

Heritage Engineer and Developers Pvt. Ltd. Vs. State of Assam and ors.

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SooperKanoon Citation : sooperkanoon.com/138442

Court : Guwahati

Decided On : Jan-19-2007

Judge : B.K. Sharma, J.

Appellant : Heritage Engineer and Developers Pvt. Ltd.

Respondent : State of Assam and ors.

Advocate for Pet/Ap. : Mr. R. Sharma

Disposition : Petition allowed

Judgement :

B.K. Sharma, J.

1. This writ petition is directed against the proceeding initiated Under Section 144 of the Cr. P.C. and the order passed therein restraining the petitioner from entering into the disputed Flat with further direction to the jurisdictional P. S. to execute the prohibitory order.

2. The petitioner is a Private Ltd. Company with due registration. Its primary object is to carry on business as property dealers, real estate developers, builders, contractors and to engage in all types of construction activities. The respondent No. 5, namely Shri Dhurba Jyoti Saikia, was its one of the Directors. The petitioner has engaged in construction of an apartment called Ashirbad Apartment with Flats

therein.

3. It was in the year 1997, the petitioner launched the said Apartment and called for booking from the prospective purchasers of the Flats. The rules and guidelines governing the terms and conditions for the allotment of Flats were formulated in terms of which all perspective purchasers were required to execute individual deed of agreement for sale wherein the price of the respective Flats along with manner and mode of payment are also specified. The agreement also provides for inter se rights and liabilities of the parties. Along with the agreement the perspective purchasers are also required to sign the format containing the terms and conditions which strictly provide for mode of payment etc. The payments are to be made by A/c payee Cheque or Demand Draft and the petitioner is to issue money receipt.

4. According to the petitioner, the erstwhile Director, i.e. the respondent No. 5, misused his position as such and indulged in various financial irregularities. When such irregularities committed by him were detected, the petitioner furnished information to the jurisdictional Police Station on the basis of which Chandmari Police Station registered P. S. Case No. 146/01 under Section 381/468/420/406, IPC. The respondent No. 5 was also arrested and according to the petitioner some of the stolen properties of the petitioner-Company were recovered from his possession including cash book etc. On 30-9-2002 the annual general meeting of the petitioner-Company took a resolution to remove the respondent No. 5 as Director and accordingly submitted intimation to the Registrar of Companies, Shillong under whom the petitioner-Company was registered. The petitioner-Company also published a public notice on 2-11-2002 in the Assam Tribune furnishing information relating to removal of the respondent No. 5 as Director of the petitioner-Company. In the notice, it was intimated that anybody dealing with the respondent No. 5 would do so on his own risk and cost.

5. As per the allegation made in the writ petition, on 10-6-2002 the respondent Nos. 6 and 7 who are the husband and wife along with 15 to 20 hooligans forcibly entered into the Apartment and occupied a residential unit (Flat). When the staff and the employees of the petitioner-Company tried to resist, they were threatened

with weapons. The said two respondents along with their men damaged a portion of the Flat in question and fitted bolts, hooks etc. in the Flat of their own. Since then they have been staying therein along with agents. Situated thus, the petitioner lodged an FIR dated 10-6-2006 (Annexure IV) which however, was refused to entertain by the police (Dispur P.S.) on ground that the respondent No. 2, i.e. the Addl. District Magistrate, Kamrup (M) has issued prohibitory order Under Section 144, Cr. P.C. in case No. 155 (M)/2006.

6. According to the petitioner it was not served with any notice relating to 144. Cr. P.C. proceeding initiated at the behest of the respondent Nos. 6 and 7. However, being intimidated by the Police, the representatives of the petitioner Company made enquiries and upon such enquiry they came to know that the proceedings Under Section

, Cr. P.C. in the from of the Case No. 155 (M)/2006 was drawn up on the basis of the petition filed by the respondent Nos. 6 and 7. In the complaint it was stated that they were in occupation of the Flat from 26-5-2006 and that the petitioner-Company and their agents had been harassing and disturbing them. It was on the basis of such complaint, the respondent No. 2 initiated the proceeding Under Section 144, Cr. P.C. and passed the impugned order dated 31-5-2006 restraining the petitioner and their men or agents from entering into the disputed Flat.

