be transferred.

Thereupon the District Magistrate made the following affidavit :—

"It is a fact that Mr. Thakar is the *yejman* of Vishwanath Gopal Badve, but the word 'patron' is not a quite correct translation of the term '*yejman*.' It is customary for every Hindu to have some '*upadhya*' or priest at sacred places like Pandharpur; this relation of '*yejman*' and priest has descended to Mr. Thakar and Vishwanath Badve from their forefathers as a mere matter of form. I am sure it can in no way affect the judicial impartiality of the former.

"It is also true that Mr. Thakar once submitted a report to the District Deputy Collector, Sholápur, regarding the *Alankar Puja* while Mámlatdár at Pandharpur; but that report simply expressed his general views and has nothing to do with the trial of the case or consideration of its judicial merits. It was merely a departmental report submitted in a non-judicial capacity. Besides, in the present case, this report has been already rejected as evidence. I, therefore, declare that neither of these facts will influence the Magistrate in a judicial inquiry or interfere with his judicial independence."

G. S. Rao for applicants.

N. G. Chandavarkar for opponents.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for the Crown.

The following judgment was delivered by

JENKINS, C. J.:—A dispute having arisen at Pandharpur between the *Badves* and *Sevadharis* of a temple, with reference to the right of the *Sevadharis* (or temple servants) to participate in the *Alankar Puja* (or decoration rites), the Magistrate of the district, apparently with a view to prevent a possible breach of the peace, referred petitions received by him on the subject to a First Class Magistrate and on receiving his report issued an order purporting to affect the *Sevadharis* generally. That order owing to the defective procedure followed, and other grounds of objection, appearing to be open to revision as *ultra vires* of the powers conferred by Chapter XII of the Code of Criminal Procedure, was considered in Application No. 247 of 1899 and ultimately set aside by a Division Bench of this Court (*In re Pandurang Govind* [1], Mr. Justice Ranade and Mr. Justice Crowe) which directed the District Magistrate to "rehear the case after making all the persons interested parties, and receiving the evidence they may produce before him, and to pass a fresh order." It appears that

(1) (1900) 24 Bom., 527.

1900.

IN RE PANDURANG GOVIND.

after the return of the records and proceedings, further action was taken by the First Class Magistrate, who issued to the parties concerned in the alleged dispute an order, which purports to be under sub-section 1 of section 145 of the Code, requiring them to attend in person or by pleader, or to put forward statements of the rights which they respectively claim. The present application has now been made to this Court to transfer the matter from the Court of the First Class Magistrate who made that order, to some other competent Court.

The impartiality of the Magistrate in question has been impugned both on the ground that he has already inquired into and reported (unfavourably it would seem to the present applicants) on the subject of the dispute, and also that he is the hereditary *yejman* of one of the parties concerned in the dispute as an *upadhya* or priest of the shrine. Among the papers now before this Court is a document which purports to be an affidavit by the Magistrate of the District, and which (*inter alia*) sets forth the opinion of that officer to the effect that the Magistrate whose impartiality is impugned, will not be influenced by the relations in which he admittedly stands to one of the parties interested. It is somewhat difficult to understand on what grounds it could have been supposed that such an expression of opinion could have formed a basis for any decision by this Court as to the advisability of directing the transfer applied for. And it is by no means reassuring to find that the head of the Magistracy of the district, in a document of so solemn a nature as an affidavit under the sanction of an oath, should have felt no hesitation in making a statement which is not one as to facts, but as to his personal opinion, which in the circumstances can only rest upon conjecture as to the mental attitude of another officer. In considering the expediency of directing a transfer for the ends of justice, the Calcutta High Court (*Dupeyron* v. *Driver*[1]) has deemed it essential to decide "not merely the question whether there has been any real bias in the mind of a Magistrate, but also the further question whether incidents may not have happened which though they may be susceptible of explanation are nevertheless such as are calculated to create in the mind of

(1) (1896) 23 Cal., 495.

the accused a reasonable apprehension that he may not have a fair and impartial trial." This ruling has been followed in *Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty*[1], where it was observed that the importance of securing the confidence of parties in the fairness of the tribunal is next only to the importance of securing a fair and impartial tribunal (p. 733). A similar view was expressed by the Allahabad High Court—*Farzand Ali* v. *Hanuman Prasad*[2]. The District Magistrate on perusing those rulings will no doubt perceive that the impressions produced in his own mind as to the impartiality of the Magistrate, require less consideration than the effect likely to be produced in the minds of the *parties and their witnesses*, by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either the one party or the other. Such considerations could not altogether have been overlooked had it been necessary for this Court to determine whether transfer should in this case be directed.

Having regard, however, to the wording of section 526 of the Code we have come to the conclusion that the provisions of that section confer no power to direct the transfer of any proceedings initiated under section 145 of that Code.

The orders that may be passed under sub-section (1) of section 526 are specified in sub-clauses (i) to (iv) of that sub-section. The first of these clauses authorizes an order that any offence be *inquired into* or *tried* by any Court competent in all respects but that of local jurisdiction. Section 145, however, does not contemplate inquiry or trial into an offence. It deals, as the heading to Part IV in which it is contained suggests, with the prevention of offences, which, if the procedure be effectual, may never be committed, and which if committed could not be inquired into or tried under the procedure prescribed in section 145.

