

Ramesh Chandra Saxena Vs. VIth Additional Sessions Judge and ors.

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Court : Allahabad

Decided On : Dec-19-1997

Reported in : 1998CriLJ3794

Judge : O.P. Garg, J.

Acts : Commercial Establishment Act; Code of Criminal Procedure (CrPC) , 1974 - Sections 145, 145(1), 145(4), 145(5), 146, 397, 397(3), 399(1), 399(3), 401 and 482

Appeal No. : Criminal Misc. Application No. 2349 of 1997

Appellant : Ramesh Chandra Saxena

Respondent : VIth Additional Sessions Judge and ors.

Advocate for Def. : A.K. Jain, G.A. and ;Viresh Mishra, Adv.

Advocate for Pet/Ap. : Anand Kumar Gupta, ;A.K. Dixit and ;S.K. Garg, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

O.P. Garg, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure with the prayer that the order dated 8-4-1997, Annexure 15 of the petition, passed by Sri Swatantra Singh, the then VIth Additional District and Sessions Judge, Aligarh in revision No. 118 of 1997 Ashok Kumar Jain v. State of U.P. and others. setting aside the order dated 27-1-1997 passed by the City Magistrate Aligarh - Opposite Party No. 2 in proceeding under Section 145 of the Code, be quashed.

2. Counter and rejoinder affidavits have been exchanged. Heard Sri Anand Kumar Gupta for the petitioner and Sri Viresh Mishra for opposite party No. 3 - Ashok Kumar Jain as well as learned standing counsel on behalf of the opposite party Nos. 1 and 2.

3. Shorn of all superfluities, the case of the petitioner is that there is a shop No. 7/4, Railway Road, Abdul Karim Crossing, Aligarh of which S/Sri Arvind Kumar and Manoj Kumar are owners -- landlords. It is alleged that the petitioner Ramesh Chandra Saxena was inducted as tenant in the said shop in the year 1954. Sri Saxena was employed in the Life Insurance Corporation of India and, therefore, he had certain difficulties in doing business at the shop. His father, Bhagwat Swamp looked after the business and after his death in 1965, Smt. Nirmal Saxena wife of the petitioner used to sit on the shop to carry on the business in the name and style of 'Nirmal Cut Piece'. Ashok Kumar Jain - opposite party No. 3 is the real brother of one Anand Kumar Jain who happens to be the colleague of the petitioner in Life Insurance Corporation of India. Ashok Kumar Jain was appointed as a Salesman on the shop in the year 1980 and a document dated 22-1-1980, which is contained in Annexure 1 to the affidavit, was executed, whereby Ashok Kumar Jain had undertaken to work as a salesman in lieu of share of 25% of the monthly profit and that he would place the keys of the shop every evening at the residence of the petitioner. In the year 1991-92 the petitioner fell seriously ill and was admitted in the hospital. The wife of the petitioner could not attend the shop regularly as she was busy in attending the petitioner. Ashok Kumar Jain was directed to look after the business of the shop and when the wife of the petitioner went to the shop after the petitioner came back from hospital, Ashok Kumar Jain did not allow her to enter the shop with the result a dispute about the possession of the shop arose and the local police of police station Delhi Gate, Aligarh

submitted a report before the City Magistrate, Aligarh on 21 -4-1992 for initiating action under Section 145, Cr.P.C. A preliminary order was passed by the City Magistrate opposite party No. 2 on 22-4-1992 and on the report of the local police of the same date, it was ordered that the shop be sealed and consequently four locks which existed on the shutter of the shop, were sealed.