7. Along with the complaint filed by the respondent Nos. 6 and 7, a deed of agreement registered on 25-11 -2002 was also enclosed. This deed of agreement was purportedly executed by and between the petitioner-Company represented by the respondent No. 5, Shri Dhurba Jyoti Hazarika and the respondent Nos. 6 and 7. Subsequently, the petitioner-Company was served with a copy of the prohibitory order shown to have been issued on 31-5-2006. According to the petitioner, the residential unit which the respondent Nos. 6 and 7 has taken forcible occupation was allotted to another purchaser vide agreement No. 9253 dated 29-7-2005 and deed of conveyance No. 14665 dated 17-12-2005. It has also been stated that the purchaser was granted housing loan by the LIC, Guwahati Branch vide their letter dated 24-12-2005. The copies of the deed of conveyance and the letter dated 24-12-2005 have been annexed to the writ petition (Annexures IX and X respectively).

8. It is the grievance of the petitioner that the respondent No. 2 has passed the impugned prohibitory order in a most arbitrary, illegal and capricious manner. It has been asserted that the condition precedents for initiating the proceeding under Section 144, Cr. P.C. are missing in this case. According to the petitioner, it is on the basis of the impugned order, the respondent Nos. 6 and 7 entered into the premises and the order was passed by the respondent No. 2 without satisfying himself about the requirement of passing such an order. It has further been stated by the petitioner that the deed of agreement which was annexed along with the complaint petition filed by the respondent Nos. 6 and 7 is in executable and the same could not have been executed on 25-11-2002 when the respondent No. 5 was no longer the Director of the petitioner-Company, he having been removed as the Director with due notification w.e.f. 1-10-2002.

9. The respondent No. 2 has filed his affidavit stating inter alia that the proceeding Under Section 144, Cr. P.C. vide Case No. 155(M)/ 2006 was drawn up on the basis of the petition filed by the respondent Nos. 6 and 7 duly supported by documents and affidavit. It has been stated that the said proceeding was drawn up and the impugned order dated 31-5-2006 was passed on being satisfied from available documents, police report and other relevant information.

10. In the affidavit filed by the respondent Nos. 6 and 7, it has been stated that they made an application to the petitioner-Company for a Flat consisting of two bed rooms measuring 807 sq. ft. (Type A) on the 3rd floor of the proposed Arshirbad Apartment at a cost of Rs. 6,05,000/-. According to them they have deposited necessary amount towards purchase of the Flat, but the petitioner-Company failed to give possession of the flat in time. As regards the removal of the respondent No. 5 as one of the Directors of the petitioner-Company w.e.f. 1-10-2002 and registration of the deed of agreement on 25-11-2002, they have stated that the agreement having been signed on 2-8-2002, the registration thereof on 25-11-2002 is immaterial. As regards the publication of the notice in the Assam Tribune furnishing the information as regards the removal of the respondent No. 5 as Director, the respondents have contented that they have no knowledge about the same.

11. Certain allegations have been made against the petitioner-Company as regards their purported failure to hand over the possession of the Flat. It has also been alleged that in the Month of May, 2006, one of the Directors of the petitioner-Company told the respondents point blank that no Flat would be allotted to the respondents. Situated thus, according to the respondents, they entered into the Flat in question on 20-5-2006 with bags and baggages. As per their own admission, the Flat is not yet complete, but they have entered into the same being apprehensive that same would be allotted to some other party. Thus there is no formal handing over of the Flat to them. As regards the proceeding Under Section 144, Cr. P.C. they have contended in the affidavit that they took recourse to the same apprehending breach of peace on the basis of which the respondent No. 2 restrained the petitioner and their agents from entering into the disputed Flat. The respondents in their affidavit have further stated that they have already instituted a suit for specific performance and the same has been registered and numbered as T.S. 142/2006 and presently it is pending before the learned Civil Judge (Sr. Division) No. 1 at Guwahati. Along with the suit they have also filed Misc. Case No. 103/2006 praying for injunction restraining the petitioner-Company from selling the Flat to any other person. At the time of filing the suit, the date for filing the written statement was fixed as 30-10-2006.

