

Pramod Kumar Singh Vs. the State of Bihar and anr.

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Court : Patna

Decided On : Apr-17-2006

Judge : Navin Sinha, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 144, 145 and 146(1) - Order 39, Rules 1 and 2

Appeal No. : Cr. Misc. No. 34177 of 2003

Appellant : Pramod Kumar Singh

Respondent : The State of Bihar and anr.

Advocate for Def. : Shiv Nandan Ray, Sr. Adv. and Rama Sinha, Adv. for O.P. No. 2 and R.B. Roy Raman, APP

Advocate for Pet/Ap. : Khurshid Alam, Adv.

Judgement :

Navin Sinha, J.

1. Heard learned Counsel for the petitioner, learned Counsel appearing on behalf of opposite party No. 2 as also the learned Counsel for the State.
2. The petitioner questions the order of attachment passed under Section 146(1) Cr.P.C. in a pending proceeding under Section 145 Cr.P.C.

3. The opposite party No. 2 filed an application on 3.5.2003 for initiation of a proceeding under Section 144 Cr.P.C. arising out of an apprehension of breach of peace by the reason of residential construction being made by the petitioner upon the subject lands in Mauza Mohammad pur, Khata No. 76 Khesara No. 344, measuring 4 Katha 14 dhurs 10 dhurki The. Subdivisional Magistrate called for a report from, the police. The report dated 7.5.2003 at Annexure 3 states that presently the opposite party (petitioner herein) was carrying on construction work upon the lands. Two brick rooms with a thatched roof had been built, earth had been filled for levelling the land and 15 pillars had been constructed by the opposite party (petitioner herein). The proceedings under Section 144 Cr.P.C. were then initiated requiring the parties to file their show cause with a direction to both parties not to go upon the lands. On 21.7.2003 the proceedings were converted into one under Section 145 Cr.P.C. It is not in dispute between the parties that this was so done during subsistence of the order under Section 144 Cr.P.C.

4. On 8.8.2003 a report was again submitted to the Sub Divisional Magistrate that the petitioner who was in possession of the land was continuing with construction work upon the same despite instructions not to do so.

5. Learned Counsel for the petitioner submits that the the application of the opposite party under Section 146(1) Cr.P.C. was heard on 24.10.2003 and. the matter was then posted on the same day to 11.11.2003. The order sheet of the proceedings however shows that the Sub Divisional Magistrate later passed an order of attachment on 24.10.2003 itself posting the matter for further consideration on 11.11.2003. This order of 24.10.2003 was recorded in the ordersheet as 24.11.2003. There was no occasion for the Magistrate to record the date of the order as 24.11.2003 when he was posting the matter for 11.11.2003. Quite obviously the order was antedated order, where the matter itself had been adjourned to 11.11.2003 for orders on 146(1) Cr.P.C. matter. He next submits that in view of the report of the police dated 7.5.2003 and 8.8.2003 it was not in controversy that the petitioner was in possession of the land in question. There was thus no occasion for the Sub Divisional Magistrate to attach the subject property which in any event were residential house property, in a proceeding

purportedly under Section 146(1) Cr.P.C.. The order of attachment itself records that it was apparent from the police report that the petitioner was in possession of the land. The present was therefore clearly not a case where the Magistrate was unable to decide as to which of the parties was in possession of the subject of the dispute or that none of the parties was in possession and therefore the case was one of emergency to prevent any untoward incident taking place requiring attachment of the property. In any event there was a Title Suit No. 162 of 1993 pending in which on an application under Order 39 Rules 1 & 2 orders for status quo had been passed as far back as on 2.12.1993 and at which stage the in junction matter remained pending. Learned Counsel next submits that this Court on 13.5.2004 while issuing notice to opposite party No. 2 stayed operation of the order of attachment ' under Section 146(1) Cr.P.C. Notwithstanding the same opposite party No. 2 filed a fresh application on 28.7.2004 before, the Sub Divisional Magistrate to initiate fresh proceedings under Section 144 Cr.P.C. This was objected to by the petitioner in view of the pendency of the present application and the interim order therein. Notwithstanding the same the Magistrate called for a report from the Police. The Report dated 17.8.2004 , again confirmed that the petitioner was in possession of the lands and had made certain constructions. thereupon. The Sub Divisional Magistrate nonetheless proceeded to initiate a fresh proceeding under Section 144 Cr.P.C. and converted the same into one under Section 145 Cr.P.C. on 22.9.2004. He submits that this was clearly an act: to overreach the orders of this Court, and was vitiated by malafides.