4. Ashok Kumar Jain opposite party No. 3 filed an application before the City Magistrate on 24-4-1992 (which is contained in Annexure 10 to the affidavit to the petition) with the prayer that the proceedings under Section 145, Cr.P.C. be dropped. The petitioner also filed an objection against the application of Ashok Kumar Jain. The City Magistrate, vide order dated 28th May, 1992, Annexure 12, to the affidavit to the petition, rejected the application of Ashok Kumar Jain. In the meantime, Ashok Kumar Jain had filed Civil Suit No. 681 of 1991 in the Court of Munsif Koli, a copy of the plaint being Annexure 9 to the affidavit to the petition. It was observed by the City Magistrate in his order dated 28-5-1992 that the order passed in the civil suit is of no consequence and the question of possession shall be decided evidence of the parties. Ashok Kumar Jain filed revision application No. 282 of 1992 against the initial order dated 22-4-1992 passed under Section 145, Cr.P.C. as well as another revision application No. 291 of 1992 against the order dated 28-5-1992 passed by the City Magistrate. Both these revision applications were dismissed as not maintainable, on the ground that the impugned orders were merely interlocutory in nature. Ashok Kumar Jain filed Civil Misc. Writ No. 37432 of 1992 to challenge the order dated 17-8-1992 whereby revision application No. 282 of 1992. was dismissed. Both the parties filed their written statement before the City Magistrate who by order dated 27-1-1997, Annexure 14 to the petition, decided that the petitioner Ramesh Chand Saxena was in possession of the dispute shop and that Ashok Kumar Jain was only a servant of the petitioner and did not have independent possession in his own rights. Against this order dated 27-1 -1997, Ashok Kumar Jain preferred a revision application No. 118 of 1997 before the Sessions Judge, Aligarh which was ultimately decided by the impugned order dated 8-4-1997 passed by the VIth Additional Sessions Judge, Aligarh.

5. The case of the opposite party No. 3 - Ashok Kumar Jain on the other hand is that he is in long standing possession over the disputed shop for the last about 12

years in his own right and has been carrying on his own business. According to him, he has been paying rent at the rate of Rs. 206/- per month to Sri Om Prakash Gupta, father of Arvind Kumar and Manoj Kumar who are abroad but two receipts have been issued to him; that he has a licence issued by District Supply Officer renewed from time to time upto 30-9-1989 by which he has been authorised to carry on the business of cutpiece cloth in the disputed shop that his business establishment has been registered under the Commercial Establishment Act and that there is an electricity connection in his shop which too stands in his name. He has denied the fact that the petitioner Ramesh Chandra Saxena, or for that matter, his wife Smt. Nirmala Saxena had ever been in possession of the disputed shop or the business, which is being carried on in the said shop.

6. It is an indubitable fact that the Ashok Kumar Jain opposite party No. 3 has been in occupation and possession of the shop in question at least since 1980. His actual physical possession over the shop in dispute has not been denied nor it can be disputed. The moot point for consideration is whether the physical possession and occupation of Ashok Kumar Jain over the disputed shop and its business is in his own independent right or it is by virtue of his having been appointed as a salesman by the petitioner. The parties would swim or sink with the finding on this point.

7. Learned counsel for the petitioner also raised a legal point that the Additional Sessions Judge in exercise of his revisional powers had no authority or jurisdiction to set aside the order dated 27-1-1997 passed by the City Magistrate and that the said order has been illegally set aside on incorrect appraisal of the evidence on record. This submission has been repelled by learned counsel for the opposite party No. 3 Ashok Kumar Jain, maintaining that the Additional Sessions Judge did have the jurisdiction to set aside an order which was passed in all illegal manner in proceedings under Section 145, Cr.P.C. by the City Magistrate, particularly when the provisions of Section 145, Cr.P.C. could not be invoked in the light of the facts of the present case. It was also urged that the present petition under Section 482, Cr.P.C. is not maintainable as the order passed by the City Magistrate on 27-1-1997 has been set aside after being duly scrutinised in revisional proceedings.

