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Sangam Kumar Vs. Sub-divisional Magistrate and anr.

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Court : Allahabad

Decided On : Sep-01-1997

Reported in : 1998CriLJ2096

Judge : S.K. Phaujdar, J.

Acts : Specific Relief Act - Sections 6; Code of Criminal Procedure (CrPC) , 1974 - Sections 145, 145(1), 145(4), 145(6), 146, 146(1), 146(3), 156(3), 200 and 482

Appeal No. : Criminal Misc. Appln. No. 4786 of 1997

Appellant : Sangam Kumar

Respondent : Sub-divisional Magistrate and anr.

Advocate for Def. : S.P. Singh, Govt. Adv.

Advocate for Pet/Ap. : S.K. Singh and ;V.K. Singh, Advs.

Disposition : Petition allowed

Judgement :
ORDER

S.K. Phaujdar, J.

1. Through this application under Section 482 Cr. P. C. the applicant has prayed for quashing two orders of the respondent No. 1 dated 28-7-1977. These orders

were passed in purporting exercise of the power of the Magistrate under Section 145 Cr. P. C. as per Annexures 7 and 8 to the affidavit in relation to Case No. 11 of 1997 between Chameli Devi and Sangam Kumar.

2. The husband of Chameli Devi made a report to the District Magistrate, Sonbhadra, in his capacity as member of Human Rights Commission on 28-7-1997. This report was forwarder to the Sub-Divisional Magistrate, Robertsganj and thereupon the impugned orders were passed.

3. It was stated in mis application that a shop in the main market of Robertsganj was under the ownership and possession of Chameli Devi through her son and through a tenant in another portion. On 25-7-1997 about 3 p.m. when the son of the applicant and said tenant were away to their houses for mid-day meals and the shops were lying closed, Naib Tahsildar of Robertsganj with police help and with the respondent Sangam Lal (at times named as Sangam Kumar) broke open the lock of the shop and removed valuables therefrom. When the complainant and others went there, the tenant was called and was forced to sign on some papers. The aforesaid Sangam Kumar also assaulted Chameli Devi. When asked these persons had declared that the Up-Jiladhikari Robertsganj (Sub-Divisional Officer) had directed dispossession and report was allegedly made to the Additional District Magistrate and to the officer in charge of Kotwali Police Station. Information was also sent to the Chief Minister at Lucknow. The complaint and other stayed in the shop for security reasons but Sangam Kumar and others came armed and abused them and pushed them out of the shop and also threw away their commodities kept there. They also removed other valuables. Police was a silent spectator. Accordingly the application was filed so that a first information may be lodged and the looted materials could be recovered and restored.

4. The order of the Magistrate in case No. 11 of 1997 dated 28-7-1997 indicates that he had before him three applications of the husband of Chameli Devi dated 19-7-1997, 25-7-1997 and 28-7-1997 and he was satisfied from the averments that within his jurisdiction house and shops were situated on plots No. 575, 576, 577 and 578 in Robertsganj Municipal Area, for title and possession, there was a dispute between Chameli Devi and Sangam Lal and the dispute concerning

possession had reached such a situation that a breach of piece was apprehended. Accordingly he drew up a proceeding under Section 145(1) and asked the parties to submit their statements and witnesses in respect of possession of the disputed land.

5. On the same day the Magistrate also recorded an order to indicate that as the parties were claiming possession over the land leading to breach of peace, it was a case of emergency and hence he attached the lands and forbade both the parties from going upon it.

6. The present applicant who figured as the respondent in the proceeding before the Magistrate had, in his affidavit in this Court averred in paragraph 25 thereof that no report was filed by Chameli Devi on her husband on 19-7-1997 or 25-7-1997. In the counter affidavit, paragraph 25 was duly replied to in paragraph 15 of the affidavit but nothing was stated about the absence of any application dated 19-7-1995 and 25-7-1995. It was argued on behalf of the applicant that the initiation of the proceeding was bad in law as there were no materials before the Magistrate to be satisfied about any breach of peace. It was argued that the present applicant was put in possession and although other remedy might be available, a remedy by way of a proceeding under Section 145 Cr. P. C. was not envisaged in the circumstances of the case.

