

Banney Vs. Ramesh Chandra and ors.

Banney Vs. Ramesh Chandra and ors.

SooperKanoon Citation : sooperkanoon.com/481405

Court : Allahabad

Decided On : Mar-01-1982

Reported in : 1983CriLJ18

Judge : T.S. Misra, J.

Appellant : Banney

Respondent : Ramesh Chandra and ors.

Judgement :

ORDER

T.S. Misra, J.

1. This petition arises in the following circumstances:

On the report of S. H, O. Kotwali, Paizabad dated 24th April, 1974. proceedings under Section 145, Criminal P. C. were initiated and Sri. S.R. Pandey, City Magistrate, Faizabad passed an order on the same day purporting to be under Sections 145 and 146(1) of the Criminal P. C. Thereafter an application was filed by Banney alias Nisar Ahmad alleging that the attachment of the property was made against the provisions of the Criminal P. C. hence the order of attachment be withdrawn. The learned City Magistrate after hearing the parties made the following order.-I have gone through the file and heard the learned Counsel for the parties. The attachment of the property was made under Section 146(1) of Cr.

P.C. which came into force on the 1st April, 1974. As such the provisions of old Cr. P.C. are not applicable in this case. Under Section 146 of New Cr. P.C. Magistrate may attach the subject of dispute until a competent court had determined the rights of the parties thereto with regard to the person entitled to the possession thereof. This Court has got no power to decide the dispute of immoveable property under Section 145, Cr. P.C. Parties are directed to seek remedy in respect of their rights and possession from a competent Civil Court. The property in dispute will remain in possession of receiver till the decision of the competent Civil Court. The supurdgar appointed by S. O. will act as receiver under Section 146(2) of Cr. P.C.

2. Banney then filed a revision petition in the court of the Sessions Judge which was rejected by the learned Second Additional Sessions Judge, Faizabad by his order dated 26th June, 1976. The petitioner has by the instant petition asked for the quashing of both the orders. as well as the order of attachment. The learned Counsel for the petitioner submitted that the order of attachment dated 24th April, 1974, followed by the order dated 27th April, 1976 passed by the City Magistrate were not in conformity with Sections 145(1) and 146 inasmuch as the learned Magistrate had not applied his mind in coming to the conclusion that there was an apprehension of breach of the peace or that there was any emergency to pass an attachment order.

3. In order to appreciate the contention, it would be appropriate to quote here the material portion of the order dated 24th April. 1974, passed by the City Magistrate;

Whereas I am satisfied from the report of S. H. O. Kotwali, Faizabad dated 24-4-1974, that there is an apprehension of the breach of the peace between the following parties regarding digging of an old well on a land lying in front of the house of First Party Banney alias Nisar Ahmad, boundary of which is given below to meet the needs of water. I, therefore hereby order that the land of the boundary given below be attached and given in supurdagi of some reliable person not interested in the parties. Parties be directed to appear in the court on 30-4-1974 at 10 A. M. to file their written-statements, affidavits and papers to show their possession.

The learned Magistrate in the first para of the said order stated that from the report of the SHO Kotwali it appears that there was an apprehension of breach of the peace between the parties regarding the digging of an old well on a land lying in front of the house of the first party Banney alias Nisar Ahmad to meet the needs of water. He then proceeded to attach the land and ordered that the same be given in the custody of some reliable person not interested in the parties. Then he proceeded to direct the parties to appear in the court on 30th April, 1974, to file their written-statements, affidavits and papers to show their possession. This order purports to be a composite order under Sections 145(1) and 146(1), Criminal P. C. The provisions of both the aforesaid sections came up for construction before the Supreme Court in *Mathura Lal v. Bhan-war Lal*, : 1980 CriLJ1 . Examining the scheme of both the sections the Supreme Court observed (at Pp. 6&7 of Cri. L. J.):