8. To begin with, it may be mentioned here that the object of Section 145, Cr.P.C. is to prevent breach of peace and for that end, to provide a speedy remedy by bringing the parties before Court and ascertaining who of them was in actual possession. The State cannot permit that the riots should be committed and heads be broken merely because two contending parties hold different opinions about the claims to the possession and ownership of some immovable property. The maintenance of public peace is the object in the mind of the legislature and that being the supreme object in view, the convenience and even rights of the individual must for the time being be sacrificed for its attainment. It may be that the owners of the property are temporarily deprived of what is lawfully their property and may also be subjected to other inconveniences but all these considerations are subservient to the imperative necessity of preserving the peace. The proceedings under Section 145 have to be taken cautiously and the Magistrate must follow the provisions scrupulously. The proceedings should not be initiated with some ulterior motive, i.e. where the purpose of the party is to get possession without the expenses, delay and trouble of a civil suit or the settlement of what are really civil disputes. The enquiry under Section 145, Cr.P.C. is confined to the question of actual possession only and a Magistrate should not enquire into the rights of the parties. Sequel to the provisions are the provisions contained in Section 146 of the Code. Sections 145 and 146 stand together and constitute an integral scheme for the resolution of situation where there is likelihood of breach of peace because of a dispute concerning immovable property. Section 146, therefore, has no independent entity of its own and, of necessity, has to be read together with Section 145.

9. There is much obfuscation about the scope of Section 146. The power of attachment conferred in Section 146 of the Code has to be exercised in emergent situations i.e. where there is no alternative but to maintain the peace and tranquility by attaching the property concerning which rival contentions about the possession have been raised. Therefore, power to attach the subject of dispute given under Section 146 must not be exercised lightheartedly as it is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by two sides. The resultant effect of the attachment under Section 146 is almost the same as an act of confiscation and,

therefore, a Magistrate should naturally be reluctant to make use of this Section and it becomes necessary to use the same, it should be in exceptional and sparing circumstances. Experience shows that now- a-days, attachment under Section 146 is resorted to as a normal course to supposedly quell the disturbances and breach of peace on account of disputes with regard to immovable properties. A power which is to be exercised in rarest of rare cases, has now become a normal course, which is lightly adopted by the Magistrates. Where rival contentions of the parties and the evidence on the question of possession of both the parties is equibalanced and the Magistrate is unable to decide, which means some real hurdle, some genuine obstacle, some difficulty, which the Magistrate considers to be insurmountable, that is to say, even though an honest attempt is made to arrive at a correct conclusion by disentangling the complex question of fact, from the mass of evidence placed before him, he is unable to make up his mind as to which party is in possession. then only an order of attachment, should be passed and that too in emergency. Emergency cannot be confused with interest of justice. To make out a case of emergency, there must be some material before the Magistrate coming forth on the record' from the statements of the parties, documents produced by them or such other evidence as they may choose to adduce and not upon the personal impression earned by the Magistrate at the time of visit on spot. Emergency means that apprehension of breach of peace is imminent and to fortify the preventive measure, attachment is an absolute essentiality.

10. In the backdrop of above legal position, now, we have to sift the rival contentions of the parties. The petitioner, Ramesh Chandra Saxena's case for possession over the disputed shop is based on the ground that Ashok Kumar Jain was his servant, who was appointed as Salesman and, therefore, even if Ashok Kumar Jain was found to be in actual physical possession of the shop, his possession was merely that of his servant and agent. In 1975 Cr LJ 652 : (1975 All LJ 23), Radha Kishan Mehta v. State of U.P., a Division Bench of this Court held that in the very nature of things, possession of a servant or agent, even though actual, stands on a footing different than the actual physical possession of a co-owner. Possession of a servant in relation to the properties belonging to his master is invariably of the master himself. Therefore, no proceedings under

Section 145 will be maintainable if the person asserting the possession is found to be servant or agent of his master. A reference may also be made to old decision of Nagpur Judicial Commissioner dated 13-8-1925 reported in 1926 (27) Cri LJ 212, Baji Rao v. Dadi Bai wherein it was held that the possession of an agent or a servant, which is permissible cannot give a party to a proceeding under Section 145 a locus standi against his principal or master. The possession, that can be pleaded in such proceedings, must be the possession based on claim or right to possession.