12. The writ petition was entertained by order dated 24-7-2006 and by order dated 11-8-2006, it was provided that the respondent Nos. 6 and 7 would not make any construction in the Flat and that the Officer-in-Charge, Dispur Police Station would ensure the compliance of the order. When the matter was further taken up on 4-9-2006, a serious allegation was made that in spite of the order dated 11-8-2006, directing the respondent Nos. 6 and 7 not to make any construction over the disputed Flat, they have been continuing with construction and that in spite of approach being made to the Dispur P.S., they have not taken any steps towards compliance of the order passed by this Court. In view of such serious allegation, a direction was issued to the respondent No. 4, i.e. the Officer-in-Charge, Dispur P.S. to appear before the Court to answer the allegation. The direction was also issued to the respondent Nos. 6 and 7 to file their affidavit both in respect of the writ petition as well as the allegation of violation of the order of this Court.

13. I have heard Mr. R. Sharma, learned Counsel for the petitioner as well as Mr. B.D. Konwar, learned Counsel representing the respondent Nos. 6 and 7 who subsequently withdrew from the case. I have also heard Mr. A. Majumdar, learned Sr. Counsel who later on represented the respondent Nos. 6 and 7. I have also heard Mr. H. K. Mahanta, learned Counsel representing the respondent No. 2 as well as Ms. R. Chokraborty, learned State counsel representing the State respondents. She has also produced the records. Mr. Mahanta has also produced the records obtained from the respondent No. 2.

14. The respondent Nos. 6 and 7 filed the petition before the respondent No. 2 on 31st May, 2006 with the prayer for drawing up a proceeding Under Section 144, Cr. P.C. against the petitioner-Company. In the petition, they categorically indicated the date of alleged purchase of the Flat vide registration deed No. 789/2002. The date is 25-11-2002. On perusal of the deed of agreement, it is seen that the agreement was signed by and between the respondent Nos. 6 and 7 and the respondent No. 5 who already ceased to be the Director of the petitioner-Company w.e.f. 1-10-2002. Thus, the deed of agreement does not have any validity. Throughout the complaint petition, what has been stated is that, in spite of repeated request, the petitioner-Company deliberately failed to give possession of the Flat to the respondent Nos. 6 and 7 and accordingly entered into the Flat on 20-5-2006 and their men and agents started living there. It has further been stated in the complaint petition that the petitioner-Company with their men/members are causing disturbance and they have threatened the members of the respondent Nos. 6 and 7 to vacate the said Flat. It is only with this kind of statement, the respondent Nos. 6 and 7 prayed for promulgation of the prohibitory order Under Section 144, Cr. P.C. in respect of the Flat.

15. The respondent No. 2 solely on the basis of the application filed by the respondent Nos. 6 and 7 passed the impugned order dated 31-5-2006 restraining the petitioner-Company and their men and agents from entering into the disputed Flat. In the affidavit filed by him in this proceeding, it has been stated that he had passed the impugned order dated 31-5-2002 and according to his judgment a proceeding Under Section 144, Cr. P.C. can be on the basis of the available documents, police report and other relevant information. In the instant case, the

records do not indicate anything of this sort, not to speak of any police report. There is also no question of there being any police report, inasmuch as no such report was called for and the impugned order was passed on 31-5-2002 itself, i.e. the date on which the petition was filed by the respondent Nos. 6 and 7. There is also nothing to indicate that there was any other information before him except the application and the deed of agreement dated 25-11-2002.

