

K.K. Afora Vs. State and ors.

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Court : Delhi

Decided On : Jun-11-1984

Reported in : 1984(2)Crimes104; 1984(7)DRJ327

Judge : H.L. Anand, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 145 and 146

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 1157 of 1983 and Contempt Civil Petition No. 22 of 1984

Appellant : K.K. Afora

Respondent : State and ors.

Advocate for Pet/Ap. : D.C. Mathur and; K.B. Kalra, Advs

Judgement :

H.L. Anand, J.

(1) This is yet another case in which a purely civil dispute between the parties was taken to a criminal court under Section 145 of the Code of Criminal Procedure because of an alleged precipitate action by one of the parties to oust another, otherwise than in due course of law, to by pass the cumbersome and prolix civil process.

(2) The premises in dispute has admittedly been in the occupation of once Ram Sarup during the last many years as a tenant and/or a licensee under the Custodian of Evacuee property. Ram Sarup was apparently residing and possibly also carrying on business in the premises. Baij Nath, father of respondent No. 2, claims to have purchased the property, of which the premises in dispute forms a part, from the Rehabilitation Department and contends that the Department had directed Ram Sarup to attorn to him. It is, however, claimed that Ram Sarup nevertheless never paid the arrears of rent to Baij Nath. Baij Nath, however, admittedly took no step to evict Ram Sarup on that ground. Ram Sarup died on October 24, 1982 and was. survived by a married daughter, named Gomti Devi. Gomti Devi has been living with her husband in a separate house, it appears that on the death of Ram Sarup, Gomti Devi occupied the premises in dispute apparently claiming to be the sole surviving legal representative of Ram Sarup, a circumstances which was obviously not very palatable to Baij Nath. his son, Netar Prakash, respondent No 2, and the other members of the family, who would naturally be keen to get rid of Gomti Devi on the ground that Ram Sarup left no heritable estate in the premises in dispute, apart from the movables in the property, to which Gomti Devi could possibly lay her claim. It is significant that on April 26, 1983. a suit was filed against Gomti Devi and her husband by Baij Nath through his son, respondent No. 2 to recover possession of the disputed premises from them on the ground that their possession was 'unauthorised' and 'illegal'. The suit is still pending.

(3) It is claimed by K.K. Arora, an Advocate of Delhi, petitioner in the present petition under Section 482 of the Code, that the possession of the 'property in dispute was handed over to him by Gomti Devi under an arrangement, which was described as the 'sale' of the property in his favor, of a consideration of Rs. 10,000.00 . The necessary documentation, on the basis of which he makes the claim, purports to be of April 13, 1983. i.e. the date on which he claims to have been put in physical possession of it. The document is based on the claim as if 'Ram Sarup had any proprietary interest in the premises. He further claims that a power of attorney was also executed on the said date in his favor, by Gomti Devi, to' enable him to perfect his title to the premises. It is, however, not disputed that no registered instrument of sale was executed. There is also considerable

controversy between the parties if Gomti Devi or for that matter even Ram Sarup had any interest of a proprietary nature in the property in dispute apart from the fact that he was admittedly in possession of the same when he died and its possession thereafter passed on to Gomti Devi. Be that as it may, it is the case of the petitioner, K.K. Arora, that he had not only occupied the property but had also spent considerable amount in the renovation of it to set up an office and had shifted his library and other belongings to it. It is claimed by him, and this is the subject-matter of a First Information Report, recorded by him on April 29, 1983, that on the night between 28 & 29 of April, 1983 Netra Prakash and certain other members of the family, who are in occupation of the other part of the property, purchased by Baij Nath, between which and the premises in dispute there is a common wall, trespassed into the premises in dispute by breaking the wall, on which a case under Section 380/448/452/34 Indian Penal Code was registered by the police against Netra Prakash and certain other members of the family. This case is apparently still under investigation. On the same date, the Police sent up a kalandra under Section 145 Criminal Procedure Code, to the Sub-divisional Magistrate concerned with reference to the aforesaid First Information Report. The learned Subdivisional Magistrate apparently did not make a preliminary order on receipt of the kalandra but summoned both the parties and after hearing both the parties made a composite order on June 23, 1983 in the presence of both the parties. The petitioner was the 'first party' before the learned Sub-divisional Magistrate and Netra Prakash, 'the second party'. This is how the order runs:

'CASE called. The parties are present. I have heard them and also gone through the police report. The 1st, Party himself stated before me that the second party did try to enter into the premises by back. He says that there is no apprehension of breach of peace. Whereas the counsel for the second party gave me a statement similarly. The first party has admitted that the second party has entered the premises. After hearing the parties and after examination of the police report, I came to the conclusion that there is apprehension of breach of peace and order the proceedings under Section 145(1) Criminal Procedure Code .

I am further satisfied that the proceedings under Section 146(1) Cr. P.C. are necessary to avoid immanent danger. The property in dispute be attached under

Section 146(1) Criminal Procedure Code . The parties are directed to file their written statement and documents by 11-7-1983. sd/- S.C.Gupta S.D.M. 23-6-1983.'

(4) Aggrieved by the aforesaid composite order, K.K. Arora filed a petition in the Sessions Court, which was dismissed by the learned Addl. Sessions Judge by an order of December 17, 1983, The learned Additional Sessions Judge primarily dealt with the preliminary order and came to the conclusion that on the material before the court, the Sub-divisional Magistrate had not committed any 'impropriety or illegality' in making the order. The learned Additional Sessions Judge, however, did not devote any attention to the part of the composite order by which the property ordered to be attached under Section 146 of the Code. The operation of the order of attachment had apparently been stayed during the pendency of the petition in the Sessions Court. The present petition under Section 482 of the Code against the order of the courts below was filed by K.K. Arora in this Court on December 19, 1983 and while admitting it, I found that counsel for the petitioner was not sure if the order of attachment had already been carried out. I, therefore, made the following order on the application for stay, being Cr. M.(M) 2265/83:

'NOTICE for January 23, 1983. Operation of the order of attachment, if not already carried out, would remain stayed till further orders. dusty.'

(5) It, however, transpires that the order of attachment had been carried out and the premises had already been attached by the time an intimation of the aforesaid order of stay was conveyed to the learned Sub-divisional Magistrate. K.K. Arora, however, informed the Sub-divisional Magistrate that the High Court had 'stayed the operation of the order of attachment', on which, the learned Sub-divisional Magistrate, sent a memorandum to the Police informing it that the order of attachment had been stayed by the High Court and directing it 'not to execute the orders of the attachment.' This was apparently treated by the Police as an order to break open the seal and to restore the property to K.K. Arora, which they faithfully did, either in the bonafide belief as to the true legal effect of the order or, in collusion with and to benefit the petitioner, a point on which there is considerable controversy.

(6) Netra Parkash not only opposes the petition but by his application, being C.C.P. 22/84, prays that contempt proceedings be initiated against K.K. Arora, as also the Police officers concerned, in that notwithstanding the conditional order made by this Court, and the fact that the attachment order made by the Sub-divisional Magistrate had been duly carried out, the possession of the premises was restored to K.K. Arora, after the same had been duly attached. It was further alleged that in his affidavit of December 19, 1983, filed in the Court of Sub-divisional Magistrate, K.K. Arora made a deliberate misrepresentation that the order of attachment had been 'stayed' by this Court giving the impression as if this Court had granted an order of 'restoration' and concealing the material fact that according to the terms of the order, its operation was stayed 'if it had not been carried out'. It is further alleged that on account of the aforesaid misrepresentation and concealment of a material fact, the learned Sub-divisional Magistrate was persuaded to virtually recall his order, even though it had already been carried out, and could not have been recalled. It was further suggested that on one reckoning neither the order of this Court nor that of the learned Sub-divisional Magistrate could be legitimately construed as an order of restoration and yet give undue advantage of the order to the petitioner the police officer concerned treated the orders as authorising a restoration to the prejudice of owner of the premises.