11. Now the question is whether Ashok Kumar Jain was in possession of the disputed shop in his own right or he was in occupation of the shop as a servant/salesman of the present petitioner. This aspect of the matter has been dealt with by the learned Additional Sessions Judge in the impugned order. A number of documents have been filed by Ashok Kumar Jain to indicate that he was in possession of the shop and was carrying on his own business. The order of sealing the shop by putting the locks was passed on 22-4-1992 itself on receipt of the police report dated 21-4-1992, Annexure 6 to the writ petition. A bare perusal of the police report would indicate that Ashok Kumar Jain was, in fact, in possession and occupation of the disputed shop and that cut-piece and others' clothes kept in the shop belonged to him. The keys of the shop were also with Ashok Kumar Jain and that he has been in possession of the shop and doing the business for the last more than one decade. The report further indicates that the present petitioner Ramesh Chandra Saxena was, in fact, the tenant of the shop and wanted to retain its possession as a tenant but since he was employed in the Life Insurance Corporation, he could not himself carry on the business on the tenanted shop and, therefore, with a view to continue his tenancy, he inducted Ashok Kumar Jain, brother of his colleague in the office that the rent was being paid by Ashok Kumar Jain to the petitioner who was paying the rent to the landlords and obtaining the receipts in his name. The landlords took an objection of the induction of Ashok Kumar Jain in shop and the applicants were also moved before the Rent Control and Eviction Officer for declaring the vacancy of the shop as its possession has passed over to an unauthorised person. The landlord was not successful in getting the shop vacated and the move of declaring the vacancy was also stifled by the statement of Ashok Kumar Jain who gave out that he has

not been put in exclusive possession of the shop but was appointed as a salesman to look after the business. A document came into being for a specified purpose of protecting the tenancy rights of the petitioner. The fact remains that Ashok Kumar Jain has been in possession of the disputed shop 'and has been carrying on business therefrom for the last about 12 years prior to the passing of the preliminary order under Section 145 of the Cr. P.C. on 22-4-1992. Ashok Kumar Jain also filed certain documents to indicate that he was dealing with the business at the shop in his own independent right, inasmuch as the licence to carry on the business was given in his name; that the business was registered under the Commercial Establishments Act in his name and that the electricity supply was also in his name. On account of his employment in the Life Insurance Corporation, the petitioner could not have carried on the business at the disputed shop and there is at all no evidence of the fact that his wife, Smt. Nirmala Saxena, was carrying on and looking after the business. The possession of Ashok Kumar Jain has been long standing, i.e., for a period about 12 years prior to the date of passing of the preliminary order and the theory that he was in possession of the shop as an agent or servant of the petitioner is yet to be determined in a civil suit. The civil Court has also passed the order of injunction in the original suit No. 688 of 1991 instituted in the Court of Munsif Koli, Aligarh. It would be of no consequence that the, present petitioner is not a party to that suit. The fact remains that in the matter of dispute about the possession of the shop, an order of injunction has been passed by the Civil Court.

12. Prima facie, the established fact is that Ashok Kumar Jain is in actual physical possession of the disputed shop while the petitioner Ramesh Chandra Saxena claims himself to be a tenant of the shop and to be in possession of it through Ashok Kumar Jain, who is said to be the salesman. The dispute, it appears, has arisen on account of the fact that after the retirement from Life Insurance Corporation, Ramesh Chandra Saxena now himself wants to occupy the shop while Ashok Kumar Jain is not prepared to vacate it. Learned counsel for Ashok Kumar Jain urged that since there is no dispute about the physical possession of the shop for the last about 12 years prior to the passing of the preliminary order under Section 145, the City Magistrate acquired no jurisdiction to initiate proceedings under Section 145 of the Code. In support of his contention learned