Clause (ii) of section 526 authorizes an order that any criminal case or appeal or class thereof be transferred. The word "criminal" governs the word "appeal" as well as the word "case", and must, therefore, bear the same connotation in both connections—that is to say, a criminal case like a criminal appeal must arise

(1) (1897) 25 Cal., 727. (2) (1896) 19 All., 64.

1900.

IN RE PANDURANG GOVIND.

out of and deal with some crime already committed. It seems, therefore, that this clause confers no power to deal with procedure that can be taken only for the prevention of crime. Indeed the phrase "criminal case" recurs in clause (iii) of section 526 where it is manifestly incapable of application to any proceedings which could not be transferred to, and tried before, this Court. Clause (iv) of section 526, it is equally obvious, has no reference to proceedings under section 145. The remaining sub-sections indicate with sufficient clearness that the power to transfer operates only when there is a person accused.

Section 145, it is true, contemplates a procedure which may involve such inquiry as would fall within the definition in clause (*k*) or (*m*) of section 4 of the Code. But the action which may ultimately be taken thereunder, is not punitive, but preventive, and for that purpose, as sub-section (6) shows, is provisional only until such time as final or formal adjudication on the rights affected may be obtained and carried into effect by a Court competent to deal with the matter in due course of law. The Magistrate in acting under that section is restricted by the necessity of observing all the conditions thereby imposed as precedent to the exercise of the powers conferred. Sub-section 4 expressly provides that he is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the *fact* of possession at date of the order requiring them to put in their statements. And, further, this sub-section implies that it is unnecessary for him to formulate a decision even on that point if it should present insuperable difficulties. He is to decide the fact of possession "if possible", but alternative action when decision on that fact is not possible is authorized by the second proviso, which enables the Magistrate to attach the subject-matter of the dispute. It is thus evident that nothing that could affect the past, present or future *rights* of the parties, was contemplated in the section. The action to be taken (though judicial inquiry and judicial discretion are no doubt required as essential to the exercise of the powers conferred) is *quasi* executive action, having for its object and justification the prevention of a breach of the public peace. The existence of a dispute likely to cause a breach of the

peace is a condition lying at the root of the powers conferred. It is expressly stated in sub-section (1) as a matter on which a Magistrate *must* be satisfied before he can take any action *at all* under the section, and sub-section (5) imperatively requires that the Magistrate shall, even after he has passed his order, cancel it on its being shown that no such dispute exists or has existed.

Looking to the facts of this case, and especially to the circumstance that proceedings appear to have been protracted therein from a date earlier than the commencement of the current year without apparently any ground arising for apprehension of violence of any kind on either side, we deem it desirable that the Magistrate who is to deal with this case, should have his attention specially directed to the foregoing remarks in order that he may satisfy himself of the fact that there is such likelihood of a breach of the public peace as would be necessary to justify him in taking any action whatsoever under the section. We also deem it necessary to emphasize the necessity of limiting the enquiry, which must precede his final action, to the issues with which alone the section empowered a Magistrate to deal, that is to say to the actual fact of possession, as distinct from any question of rights. The rights of the parties can only be inquired into by Courts legally competent to give a definitive judgment thereon.

Our attention has been drawn to the wording of the order made by the First Class Magistrate, ostensibly under sub-section (1) of section 145. We understand that it requires the parties concerned in the dispute to put in statements as to their respective rights. That order is not now before us on revision. We will, therefore, confine our remarks on it to the observation that the parties cannot be called on in these proceedings to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties. He is justified only, by the terms of the section, in taking measures to prevent a breach of the peace, if satisfied that otherwise a breach of the peace is likely to be caused by the dispute. Whether he is so satisfied, and what are the measures authorized by the section which are most appropriate in the circumstance, are matters for his

1900.

IN RE PANDURANG GOVIND.

own judicial conscience. His duty as a Magistrate is to prevent a disturbance of the peace, and provided he acts within the powers given him by law, there is nothing in the Code which would justify any of the parties in attempting to hamper the beneficent exercise of his discretion. Proceedings under section 145 of the Code are by section 435 expressly excluded from the class of proceedings liable to be dealt with on revision. And in all the cases in which the High Courts have interfered with proceedings purporting to have been taken under Chapter XII, that interference has been justified by the fact that the orders revised were not really orders under that chapter at all, but would have required, to validate them, powers which the Legislature has not seen fit to confer on any one. The powers which are conferred by Chapter XII appear, however, to be such that in order to attain their object, the prevention of disturbances and other offences affecting the public, they must necessarily be exercised with promptitude, and it would paralyse the Magistracy in the preventive action contemplated in Chapter XII if, at the moment when such action is about to be taken, parties to a dispute likely to cause a breach of the peace could tie the hands of the Magistrate by obtaining a stay of his proceedings and a transfer to another Court. For these reasons we must decline to interfere, but direct that the remarks in this order should be communicated to the First Class Magistrate concerned, so far as they apply to the proceedings taken or to be taken by him.

Order accordingly.

APPELLATE CIVIL

Before Mr. Justice Fulton and Mr. Justice Crowe.

1900.
August 27.

BHIVA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VITHYA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Vatan—Bombay Act III of 1874, *Sec.* 18—*Suit for a declaration of right to a share in a vatan, and to participate in the emoluments of the vatan—Jurisdiction of the Civil Court to entertain such suit—Jurisdiction.*

Where the plaintiffs sued to obtain a declaration that they were entitled to a third share in a Maháŕki vatan and to participate in the profits of the vatan,

* Second Appeal, No. 73 of 1900.