(7) I have heard learned counsel for the parties, as indeed, the counsel for the Administration. The proceedings before the Sub-divisional Magistrate are still at a preliminary stage, parties have filed their respective written statement as to who was or would be deemed to have been in actual physical possession of the premises on the material date. Neither this Court nor the Court of the Sub-divisional Magistrate are concerned with the nature of the possession of one or the other of the parties, or as to the right of either of the parties to the premises or to any interest in it or even to its possession. In the proceedings under Section 145, the Court is eventually concerned with the question as to which of the parties was in actual physical possession or be deemed to have been in such possession on the material date and the question as to the rights of parties to the property, or to possession, have to be left to be determined by a competent court of civil jurisdiction. In view of this, it is neither possible nor proper for this Court, at this stage, to express any opinion on matters, which are outside the scope of the

proceedings under Section 145 of the Code nor would it be possible for this Court to rule on the question or otherwise express any opinion in relation to it, which the Sub-divisional Magistrate must ultimately deal with, at the trial of the proceedings.

(8) The first question that this Court is called up to decide within the constraints inherent in the nature of the proceedings, is if, on the material before the learned Sub-divisional Magistrate, the conditions requisite for a preliminary order were satisfied. True, the learned Sub-divisional Magistrate summoned the parties to appear before him even before making a preliminary order. It is a possible view to take that when the Sub-divisional Magistrate takes seize of the report of a Police Officer or upon other information that a dispute likely to cause a breach of peace exists concerning any land or water or the boundaries thereof, he must first make a preliminary order if he is so satisfied before proceeding further. The learned Sub-divisional Magistrate did not follow that procedure because he summoned the parties to appear before him before making a preliminary order and made the preliminary order only on June 23, 1983, in the presence of, and after hearing both the parties, besides considering the police report. In the way Section 145 Criminal Procedure Code . is being extensively misused in Delhi for purely ulterior purposes of supplanting civil proceedings, such a procedure, though not strictly in conformity with the provisions, does not appear to vitiate the making of the preliminary order or the proceedings taken pursuant thereto. There is also no substance in the contention that the composite order of the learned Sub-divisional Magistrate of June 23, 1983, sought to be challenged, could not be considered to be a preliminary order, as envisaged by the provision. First part of the order satisfies the requirements of a preliminary order and it does not cease to be so merely because an order under Section 145 and 146 Cr. P.C. were not separately made but are made on the same date and from part of a composite order.

(9) The First Information Report recorded at the instance of the petitioner on April 29, 1983 contains a categorical allegation that on the night between 28th and 29th, Baij Nath, and certain other members of the family, named in the report, 'broke the back wall of the room and occupied the backside room unauthorisedly', 'with an intention to take the possession.' It is further alleged that 'they also permanently closed the door of the room by way of putting curtains etc. from the inside'.

According to the kalandra, which is of April .30, 1983, it is made out that on April 29, 1983 at 10 P.M., party No. 1, the petitioner and party No. 2 'were found holding discussion with regard to house No. 9571/13..... .. and each of them was claiming his right in the said house. Both the aforesaid persons were persuaded but they continued to claim their right'. According to the preliminary order, the First Party 'himself stated before me that the second party did try to enter into the premises by back. He says that there is no apprehension of breach of peace. Whereas the counsel for the second party gave me a statement similarly.'

(10) While it is no doubt true that the kalandra, does not, in terms, mention that there was apprehension of breach of peace, whether imminent or likely, the First Information Report and the statements made by the parties before the Sub-divisional Magistrate left no manner of doubt that there was a dispute between the parties with regard to the possession of the premises. The petitioner himself had alleged in the First Information Report that the other side had broken the wall 'from the back' and occupied the premises and even 'closed' the front door from within and if the petitioner was back inpossession, as claimed by him, it must have been only after the registration of the case against the other side, and/or by the petitioner's reentry in the' premises, after the other side had been removed from the premises. The order of the learned Sub-divisional Magistrate is unfortunately rather vague but if in the background of the aforesaid circumstances and on the material before it, 'the Sub-divisional Magistrate came to the conclusion that on account of the dispute regarding possession of the property there was apprehension of breach of peace, the order could not be said to suffer from any infirmity which would justify interference of this Court under Section 482 of the Code. The impugned order is neither happily worded nor is elaborate but that, by itself, would not justify interference if the material disclosed, as it did, that the situation with regard to the dispute relating to possession was pregnant with possibilities of breach of peace, even though not imminent. The challenge to the preliminary order must, thereforee, fail.