counsel placed reliance on 1986 Cr LJ 1110 (Gauhati) K. I. Singh v. A.I. Singh in which it was held that 'the jurisdiction to act under Section 145 arises in a case only when there is a 'dispute' as to 'actual possession' of immovable property which is likely to lead to breach of peace. As soon as the written statements of 'claims' are put in pursuant to the 'priliminary order' passed Under Section 145(1) it is the duty of the Magistrate to examine if the 'claims' relate to the question of 'actual possession' as envisaged by Section 145(5) and not to 'right to possess'. Indeed, there may no occasion for receiving any evidence if no 'dispute' as contemplated Under Section 145(1) is disclosed by the claim'. He must, therefore, examine the nature of the claim and decide whether to proceed Under Section 145(4) and see if the 'dispute' was such as was capable of being decided by him. If the claim is vague or is of a nature which projects not the 'facts of actual possession' of, but the 'right to possess the subject.-matter of dispute, he will be justified in dropping the proceedings or in other words, cancelling the order passed under Section 145(1) by virtue of powers vested under Section 145(5). Because, whenever claim is made by any party in its written statement a 'right to possess' the party may also insist on leading evidence under Section 145(4) to establish its claim. This is not permitted by law.'

13. A reference was also made to 1997 CLJ 2007 (Allahabad) Govind Sharan v. State of U.P. in which it was observed that where one party claims actual possession over the disputed property and the other party claims a right of user, no dispute regarding the possession can be determined and Section 145 is not applicable and if the provisions of Section 145 have been invoked preliminary order as well as the order of attachment are likely to be set aside as illegal. In Radha Kishore Mehra's case (supra), it was ruled that in proceedings under Section 145, the Courts are concerned with the question of possession and not title of the parties. The material question for consideration in such proceedings is always 'who was in possession?' was it exclusive or joint? In the instant case, the petitioner who was in physical possession of the shop was trying to take back the possession, of course by dispossessing Ashok Kumar Jain. The local police instead of protecting the possession of the actual occupier reported that the property be attached, obviously to keep the actual occupier out of possession. In the instant case the attachment of the property by means of sealing the shop was,

as a matter of fact, not called for. A perusal of the police report would indicate that there was no dispute which was likely to result in imminent breach of peace. The mere fact that the situation was tense was not sufficient to invoke the emergency provisions of Section 146. If the petitioner wanted to take the possession by dispossessing the actual occupant of long standing unlawfully, he should have been prevented from doing so and full protection should have been afforded to the person who was in actual possession. The initiation of the proceedings under Section 145 on the basis of mere police report which did not disclose a dispute and emergency to attach the property was totally unjustified. Therefore, in the ultimate analysis, the learned Additional Sessions Judge committed no illegality in setting aside the order dated 27-1-1997 passed by the City Magistrate, Aligarh.

14. The learned counsel for the petitioner further canvassed the point that the impugned order was passed on a revision application which was not maintainable as, according to the learned counsel, the order passed by the City Magistrate after taking into consideration the facts and circumstances of the case as well as the evidence of the parties was not subject to revision. This aspect of the matter has been gone into by the Court below in sufficient details. There is no doubt about the fact that a revision application against the orders passed under Sub-section 145 and 146, Cr. P.C. lies both to the Sessions Judge and the High Court, though both the Courts have the same powers (Sub-section 399(1) and 401). The dispute is about the scope of the powers of the revisional Court. In case where the Magistrate has acted clearly without jurisdiction, or has acted with gross irregularity, or has exercised jurisdiction in a capricious manner or has exercised jurisdiction on wrong principles, the revisional Court has the power to interfere and to correct the mistake. The revisional Court may interfere where the lower Court has recorded finding without consideration of the material evidence on record. In a case reported in (1985) 1 GLR 292, Pabundra v. Jagdish the Court has gone to the extent of laying down that the Sessions Judge in revision is duty bound to discuss evidence threadbare as first Court of facts and to arrive at its own independent findings before recording any conclusion. The revisional Court has the power to interfere where any legal evidence has either been ignored or misread or some extraneous or irrelevant matters have been considered.

