

**Mina Devi Vs. State of Bihar**

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**Court :** Patna

**Decided On :** Nov-25-1993

**Judge :** Nagendra Rai, J.

**Appeal No. :** Criminal Misc. No. 8811/93

**Appellant :** Mina Devi

**Respondent :** State of Bihar

**Disposition :** Application Allowed

**Judgement :**

**Nagendra Rai, J.**

1. The second party in a proceeding under Section 145 of the Code of Criminal Procedure has challenged the order dated 9th June, 1993 passed by the Additional Sessions Judge, Buxar, in Cr. Revision i o. 308/89, by which he has allowed the criminal revision petition filed by the first party and set aside the order dated 16-5-1989, passed by the Executive Magistrate in Case No. 498(M)/160, Tr. No. 227/82, declaring the possession of the petitioner over the Mill situated at Mauza Parana, Bhojpur.

2. The facts leading to the filing of the present application are that on the basis of the police report, a proceeding under Section 144 of the Code of Criminal

Procedure (hereinafter referred to as 'the Code') was started by the Sub-divisional Magistrate, Bhojpur, against opposite-party No. 2, who was arrayed as first party and the petitioner and his mother who were arrayed as second party. Both parties appeared and filed their respective show cause and. thereafter, the learned Magistrate, after hearing the parties and perusal of the show cause, ordered for initiation of a proceeding under Section 145 of the Code.

3. The learned Executive Magistrate finally declared the possession of the second party-petitioner over the disputed Mill by order dated 4-2-1983. Against the said order the first party-opposite party filed a revision petition, being Cr. Revision No. 81/83, which was finally heard by the 4th Additional Sessions Judge, Bhojpur, who, by order dated 24-9-1987, set aside the order of the learned Magistrate and remitted back the matter to him for fresh consideration. Thereafter, the matter was placed before the Executive Magistrate before whom the first party-opposite party did not appear inspite of the information to his counsel and the learned Magistrate by order dated 16-5-1989 again declared the possession of the second party-petitioner over the disputed Mill. Against the said order again the first party-opposite party went in revision before the Sessions Judge which was finally by the First Additional Sessions Judge, Buxar, who by the impugned order dated 9th June, 1993, allowed the revision petition on the ground that the direction of the revisional court was not considered, the documents filed by the parties were not considered and there is no evidence on the record to show that the apprehension of breach of peace is still continuing after lapse of more than 10 years of the initiation of the proceeding. According to him, since the proceeding is an old one, the same cannot be allowed to continue in view of the law laid down by this Court in the case of Anil Kumar and Anr. v. Ram Parvesh Dubey and Anr. 1987 BLJ 126 and in the case of Ram Chandra Rai and Ors. v. State of Bihar and Anr. 1991 BBCJ 100.

4. Learned Counsel for the petitioner contended that the revisional court was not justified in law dropping the proceeding on the ground that the proceeding remained pending for more than 10 years. According to him the delay in disposal of the proceeding could not be a ground for quashing the proceeding under Section 145 of the Code. The proceeding could be dropped or cancelled only

when the Magistrate comes to a conclusion that the apprehension of breach of peace with regard to the disputed Mill does not exist or has existed. The decisions referred by the court below for dropping of the proceeding on the ground of lapse of time are no longer a good law after the judgment of the Supreme Court in the case of Abdul Rehman Antulay etc v. R.S. Nayak and Anr. : 1992 CriLJ2717 .

5. Learned Counsel appearing for the opposite party, on the other hand, relied upon the judgments of this Court, reported in Kamleshwar Rai and Anr. v. Keshav Rai and Anr. 1986 BBCJ 678; Anil Kumar and Anr. v. Ram Parvesh Dubey and Anr. (supra) and Ram Chandra Rai and Ors. v. The State of Bihar and Ors. (supra) and submitted that as the proceeding under Section 145 of the Code is of urgent nature the same should be disposed of with utmost expedition. If more than 7 years have elapsed after the initiation of the proceeding, it would not be proper to allowed the proceeding to continue, as in that situation an apprehension of breach of peace cannot be said to be continuing after lapse of such time.

6. After hearing the Counsel for the parties and after going through the record, I am of the view that the submission advanced on behalf of the petitioner has to be accepted for the reason detailed hereinafter.