7. In course of his arguments in reply the learned counsel for the respondent submitted that Chameli Devi was declared to be in possession of the disputed property in an earlier proceeding under Section 145 Cr. P. C. initiated in 1985. The present applicant had filed a civil suit of declaratory nature and was refused an interim order of injunction and although he got a declaratory decree in his favour. The same was not open execution and the order of the Sub-Divisional Magistrate directing him to be put in possession was absolutely bad in law. It was argued that Chameli was dispossessed illegally within two months next prior to the initiation of proceeding under Section 145 Cr. P. C., it was open for her to get possession restored under Section 145(4) and (6) Cr. P. C, It was contended that satisfaction of the Magistrate regarding existence of a breach of peace was subjective and the impugned order could not be questioned by the higher Court.

8. The learned counsel for the respondents took me through several case laws touching the points raised by him supporting the impugned order. It was argued that a civil Court degree could not have been executed beyond the terms of the decree and on this point reliance was placed on several decisions, including one of the Supreme Court, reported in AIR 1970 SC 1475 (Vasudev Dhanjibhai Modi v. Kajabhai Abdul Rehman. It was indicated in this judgment that the executing Court cannot go behind the decree. This point of law is a firmly established principle. It is also not disputed that if a decree is not for possession and is merely for declaration it may not be executed to give possession to the decree holder. This argument is relied only on the point if possession was duly made (sic) to the present applicant. We are, however, confronted with a question if at all materials were there before the Magistrate for his satisfaction about existence of a breach of peace.

9. Almost this very point was urged from another angle stating that a person could not have been dispossessed unlawfully or forcibly except by the course of law. Reliance was placed on a judgment of the Supreme Court (Krishna Ram Mahale v. Mrs. Shobha Venkat Rao) as reported in 1990 (1) All Rent Cas at page 270 : AIR 1989 SC 2097. The Supreme Court observed in this case that it was a settled law in this country that where a person is in settled possession of property, even on the assumption that he had no right to remain on the same. He cannot be dispossessed by the owner of the property except by recourse of law. This point was urged to highlight the fact that the Sub-Divisional Magistrate could not have delivered possession to Sangam Lal in execution of a mere declaratory decree.

10. The next point urged by the learned counsel was that in case a person is dispossessed unlawfully within two months next prior to initiation of a proceeding under Section 145(1) Cr. P. C., the Court had every jurisdiction under Section 145(4) Cr. P. C. to restore possession to him. Reference Was made to the decision of the Supreme Court in the case of Bhinka v. Charan Singh as reported in AIR 1959 SC 960 corresponding to 1959 Cri LJ at page 1223. It was observed herein that in passing an order under Section 145(6) Cr. P. C., the Magistrate does not decide title and is to look to possession only. In this very decision the Supreme Court pronounced a very important interpretation of law. It was observed in

paragraph 16 of the judgment that in passing an order under Section 145(6) Cr. P. C., the Magistrate does not purport to decide a party title or right to possession of the land but expressly reserves that question to be decided in due course of law. The Supreme Court then added. 'The foundation of his jurisdiction is on apprehension of the breach of peace'. On the point of real meaning of provision under Section 145(4) Cr. P. C. Another case law was cited as reported in 1995 Criminal Law Journal at page 70. Here was a dispute between a tenant and landlord. The tenant was admittedly in possession of a portion of the disputed premises. The land lady required the tenant to shift temporarily to a small portion on the pretext of the marriage of her son promising that immediately after the marriage of her son the tenant would be put back to his original tenanted premises. But it was not done. The petitioner tried to take back possession, after failing in his attempts of pursuading the land lady and he made a report that there was a likelihood of a breach of peace. Upon this ground a proceeding under Section 145 Cr. P. C. was taken up and by an order under Section 146 Cr. P. C. In this perspective, the Court had observed that the dispossession of the tenant was certainly wrongful and the Magistrate had every authority to put back the tenant in possession under Section 145(4) and (6) Cr. P. C. It was observed in this connection that for the claim of restoration of possession existence of other avenues does not bar a proceeding under Section 145 Cr. P. C.