16. The respondent No. 2, as per the direction of this Court has produced the records of Section 144, Cr. P.C. proceeding (Case No. 155 (M)/06). The records produced by the respondent No. 2 have revealed that Section 144 Cr. P.C. proceeding vide Case No. 155 (M)/06 was initiated on the basis of the application filed by the respondent Nos. 6 and 7 on 31-5-2006. The application was accompanied with certain documents showing transaction of accounts with the petitioner-Company as well as the aforesaid deed of agreement executed on 25-11-2002. The records also do not reveal any police report and/or other relevant information etc. and naturally so when the same could not have been obtained on the same date of filing the application by the respondent Nos. 6 and 7.

17. There is no manner of doubt that respondent No. 2 passed the impugned order dated 31-5-2002 solely on the basis of the application filed by the respondent Nos. 6 and 7 enclosing therewith the copy of the deed of agreement executed on 25-11-2002. The respondent No. 2 was certainly not deciding the civil dispute and yet he passed the extraordinary order restraining the petitioner-Company from entering into its own Flat. Such an order was passed taking recourse to the provision of Section 144, Cr. P.C. merely on throwing an application on him with the following statements.

That there is every apprehension to cause breach of peace between the parties and tranquillity among the public and under the circumstances it became necessary to promulgate Section 144, Cr. P.C. over the said Flat restraining the entry of any person of the second party and his associates.

That the Second party and his men/ members are causing disturbances very frequently and threatened the members of the Second party to vacate the said Flat immediately otherwise they will force them to leave the same by adopting any

means of violence.

18. In the above context, it will be appropriate to note the relevant provisions of Section 144, Cr. P.C.:

(1) The District Magistrate may, whenever he considers it necessary so to do for the preservation of public peace or public safety or for the maintenance of public order, by public notice or by order, prohibit in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organizing or holding of, or taking part in any mass drill or mass training with arms in any public place.

(2) A public notice issued or an order made under this section may be directed to, a particular person or to persons belonging to any community, party or organization.

(3) No public notice issued or an order made under this Section shall remain in force for more than three months from the date on which it is issued or made.

19. The contents of the petition filed by the respondent No. 5 purportedly Under Section 144 Cr. P.C. have been noted above. The consideration of this Court is as to whether the disclosure made in the application warranted initiation of any proceeding under Section 144, Cr. P.C. and that too with the passing of an ex-parte interim order. It is also to be considered as to whether the disclosure made in the application constituted sufficient grounds for proceeding under Section 144, Cr. P.C. and immediate prevention as was provided by the ADM, Nagaon in the ex parte impugned order dated 27-3-2002.

20. This Court in the case of (1986) 2 GLR 167 Maqbul Hussain v. Syaidur Rahman dealing with the scope and ambit of the power of the Magistrate to draw up proceeding under Section 145, Cr. P.C. observed that to assume jurisdiction the Magistrate must be satisfied that the dispute is likely to cause 'a breach of peace'. It is not a breach of mental peace of the parties, but apprehended breach of peace in the locality.

21. It was further observed that Section 145, Cr. P.C. is an extraordinary provision to grant extra ordinary relief, when there is likelihood of breach of peace of the

locality. Serious concern was expressed that just on some pretext or pretence flood of proceedings under Section 145, Cr. P.C. are entering the Courts like flood water entailing wastage of public money and time. It was emphasized that before taking up a proceeding under Section 145, Cr. P.C. the Magistrate must be careful, cautious and circumscribed and slow. Referring to the decision of the Apex Court in *R. Puri Mahant v. State of U.P.* reported in : AIR 1985 SC472 , it was observed that the quintessence of the said decision is to discourage the proceeding under Section 145, Cr. P.C. as far as possible. Noticing the warning sounded by the Apex Court in the said decision, it was observed that the Magistrate should initiate the proceeding under Section 145, Cr. P.C. only when essential elements of the Section are found to be present in the case.

22. The following observation made by this Court in the said decision of *Maqbul Hussain* is worthy to mention:

It is difficult to obtain an order of injunction in a civil suit because the party is bound to satisfy the Court that there is a *prima facie* case, the balance of convenience tilts in his favour and also to satisfy the Court that if injunction is refused the applicant shall suffer irreparable injury. So many hurdles are to be crossed before obtaining an order of injunction. An order of injunction or prohibitory order takes away certain rights of the party injuncted. It is indeed difficult to obtain an injunction, but just throw a petition and assert that there is apprehension of breach of peace in respect of the possession of an immovable property, claim for drawing up a proceeding asserting right to possess the property, a proceeding is readily drawn up Under Section 145, Criminal Procedure Code. The proceeding is initiated no matter whether it is a private dispute between the parties or it is a dispute which necessitates drawal of the proceeding for the maintenance of public order and tranquility.

