

JaineesuddIn and ors. Vs. JabesuddIn and anr.

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Court : Madhya Pradesh

Decided On : May-20-2006

Reported in : 2006(3)MPLJ342

Judge : A.K. Gohil, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 145, 146 and 482

Appeal No. : Misc. Cr. Case No. 642/2003

Appellant : JaineesuddIn and ors.

Respondent : JabesuddIn and anr.

Advocate for Def. : S.P. Jain, Adv. for Respondent No. 1 and ;Vivek Khedkar,
Public Prosecutor for Respondent No. 2/State

Advocate for Pet/Ap. : M.K. Jain, Adv.

Disposition : Appeal allowed

Judgement :

ORDER

A.K. Gohil, J.

1. Heard finally.

2. Petitioners have filed this petition under Section 482, Criminal Procedure Code challenging ex parte order passed by SDM, Chanderi on 16-7-2001, which has been affirmed by Revisional Court vide order dated 29-11-2002.

3. The brief facts of the case are that the respondent No. 1 filed an application before SDM, Chanderi under Sections 145 and 146, Criminal Procedure Code. The SDM, Chanderi instead of passing the preliminary order under Section 145, Criminal Procedure Code and issuing notice and providing opportunity of hearing to the petitioners, passed an order under Section 146, Criminal Procedure Code and directed for the attachment of the land in dispute and for handing over its possession to third person and thereafter directed for registration of the case as well as for notice to the opposite party. This ex parte order was challenged by the petitioners in a revision but unfortunately learned Addl. Sessions Judge without considering this aspect of the matter that the said order is not a legal order as the SDM has not passed any preliminary order under Section 145, Criminal Procedure Code and has also not issued any notice to the opposite party before passing order under Section 146, Criminal Procedure Code and without hearing them directed attachment of the property and handing over its possession to some other person, affirmed the said order. The petitioners have challenged both the aforesaid orders in this petition.

4. The contention of the learned Counsel for the petitioners is that both the orders are contrary to the provisions of Sections 145 and 146, Criminal Procedure Code and they have been passed in violation of the principle of natural justice. Even before issuing order of attachment no preliminary order was passed for taking cognizance under Section 145 and no opportunity was afforded to the petitioners before passing the order of attachment.

5. In reply, learned Counsel for the respondent submitted that the petitioners participated in the revision. The Revisional Court has considered this aspect of the matter and subsequently by order dated 3-1-2003 affirmed the order of attachment, against which revision was also filed which was also dismissed and the High Court has also dismissed the second revision.

6. Shri Vivek Khedkar, learned Public Prosecutor, appearing for the State has not disputed this legal position that the SDM should have first examined whether any dispute under Section 145, Criminal Procedure Code has arisen and after passing preliminary order he should have considered the application under Section 146 and should have passed the order of attachment of the land after issuing notice to the opposite party and that too after providing opportunity of hearing to them.

7. Having heard the learned Counsel for the parties and after perusal of the record, I am of the view that the order passed by SDM, Chanderi dated 16-7-2001 is not legal, as he has not adopted the correct procedure as laid down under the law. There is no finding under Section 145, Criminal Procedure Code that he is satisfied from the report of the Police Officer or upon other information that a dispute exists which is likely to cause a breach of the peace over the land. From the proceedings it is also clear that neither he recorded his satisfaction nor received any proper information nor called any police report, nor passed any preliminary order and without following due procedure prescribed under the Law passed an order of attachment.

8. It was mandatory on the part of the SDM to issue notice to the opposite party and to hear him before passing the order of attachment. If he was of the view that there was some emergency and it was necessary to pass attachment order ex parte then he could have issued notice to the other side and he should have invited reply and objection thereon but from the order-sheet dated 16-7-2001 it is not clear that he has followed the procedure laid down under Sections 145 and 146, Criminal Procedure Code. In revision it was also the duty of the Additional Sessions Judge to examine the aforesaid question of the legality of the order dated 16-7-2001 but the Additional Sessions Judge has also not examined the legality of the order and without applying judicial mind and without considering the order dated 16-7-2001, the nature of proceedings and also this fact that the said order is not only contrary to law but is contrary to the principle of natural justice, dismissed the revision. It was expected from the Additional Sessions Judge, who is basically a Judicial Officer, that he will consider the matter judicially but it appears that the approach of the Addl. Sessions Judge was also not a judicial approach. He has neither considered the provisions of Sections 145 and 146,

Criminal Procedure Code nor the correct procedure which was required to be followed by the SDM, who is Executive Magistrate. There is no whisper in the said order dated 16-7-2001 about any emergency or any danger of peace existed on spot and without considering the requirement of law the Additional Sessions Judge has recorded the findings, which are also contrary to the record, pleadings and law. Thus, the orders passed by the Courts below cannot be said to be legal.

9. It is true that the inherent powers under Section 482, Criminal Procedure Code are wide in nature but such power is to be exercised with great restraint. It is the settled principle that wider would be the power, greater should be the restraint. Where error of law has crept in the judgment and the mandatory provisions are not complied with and if that causes great injustice to a party and violates even the principle of natural justice, in that case with a view to prevent abuse of the process of any Court as well as for securing the ends of justice the inherent powers can be exercised and errors can be corrected and justice can be done. In this case since the SDM has not exercised the jurisdiction properly and the Revisional Court has also not corrected the same, and if the High Court feels that ends of justice requires that an order should be made, the High Court can exercise the inherent powers and give suitable directions.

10. As stated above, under the facts and circumstances of the case, this case appears to be fit case where the Court can exercise inherent powers and correct the mistake committed by the Courts below. In fact, in such cases where the property rights of the parties are involved the Magistrate should have exercised the powers cautiously after considering the scope of enquiry under Section 145, Criminal Procedure Code. It is admitted position that the scope of enquiry under Section 145, Criminal Procedure Code is very limited and first the SDM is required to pass a preliminary order after recording its subjected satisfaction on the material before him that the dispute relating to the breach of peace with regard to possession of property exists between the parties. Normally the order of attachment of the property under Section 146, Criminal Procedure Code should be passed after hearing the opposite party.

11. Since both the Courts below have failed to exercise the mandatory provisions and have also failed to adopt the fair procedure, in my considered opinion, this petition deserves to be allowed. Consequently, it is allowed. The orders passed by the Courts below are hereby set aside and the case is remanded to the SDM, Chanderi to proceed with the case, if any dispute exists between the parties with regard to the possession of the land or property, in accordance with law, after following the due process.

12. Consequently, this petition is allowed with the aforesaid direction.

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