11. Arguments were advanced and cases were cited on the question as to who could have executed the decree of a Civil Court. This question does not cover this proceeding as, even if delivery of possession to the present applicant by the Sub-Divisional Magistrate was wrongful, I am going into the validity of that order, but only to sec the validity of the order dated 28-7-1997. The arguments of the parties made it clear that possession, however, illegal, was made over to the present applicant in pursuance to an application dated 15-7-1997, the initial order dated 28-7-1997 referred to three applications of the husband of Chameli Devi but the existence of first two is not asserted even by Chameli Devi in her counter affidavit and the existence of the same has been denied by the present applicant, I have before me, therefore, only the application dated 28-7-97. It was vehemently argued by the learned counsel on behalf of Chameli Devi that she is being subjected to torments and tortures by the present applicant and others and even

the police is not rendering the required help. This could be true and, if true, is certainly unfortunate. In the application upon which action was taken she prayed for drawing an FIR and for legal action against the wrong doers as also for restoration of the looted property. There is no whisper in the application about any breach of peace over possession rather the trend of argument suggested that possession, although unlawful, was delivered to the present applicant. The Supreme Court has clearly pointed out that it is the existence of breach of peace that gives jurisdiction to the Magistrate to proceed under Section 145(4) Cr. P. C. In the decision of the Madhya Pradesh High Court as reported in 1995 Criminal Law Journal p. 70 also the parties were quarreling amongs themselves to take back/retain possession of the disputed property. Thus the jurisdiction for the Magistrate was created in that case. In the ease at our hands the respondent did not appear to have offered any physical resistance in the delivery of possession which is now stated to be illegal. If there have illegal eviction her remedy lies in a suit under Section 6 of the Specific Relief Act in which she is not supposed to prove her title, she is only to prove that she had been in possession and she was dispossessed without her consent from the immovable property otherwise than in due course of law and the only constraint is that she is to file a civil suit within six months from the dale of dispossession. The relief is absolutely summary and no appeal lies from any order or decree passed in any such suit. The decision of the Madhya Pradesh High Court (supra) no doubt speaks of maintainability of a proceeding under Section 145 Cr. P. C., irrespective of existence of the above alternative remedy, but the fact of the case suggested that there were materials to initiate the proceeding as there was a likelihood of a breach of peace.

12. Under Sections 145(1) and (6) Cr. P. C. the Magistrate may direct restoration of possession, but these powers arc consequential ones depending upon proper initiation of a proceeding under 145(1) Cr. P. C. and are not original powers which may be exercised without taking recourse to 145 (1) Cr. P. C. The present respondent No. 2 is left with another remedy so far her grievances were concerned. The application could be placed before the C. J. M. of the area for his decision, if it could be referred under Section 156(3) Cr. P. C. for registration of a case and investigation.

13. Considering all the above aspects, it is felt that the Magistrate had no material before him to record an order that there was an apprehension of breach of peace over possession and although he writes in his order about such existence of a breach of peace and although it is argued that this subjective satisfaction could not be interfered with by the High Court, it is felt that there must be some objective measures to see whether such subjective satisfaction was real there. If it is a case of existence of certain allegations stating or averring apprehension of breach of peace, certainly the conclusion remains to be drawn exclusively by the Magistrate. But when it is a case where no averment is there regarding apprehension of breach of peace, the order of the Magistrate may not be supported merely on the plea that it was his subjective satisfaction not to be interfered with. Every case of tresspass or unlawful possession may not give rise to an apprehension of breach of peace and every case of offence of theft and assault associated with trespass may not also give rise to any such conclusion unless the other party also takes up a defiant attitude.

14. An order under Section 146(1) Cr. P. C. could be passed only when a proceeding is validly initiated under Section 145(1) Cr. P. C. If the order under Section 145(1) Cr. P. C. does not stand the test of law, the consequential order under Section 146(1) Cr. P. C. must also go.

15. The application stands allowed. The orders of the Sub-Divisional Magistrate, Robertsganj in case No. 11 of 1997 dated 28-7-1997 under Sections 145(1) and 146(1) Cr. P. C. are quashed. The concerned application dated 28-7-1997 filed by the husband of Chameli Devi be forwarded by the Sub-Divisional Magistrate to the nearest Chief Judicial Magistrate (having jurisdiction to take cognizance of offence) who on receipt of such application shall apply his judicial mind as to whether action under Section 146(3) Cr. P. C. would be called for or call the complainant and treat it as a complaint arid proceed according to Section 200 and the [provisions that follow, h will be op. a for the respondent Chameli Devi to file a suit for recovery of possession under Section 6 of the Specific Relief Act before the appropriate Civil Court subject always to the limitation period indicated therein.

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