7. The proceeding under Section 145 of the Code is an urgent proceeding for maintenance of public safety and tranquillity. Its object is to prevent breach of the peace and to provide a lawful remedy for determining the claim of the parties with regard to actual possession and to maintain a status quo till the matter is finally decided by the competent court. If the Magistrate is satisfied with the two conditions, namely, that there is apprehension of breach of the peace with regard to immovable property and the same is likely to cause apprehension of breach of peace, then he has to initiate a proceeding under Section 145 of the Code. After initiation of the proceeding the Magistrate has three options in law, he can cancel the order if any party to the proceeding at any time after the initiation of the proceeding shows that no apprehension of breach of peace concerning the disputed land exists or has existed, he can hold an inquiry as provided under Section 145(4) and pass a final order declaring the possession of one of the parties or he can attach the land under Section 146 of the Code in the

circumstances mentioned therein till the competent court determines the right of the parties with regard to the person entitled to possession thereon.

8. Once the proceeding under Section 145 of the Code has been initiated on the fulfilment of two conditions as mentioned above, then there is no requirement in law that the apprehension of breach of peace should continue at every stage of the under Section 145 nor there is a requirement that finding of existence of breach of peace is necessary at the time of passing the final order. However, if the materials on the record show that breach of peace has ceased to exist at any time during the pendency of the proceeding then the Magistrate will cancel the preliminary order of drop the proceeding as provided under Section 145(5) of the Code. The apex Court in the case of *Rajpati v. Bachan and Ors.* : 1980 CriLJ1276 , held , as follows:

It is, therefore, manifest that a finding of existence of breach of the peace is not necessary at the time when a final order is passed not 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 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 Section 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical and culminating in the final order under Sub-section (6) of Section 145.

9. The question for determination in the present case is as to whether a proceeding under Section 145 of the Code can be quashed only on the ground of expiry of 7 years or more from the date of initiation of the proceeding as submitted by the learned Counsel for the opposite party on the basis of the judgments of this Court, as referred to above.

10. It is true that the proceeding is of summary nature and is intended to provide speedy remedy, can be said that if the proceeding has remained pending for a particular period of the time the same has to be quashed even if there exists breach of peace between the parties concerning immovable property. The

Legislature has provided only one situation where the proceeding under Section 145 of the Code can be cancelled/dropped. Sub-section (5) of Section 145 provides that any party to the dispute at any stage of the proceeding after initiation can show that no dispute concerning the disputed land has existed or exists and the Magistrate after being satisfied that no dispute exists or has existed can cancel the proceeding order. Like a proceeding under Section 107 of the Code, no time has been fixed for disposal of the proceeding under Section 145 of the Code. There is no legislative mandate to dispose of the proceeding within a particular time.

11. Let us see as to whether the cases which have been relied upon by the learned Counsel for the opposite party supports the stand taken by him. In the case of Kamleshmar Rai (supra), it appears that the proceeding remained pending for 17 years and the learned Single Judge of this Court dismissed the revision against final order. While dismissing the revision application he observed that continuance of the second proceeding for several decades is un-reasonable and betrays both the elements of existence of breach of peace and the requirement of a speedy decision on the dispute over possession. However, he did not fix a time limit beyond which a proceeding cannot be allowed to continue. In Paragraph 5 of the judgment his Lordship opined that some time-limit should be fixed by the Legislature for disposal of 145 proceeding like a proceeding under Section 107 of the Code. In the case of Anil Kumar (supra) the same Hon'ble Judge dismissed the revision against the final order in a proceeding under Section 145 of the Code, which was passed after 9 years of the initiation of the proceeding. While dismissing the revision application His Lordship observed that there should be a ceiling on the life of the proceeding under Section 145 of the Code.. In my view, the said cases are not an authority for the proposition that if the proceeding has remained pending for a particular time then the same has to be dropped, or the final order passed in the cases has to be set aside on that ground.

12. In the case of Ram Chandra Rai (supra), it was held by a Bench of this Court that 'if the proceeding under Section 145 of the Code remains pending for more than seven years without any fresh allegation of an apprehension of breach of peace, we feel that such a proceeding should not be allowed to continue beyond

this period, since obviously it cannot be said that there is any longer any urgency in the matter.' It was further held that 'if the proceeding under Section 145 of the Code is allowed to continue beyond a period of seven years, in our view, the very purpose of the judicial proceeding gets defeated. Any such proceeding cannot be allowed to continue indefinitely if there is no apprehension of breach of peace or any new dispute likely to cause a breach of peace concerning land or water or boundaries thereof.' From the reading of the italicised portion of the judgment, it is evident that the proceeding can be quashed only on the ground of delay if there is no apprehension of breach of peace or new dispute likely to cause a breach of peace concerning land. The aforesaid observation supports the view that the test to determine whether the proceeding should be dropped or not is to see as to whether breach of peace exists or not. The period of time cannot be a deciding factor for dropping the proceeding. Thus, the aforesaid judgment does not support the stand taken by the opposite party that the proceeding can be dropped mechanically after expiry of seven years.