(11) It is, however, not possible to say the same with regard to the second part of the composite order, by which the property was ordered to be attached. This part of

the order is rather cryptic, and besides doing lip service to the provision of Section 146, gives no reason. The imminence of danger was not spelt out either in the kalandra or in the statement made by the parties before the learned Magistrate. No doubt, party No. 2 had at one time, according to the Fir occupied the premises by breaking the wall, but it appears that either because of the police intervention, following report of the commission of an offence, or otherwise, the petitioner had effected re-entry in the premises. A case of trespass had already been registered against the opposite party. There was, therefore, no ground to believe that the conditions were one of emergency, justifying the drastic order of attachment of property, whatever may be the basis on which the petitioner claimed to be in possession of the premises. The learned Additional Sessions Judge, for reasons which are not clear did not advert to this part of the composite order. The second part of the composite order is, therefore, liable to be quashed.

(12) This leaves for consideration the application of respondent Netra Prakash, being C.C.P. 22/84. The order of attachment made by the Sub-divisional Magistrate had admittedly been carried out when the memorandum of the learned Magistrate conveying to the local police that the order of attachment be not carried out was received by the local police. The stay order of this court was admittedly in terms subject to the contingency that the order of attachment 'had not already been carried out'. I have noticed above the reasons why it was made in the aforesaid terms but even if it had been an unconditional order of stay, it became infructuous because before its communication the order sought to be stayed had already been carried out. The restoration of the possession by the police to the petitioner, after breaking open of attachment, was certainly beyond the terms of the order of stay. The memorandum of the learned Magistrate to the local police merely asked the police not to carry out the order of attachment. That order could not be described or understood as an order of restoration. According to the respondent the restoration of the premises to the petitioner, in purported compliance with the order of this court, was the result of a deliberate act of concealment of material act by the petitioner, and of collusion between the petitioner and two police officers S S. Manan, S.H.O. and Sukhbir Singh, Sub-Inspector, who are impleaded as respondents 2 and 3 in the aforesaid application. It was not disputed by the petitioner that in his affidavit of December 19, 1983 filed

before the learned Sub-divisional Magistrate, soon after the stay order was made by this court, the petitioner had mentioned, that this Court had 'stayed' the order of attachment and the fact that the order of stay was conditional was not mentioned in the affidavit. The petitioner has sought to explain the omission in the affidavit of the condition incorporated in the order and the failure of the petitioner to convey the exact copy of the order on the ground that the petitioner had not correctly heard the order and when the affidavit was filed, its copy was not available to the petitioner. It is, however, immaterial whether the order as conditional or not, because even an unconditional order of stay of operation of the order of attachment would have become infructuous if already carried out and since neither this Court nor the learned Sub-divisional Magistrate made an order of restoration or any order which could be construed as an order of restoration, the restoration pursuant to the order was unjustified. The only question is if the restoration was the result of a bonafide misconception in the mind of the police officers concerned as to the true effect of the order or the result of any collusion between the petitioner and the police officers concerned. This is a matter which would certainly need to be inquired into, even though prima facie the restoration would not call for initiation of contempt proceedings.

(13) In the result, the petition succeeds in part. The preliminary order is affirmed, but the attachment order is quashed. . The learned Subdivisional Magistrate would conclude the proceedings with expedition and arrive at his conclusions with regard to the matters in controversy uninfluenced by any observations or expressions of opinion that may have been made by this Court in this judgment. The learned Sub-divisional Magistrate would also inquire into the circumstances in which and the possible motivation for which the premises were restored to the petitioner, as also as to the possible role of the petitioner, and the petitioner, and the two officers concerned, in the restoration. No further proceedings are necessary in the application of respondent Netra Parkash, which is accordingly dismissed.