23. The above observation made in relation to the ambit and scope of power of Magistrate to draw up proceeding under Section 145, Cr. P.C. squarely applies to the proceedings under Section 144, Cr. P.C. In the case of *Madhu Limaye v. Sub-Divisional Magistrate* reported in : 1971 CriLJ1720 , the Apex Court observed thus (Para 25):

24. The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application. There is no general proposition that an order under Section 144, Criminal Procedure Code cannot be passed without taking evidence : See *Mst. Jagrupa Kumari v. Chotay Narain Singh* 1936 (37) Cri LJ 95 (Pat) which in our opinion is correct in laying down this proposition. These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. In so far as the other parts of the section are concerned the key-note of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order.

24. The Officer-in-Charge, Dispur Police Station, i.e. the respondent No. 4, who was directed to furnish report, has furnished the report. As per the report, the FIR lodged by the petitioner relating to forcible entry of the respondent Nos. 6 and 7 to the disputed flat on 9-6-2006 (wrongly mentioned as 10-6-2006) has been entertained by registering Dispur P.S. Case No. 569/06/ Under Section 143/447/454/506, IPC. According to the report so furnished by the Officer-in-Charge, Dispur P. S., the respondent No. 7 was arrested on 15-6-2006, but was released on bail on the same date. The report has further revealed that the allegation of the petitioner that the respondent Nos. 6 and 7 along with their men entered into the

disputed Flat on 9-6-2006 evening is correct. It was only on 9-6-2006 (wrongly stated to be 10-6-2006) evening, the respondent Nos. 6 and 7 entered into the Flat in question and occupied the same. The report further states that the prohibitory order dated 31-5-2006 passed by the respondent No. 4 has been fully executed and the report thereof has been furnished to the respondent No. 2.

25. From the aforesaid revelation made from the records, report furnished by the respondent No. 4 and the assertion made by the petitioner coupled with the own statement of the respondent Nos. 6 and 7 in their affidavit that they had entered into the disputed Flat with bags and baggages without any valid sanction behind or permission from the petitioner-Company for occupation of the same, leave no manner of doubt that the respondent Nos. 6 and 7 occupied the Flat forcibly on 9-6-2006 on the strength of the impugned order dated 31-5-2006 passed by the respondent No. 2 in Case No. 155 (M)/ 06 under Section 144, Cr. P.C.

26. During the course of hearing, it was further alleged by the learned Counsel for the petitioner that in spite of the interim order passed by this Court not to make any further construction in the disputed Flat by the respondent Nos. 6 and 7, the constructions were being carried out by them. In this connection, the petitioner lodged an FIR on the basis of which Dispur P.S. Case No. 569/06 has been registered under Section 143/447/ 454/506, IPC and the Dispur Police has directed the respondent No. 7 not to make any construction in the disputed Flat. In spite of such direction, when further renovation of the Flat was made, the petitioner Company lodged another FIR on 8-11-2006 on the basis of which, Dispur P.S. Case No. 1190/06, dated 15-11-2006 has been registered under Section 144/323/427/34, IPC. In this connection, Senior Superintendent of Police, City, Guwahati has furnished a report which reveals that the respondent No. 7 along with others came to the Apartment/Flat in question on 8-11-2006, with a view to replace the existing door of the Flat occupied by him. In view of the interim order passed by this Court, no such replacement could have been carried out and thus, there is apparent violation of the order of this Court. However, this aspect of the matter need not detain us. These are all subsequent developments and the real controversy between the parties is in respect of the impugned order dated 31-5-2006 passed by the respondent No. 2 in Case No. 155(M)/06 registered under

Section 144, Cr. P.C.