15. A short and swift reference may also be made to the submissions of the learned counsel for Ashok Kumar Jain that the present petition under Section 482, Cr. P.C. is not maintainable. This contention is based on the assumption that once the matter has been considered by the revisional Court, a petition Under Section 482, Cr. PC. in the nature of second revision or appeal is not maintainable. The learned counsel for the petitioner pointed out that there is no absolute bar in filing application under Section 482, Cr. P.C. in spite of the fact that the order of the Magistrate was considered and set aside by the revisional Court. In support of this contention, he placed reliance on a Full Bench decision of this Court reported in 1989 U.P. CRR 255 : (1989 All LJ 732) H. K. Rawal v. Nidhi Prakash and JT 1997 (1) SC 657 : (AIR 1997 SC 987) Krishnan v. Krishna Vani.

16. There is a plathora of rulings, namely, R.P. Kapur v. State of Pubjab AIR 1960 SC 266 Madhu Limaye v. State of Maharashtra AIR 1978 SC 47 : (1978 Cri LJ 165); V.C. Shukla v. State AIR 1980 SC 962 : (1980 Cri LJ 690); Municipal Corporation of Delhi v. Ram Krishna Rohtgi AIR 1983 SC 67 : (1983 Cri LJ 159); Rajan Kumar Manchanda v. State 1980 ACC 54 (SC); Simirikhia v. Dolley Mukherjee Chhai Mukherjee (1990) 2 SCC 437 : (AIR 1990 SC 1605); Dharm Pal v. Smt. Ramshri AIR 1993 SC 1361 : (1993 All LJ 691; Ganesh Narain Hajela v. S. Bangarappa 1995 AIR SCW 2364; and Deepti alias Arti Rani v. Akhil Rai 1995 Cri LJ (SC) 695, the gammut of which is that once revisional power has been exercised on the application of the accused applicants, recourse to second revision by exercising power under Section 482, Cr. PC. cannot be taken. In H. K. Rawal's case (supra) the Full Bench has observed as follows :-that where an application Under Section 397, Cr.P.C. filed by any party in the Court of Session is decided against him it is open to that party to invoke the extraordinary jurisdiction of the High Court Under Section 482, Cr. P.C. only if the order of the Sessions judge has resulted in the abuse of the process of the Court and/or calls for interference to secure the ends of justice as the bar Under Sections 397(3) and 399(3), Cr. P.C. is not applicable to the exercise of the inherent powers by the High Court under Section 482, Cr. P.C. in such a case. If on the other hand, the order of the Sessions Judge has determined the dispute between the parties as indicated in our judgment, it cannot be interfered with by the High Court in revision at the instance of the same party or suo moto or in the exercise of its

inherent powers under Section 482, Cr. P.C. in view of the bar under Sub-section 397(3) and 399(3), Cr. P.C.

In the instant case, the Sessions Judge allowed the revision application filed by opposite party No. 3 Ashok Kumar Jain. It is, therefore, open to the petitioner to invoke the extraordinary jurisdiction of this Court under Section 482, Cr. P.C. However, on scrutiny of facts, I have found that the order of the Additional Sessions Judge is in keeping with the facts and circumstances of the case. It has in no manner resulted in the abuse of the powers of the Court and, therefore, no interference is called for.

17. In the result, the petition under Section 482, Cr. P.C. fails and is accordingly dismissed. The interim order passed by this Court shall stand vacated. The order dated 8-4-1997 passed by the learned Hnd Additional Session Judge, Aligarh in revision application No. 118 of 1997 shall be given effect to and Ashok Kumar Jain, opposite party No. 3 shall be put in possession of the shop immediately.

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