The scheme of Sections 145 and 146 is that the Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written-statements. Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the preliminary order. On the other hand, if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such possession he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations he attaches the property. Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties to go to the civil Court. Proceeding may however be stopped at any time if one or other of the parties satisfies the Magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the Magistrate disappears. The Magistrate then cancels the preliminary order. This is provided by Section 145, Sub-section (5). Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full

course. Now in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it, the obligation to proceed with the enquiry as prescribed by Section 145, Sub-section (4) is against any such implication. Suppose a Magistrate draws up a preliminary order under Section 145 (D and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating grounds of his satisfaction and calling upon the parties to appear before him and submit their written-statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, none can say that there is no dispute likely to cause a breach of the peace.

Applying the above principles to the facts of the case, it appears that the order dated 24th April, 1974, as also the order dated 27 April, 1970 were illegal, The learned City Magistrate did not draw the proceedings under Section 145 in accordance with law. Section 145 contemplates first the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists concerning any land or water or their boundaries, and next, the issuance of an order commonly called a preliminary order stating the grounds of his satisfaction and requiring the parties concerned to attend his court and to put in written statements of their respective claims as regards the fact of actual possession of the subject in dispute, No preliminary order in the manner laid down in Section 145, Cr. P.C. has been drawn up in the case in hand. Consequently all subsequent proceedings stood vitiated. It is well settled that it is by making a preliminary order that the Magistrate assumes jurisdiction to proceed with Sections 145 and 146. In fact, the

first of the situations in which an attachment may be effected under Section 146(1) of the 1973 Code has to be 'at any time after making the order under Sub-section (1) of Section 145'. Now, the preliminary order is required to enjoin the parties not only to appear before the Magistrate on a specified date but also to put in their written-statements. First in the instant case the City Magistrate does not seem to have applied his mind to come to a conclusion that there was an apprehension of a breach of the peace; Secondly, before directing the parties to appear in the court and to file their written statements and affidavits, he passed the order of attachment. Thereafter he directed the parties to appear in court. So that being the situation, even the order of attachment could not be passed because the order under Section 145(1) was not properly drawn up. That apart, an order under Section 146, Cr. P.C. could be passed by him on 24th April, 1974 if he was satisfied that it was a case of emergency. The learned Magistrate has nowhere stated in his order that he considered the case to be one of emergency warranting the passing of the order of attachment under Sub-section (1) of Section 146. Even otherwise, it cannot be spelt out from the order that the Magistrate was satisfied that it was a case of emergency. He did not explain the circumstance as to why he thought it necessary to immediately pass an order of attachment under Section 146(1), Cr. P.C. In the absence of any reason in that behalf having been stated in the order it is difficult to hold that the Magistrate had applied his mind to the facts of the case and was satisfied that it was a case of emergency where an order of attachment should be immediately passed.

4. The order dated 27th April, 1976, is also bad in law. As pointed out in Mathuralal's case (1980 Cri LJ 1) (supra), in a case of emergency a Magistrate no doubt may attach the property at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) but there is no stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. The obligation to proceed with the enquiry as prescribed by Section 145(4) is against any such implication. The learned City Magistrate instead of proceeding further in the matter as required by Section 145 held that the property in dispute will remain in possession of the receiver till the decision of the competent civil court and the receiver appointed by the S. O. will act as receiver under Section 146(2) Cri.P.C. Obviously, he has failed to exercise his jurisdiction in the matter.

5. The judgment of the learned Second Additional Sessions Judge, Faizabad is, therefore, for the same reason unsustainable and liable to be set aside. He is in error in holding that the Magistrate ceased to have any jurisdiction in the matter.

6. In the result, the petition is allowed. The order dated 24th April, 1974 and the order dated 27th April, 1976, passed by the learned City Magistrate are quashed. The order passed by the learned Second Additional Sessions Judge, Faizabad dated 26th June, 1976 in the revision a copy of which has been filed as annexure No. 3 to the writ petition is also quashed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com