27. In view of the finding recorded above that the proceeding under Section 144, Cr. P.C. was totally uncalled for and even if it was to be initiated, the ex parte prohibitory order dated 31-5-2006 could not have been passed. There was also nothing so emergent warranting passing of an ex parte order in the form of the impugned order dated 31-5-2006 solely on the basis of the application filed.

28. Even on the basis of the registered deed of agreement dated 25-11-2002, the respondent No. 2 could not have passed the impugned order dated 31-5-2006. On perusal of the deed of agreement and the clauses therein, what has transpired is that it is only the deed of agreement for sale/ purchase of Flat and not the sale deed as such. On the basis of such deed of agreement, the respondent Nos. 6 and 7 could not have forcibly occupied the Flat in question. This is precisely the reason as to why the respondent Nos. 6 and 7 have instituted the aforementioned suit namely Title Suit No. 40/05 in the Court of the learned Civil Judge (Sr. Division) No. 1, Guwahati for specific performance of the contract. If the contract is yet to be executed for which the suit has been filed, it is not understood as to why the respondent Nos. 6 and 7 could enter into the Flat, if the same is not by way of forcible occupation.

29. From the materials on record what has transpired is that the respondent Nos. 6 and 7 filed the application before the respondent No. 2 for initiation of proceeding under Section 144, Cr.P.C. and the respondent No. 2 with the power and jurisdiction vested on him readily obliged the respondent Nos. 6 and 7 by passing the impugned order dated 31-5-2006 restraining the petitioner-Company from entering into its own Flat under construction and on the strength of such a prohibitory order, the respondent Nos. 6 and 7 with their men and agents entered into the disputed Flat on 9-6-2006 and thereafter kept on forcibly occupying the same carrying out the construction even to the extent of violating the order of this Court. Such a conduct on the part of the respondent Nos. 6 and 7 is reprehensible. The impugned order dated 31-5-2006 is also conditional. The petitioner-Company and their men and agents were restrained from entering into the disputed Flat, if not already settled / allotted or decided by any competent Court/ authority. It has

been shown by the petitioner that the disputed Flat has been allotted to another party vide Annexure-9 deed of conveyance dated 24-12-2005. Thus, the respondent Nos. 6 and 7 could not have entered into the disputed Flat, even on the basis of the impugned order dated 31-5-2006.

30. The Division Bench of this Court in M/s. Apollo Machinery Mart v. State of Assam reported in 1997 (2) GLT 213, in respect of proceeding under Section 133 of Cr. P.C., allowing the writ petition filed by the appellant issued Direction to the police to hand over the possession of the land in question to the appellant. In that case, a petition Under Section 133, Cr. P.C. was filed before the Executive Magistrate against the appellant. The Executive Magistrate passed an order directing the appellant to remove purported obnoxious material immediately. Being armed with the said order and in the garb of removing obnoxious material lying in the premises, the police broken open the lock and handed over the possession of the house, shed/structure to the first party. The appellant on visit of the premises next morning found that the structures were being demolished. He naturally objected to the said demolition, but to no avail. His complaint before the Judicial Magistrate which met with dismissal for want of evidence. It was observed that the Magistrate as well as the implementing parties far acceded and overstepped their jurisdiction.

31. In view of the above, the writ petition is allowed. The impugned proceeding under Section 144, Cr. P.C. in Case No. 155 (M)/06 initiated by the respondent No. 2 including the impugned order dated 31-5-2006, stands set aside and quashed. Consequently, all actions taken by the respondent Nos. 6 and 7 towards occupation of the Flat in question also stand interfered with. The respondent Nos. 6 and 7 shall immediately vacate the disputed Flat by handing over possession of the same to the representatives of the petitioner-Company. This shall be done forthwith and the respondent Nos. 3 and 4 shall ensure vacation of the disputed Flat by the respondent Nos. 6 and 7 and handing over the same to the petitioner-Company. This direction shall be complied with forthwith.

32. The writ petition is allowed with the above directions, leaving the parties to bear their own costs.