13. Even if it is assumed that in the case of Ram Chandra Rai (*supra*) a Division Bench of this Court has held that after expiry of seven years from the date of the initiation of the proceeding, the proceeding should be dropped, in my view, the said view is no longer a good law in view of the law laid down in *Antulay's case* (*supra*).

14. Under the Code of Criminal Procedure, 1973, there is a complete separation of judicial function from the executive or administrative functions. The judicial function has been allotted to the Judicial Magistrates and the executive function has been allotted to the Executive Magistrates. There is a clear cut division between the powers of the two. Magistrates under the Code of Criminal Procedure, 1973. The power of initiating a proceeding under Section 145 of the Code has been entrusted to the Executive Magistrates, as such the nature of the proceeding is an administrative one though the parties have been given an opportunity of the hearing to comply with the requirement of *audi alteram partem*. The proceeding is not a criminal trial in the strict sense as the proceeding does not relate to an offence nor it is a punitive in nature nor the parties are arrayed as accused.

15. In this view of the matter the principle underlying the right to speedy trial as implicit in Article 21 of the Constitution of India cannot be invoked in this case. The Supreme Court in the case of Anulay (supra) held that Article 21 creates a right in the accused to be tried speedily and in case of its infringement ordinarily the charges or conviction, as the case may be, shall be quashed. It further held that it is not possible in the very nature of things and present day circumstances to draw a time-limit beyond which a criminal proceeding will not be allowed to continue. The law in the said case was laid down with reference to the right of the accused to have a speedy trial flowing from Article 21 and the same cannot be strictly applicable to a proceeding under Section 145 of the Code, But the principle laid down in Anulay's case (supra) that no time-limit can be fixed beyond which a criminal proceeding will not be allowed to continue, can very well be applied in the case of a proceeding under Section 145 of the Code. In the present day circumstances, a large number of cases are pending in the State before the Executive Magistrates and they are also engaged in discharging other executive functions, as a result of which there is delay in disposal of the proceeding under Section 145 of the Code. For such delay neither the parties can be blamed nor the proceeding can be quashed. In such a situation fixing a time-limit for disposal of cases will be neither practicable nor advisable nor it would advance the cause of justice. In my view, no time-limit can be fixed beyond which a proceeding under Section 145 will not be allowed to continue. The crucial test to determine as to whether the proceeding under Section 145 of the Code should continue or not is to see as to whether the situation contemplated by Sub-section (5) of Section 145 of the Code is attracted or not. If the case is covered by the said Sub-section, the proceeding has to be cancelled or dropped. In other words, if on the basis of the materials on the record the Magistrate comes to the conclusion that the dispute ceased to exist as contemplated under Section 145(5) of the Code, then he will drop the proceeding, otherwise he will take the proceeding to its logical end. It is neither desirable nor possible to enumerate the circumstances from which it can be inferred that the dispute regarding immovable property has ceased to exist. It depends upon the facts and circumstances of each case. However, for example, if the proceeding remains pending for a long time and parties are not co-operating in the disposal of the proceeding, the Magistrate, in a given case, may infer that

breach of peace has ceased to exist and, accordingly, could drop the proceeding. The final order passed in a proceeding under Section 145 of the Code could not be quashed on the ground of expiry of a particular period of time, as no time-limit could be fixed in law for the disposal of the proceeding.

16. Thus, after considering the question involved in the case, it is held that no time-limit can be fixed for disposal of a proceeding under Section 145 of the Code and, as such, a proceeding under the said section could not be quashed nor final order be set aside only on the ground of expiry of a particular period of time.

17. In the present case the Additiodal Sessions Judge has set aside the final order on the ground that more .than 10 years have passed after the initiation of the proceeding. The ground for sotting aside the order is not tenable in law and, accordingly, the same is set aside.

18. However, from perusal of the impugned order it appears that the first party, opposite-party had no notice after the remand by the revisional court and the learned Magistrate has not considered the documents filed by the parties. Taking into consideration the aforesaid fact, the case is remitted to the court of the learned Magistrate for fresh consideration.

19. In the result, the application is allowed, to order of revisional court is set aside and the case is remanded to the learned Magistrate for fresh consideration and disposal according to law within a period of two months from the date of receipt of this order.