6. Learned Counsel for the opposite party No. 2 submits that the Magistrate had issued verbal orders in the original proceeding under Section 145 Cr.P.C. restraining the petitioner from making construction. Nonetheless as reported by the police on 8.8.2003 the petitioner insisted to continue with the construction work. This was therefore clearly a case, of emergency in terms of Section 146(1) Cr.P.C. as the petitioner continued to flout the law and therefore the order of attachment was valid in law. It was next submitted that notwithstanding the order of this Court dated 13.5.2004 staying the operation of the attachment order under Section 146(1) Cr.P.C. there was no bar to the Magistrate in acting afresh, if materials be placed before him with regard to any subsequent development leading to fresh apprehension of breach of peace.

7. This court has considered the submissions made on behalf of the parties and has gone through the materials placed on record by them. The records of the original proceeding in Misc. Case No, 531(M) of 1993 had also been summoned by this Court on 7.10.2004. This Court has gone through the original records also.

8. The proceedings under Section 145 Cr.P.C. were concerned with the question of possession only. The right to possession or title is not to be decided in a proceeding under Section 145 Cr.P.C. Section 146(1) Cr.P.C. is a provision which may be described as an arrangement to preserve peace in a proceeding under Section 145 Cr.P.C. in specified conditions. The conditions specified clearly are that the Magistrate decides that none of the parties was in possession or he was unable to satisfy himself as to which one of them was in possession of the subject of dispute. Quite obviously if the Magistrate was unable to decide as to which one of them was in possession of the subject of dispute it was clearly a case of emergency in view of the rival claims of the contesting parties. Likewise if none of them was in possession it was clearly a case of emergency where both of them could have sought to enforce their right of possession. But, clearly where one of them is in possession and there were materials before the magistrate to that effect along with construction having been made by one of them enforcing fact of such possession, this Court finds it difficult to appreciate as to what was the emergency before the Magistrate to invoke the extreme powers under Section 146(1) Cr.P.C.. It has been noticed above that there were no order of restraint against the petitioner from making construction upon the land. Counsel for the opposite party No. 2 has clearly conceded that there were only verbal orders to that effect. The Magistrate was clearly not powerless under the provisions of law to take action against the petitioner in the event that he was acting against the orders of the, Magistrate passed in a judicial proceeding. The concept of oral orders in a judicial proceeding is unknown to the law. If the petitioner was , in possession of the land and was making construction thereupon, this Court finds it difficult to appreciate the satisfaction of the Magistrate that construction being raised by the petitioner upon, the land in his possession was a situation of emergency, more particularly in the absence of any order of restraint. This Court therefore finds it difficult to sustain the order of the Magistrate attaching the property under Section 146(1) Cr.P.C. The same is accordingly set aside.

9. This Court for the reasons of the conclusion arrived at presently does not consider it necessary to deal with the submission of the petitioner with regard to the antedating of the order of attachment. Likewise, this Court is not: persuaded to consider the submission of the petitioner that the Magistrate in collusion with the opposite party No. 2 had tried to override the orders of this Court by Initiating fresh proceedings under Sections 144/145 Cr.P.C. during the pendency of the present application and the interim order herein. Suffice it to say that from the submissions made by the petitioner in the supplementary affidavit filed today initiating fresh proceedings by the Magistrate, this Court is far from satisfied of the bonafides of the Sub Divisional Magistrate with regard to the same.

10. The proceedings under Section 145 Cr.P.C. are pending. The order of attachment under Section 146(1) Cr.P.C. has been found by this Court not to be justified and has been set aside. In the facts and circumstances of the case, this Court considers it proper to direct that the Sub Divisional Magistrate decide the substantive matter under Section 145 Cr.P.C. expeditiously preferably within a period of 45 days from the date of receipt and/or production of a copy of this order. Any order passed by the Magistrate shall obviously be subject to the orders that may be passed in the civil suit between the parties by the competent court of law.

11. This application is accordingly allowed to the extent indicated above, with directions as contained.

12. Let the records of Misc. Case No. 531(M) of 2003 be returned to the court concerned immediately.

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