

Mohd. Sabir Vs. the State

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Court : Delhi

Decided On : Apr-08-1981

Reported in : 1981CriLJ1120; 20(1981)DLT345

Judge : D.K. Kapur and; N.N. Goswami, JJ.

Acts : [Advocate Act, 1961](#) - Sections 30; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 24

Appeal No. : Criminal Appeal No. 328 of 1977

Appellant : Mohd. Sabir

Respondent : The State

Judgement :

R.N. Aggarwal, J.

(1) This order will dispose of Criminal Revision No. 31 of 1981 and Criminal Misc. (Main) No. 91 of 1981.

(2) There is a tussle between two groups (party No. 1 and party No. 2) belonging to the same community, over the management of the Society known as Sarai Khalil Welfare Society and possession of seven shops attached to the Mosque described at Makki Jama Masjid, Inderlok. The first party is headed by Bhaiya Abdul Salam. The second party comprises of 6 persons and is headed by Sabiqur Rehman. The

third party, that is, Mohd. Iqbal and 5 others claim to be the tenants of the 7 shops. (The 7th alleged tenant is Bhaiya Abdul Salam).

(3) In 1977, the Delhi Development Authority allotted a plot of land in Inderlok to Sarai Khalil Welfare Society for construction of a Mosque. The construction of the Mosque and the shop was completed in October, 1980. Party No. 2 who claim themselves to be the members of the managing committee of the society alleged that applications for allotments of the shops were invited and in November a decision was taken to allot the shops to some persons including Bhaiya Abdul Salam, but Bhaiya Abdul Salam who was supervising the construction of the Mosque and the shops taking advantage of the said position illegally and forcibly occupied the shops through the third party. The matter was reported to the police and the police apprehending breach of peace made a report to the Sub-Divisional Magistrate for taking action under section 145 of the Code of Criminal Procedure.

(4) On 2nd January, 1981 the Sub-Divisional Magistrate passed an order for calling the parties for 6th January, 1981. On 6th January 1981, the Sub-Divisional Magistrate found that a dispute over the possession of the shops is likely to create breach of peace and passed a preliminary order calling upon both the parties to put in their written statements and documents regarding the fact of actual possession over the disputed shops. Simultaneously the Sub-Divisional Magistrate passed an order under section 146(1) of the Code of Criminal Procedure for attachment of the 7 shops until a competent court determines which of the parties is entitled to the possession of the shops.

(5) It appears that on 6th January 1981 the first party was not fully represented before the Sub-Divisional Magistrate and a request was made for further hearing which was granted by the Sub-Divisional Magistrate. The Sub-Divisional Magistrate after hearing the parties further did not find any cogent reason to vary or modify the order passed on 6th January, 1981 and he confirmed the order of attachment passed on 6th January, 1981.

(6) Here it will be useful to notice the civil litigation pending between the parties. On 25th November, 1980 party No. 3 filed five separate suits for perpetual injunction restraining the defendants (party No. 2) from dispossessing the plaintiffs

therein from the shops. In the said suits the tenants had claimed that they had been inducted as tenants by the Mutwalli of the Masjid. The Mutwalli mentioned was Bhaiya Abdul Salam. Along with the suits an application was filed for an ad-interim injunction which was granted ex parte by the court. The application for the grant of ad-interim injunction was contested by party No. 2. On 2nd January, 1981 Shri V.K. Jain, Sub-Judge, by a detailed order rejected the applications filed by party No. 3 under Order 39 rules 1 and 2. The Sub-Judge found that Abdul Salam had no authority to induct the plaintiffs therein in the shops in dispute. The Sub-Judge further found that the shops in dispute vested in Sarai Khalil Welfare Society of which defendants 1 to 5 (party No.) are the members of the managing committee. It was also found that Abdul Salam had no right at all in the shops.

(7) Against the aforesaid order, party No. 3 went in appeal to the Senior Sub-Judge who on 7th January, 1981 passed an ex-parte order restraining party No. 2 from dispossessing the party No. 3 from the shops in dispute. The appeal was contested by party No. 2 and on 20th February, 1981 before the Senior Sub Judge the counsel for the appellant (party No. 3) made a statement that since the shops had been attached by the Sub Divisional Magistrate the appeal had become infructuous and, accordingly the appeal was dismissed.

(8) In January 1981 Abdul Salam on behalf of the Sarai Khalil Welfare Society filed a suit against party No. 2 for an injunction restraining party No. 2 from interfering with the business, management and other activities of the Society. In the said suit Abdul Salam had alleged that in the meeting of the general body of the society held on 10th December, 1980 he and some others had been elected to the executive body of the society and that party No. 2 claiming themselves to be the members of the executive body were illegally interfering with the management of the society. Shri M.S. Rohilla Sub-Judge on 3rd January, 1981 granted an ex-parte order restraining party No. 2 from interfering in the management of the society. The application was contested by party No. 2 and by a detailed order dated 16th January, 1981 Shri Rohilla vacated the ad-interim injunction order. Shri Rohilla found that the plaintiff (that is the first party) had no prima facie case. Against the aforesaid order Bhaiya Abdul Salam went in an appeal but without any success. A second appeal to the High Court also met with the same fate.

(9) Reverting to the criminal proceedings against the order of the Sub-Divisional Magistrate dated 6th January 1981 the first party filed a revision petition before the Sessions Judge. The revision petition was heard by Shri G. S. Dakha, Additional Sessions Judge, on 31st January 1981. The Additional Sessions Judge finding that the shops were admittedly in the possession of the party No. 3 and an ad-interim injunction restraining party No. 2 from dispossessing the alleged tenants from the shops by the civil court was in operation allowed the petition and quashed the proceedings. A direction was given that possession be restored to the parties from whom it was taken.

(10) Against the aforesaid order party No. 2 has come in revision On 2nd February, 1981 Mr. Justice M.L.Jain while admitting the petition made an order staying the operation of the order of the Additional Sessions Judge dated 31st January, 1981. The third party has also filed a petition (Criminal Miscellaneous (Main) No. 91 of 1981) with a prayer that the order of the Sub-Divisional Magistrate dated 6th/7th January, 1981 attaching the shops and also initiating action under Section 145 of the Code of Criminal Procedure be quashed.

(11) From the facts stated above, it emerges that as on today there is no restraint order against party No. 2. In the two civil suits the Court have found that Bhaiya Abdul Salam and party No. 3 prima facie have no rights in the shops. In the suit filed by the party No. 3 the finding of the Sub- Judge is that Abdul Salam had no authority to induct the plaintiffs in the shops in dispute. In the suit filed by Bhaiya Abdul Salam on behalf of the Society Shri Rohilla Sub-ordinate Judge had found that there was no prima facie case in favor of the plaintiffs therein.

(12) From the civil litigation as well as the criminal proceedings it is clear that there are serious disputes as to which party is competent to manage the Society and its property; each party (party No. 1 and party No. 2) claim themselves to be the validly elected members of the managing committee of the society. This is a clear indication that the above tussle between the two groups is mainly due to the shops attached to the Masjid. Both party No. 1 and party No. 2 claim the right to manage and possess the shops because of their being validly elected members of the managing committee of the society. Party No. 3 claim to be in possession of the

shops as tenants. It appears Bhaiya Abdul Salam had towards the end of October or beginning of November 1980 allowed party No. 3 to get into possession of the shops. The finding of the civil court is that Bhaiya Abdul Salam had no right to give possession of the shops to party No. 3. From the above finding it would follow that the society has been forcibly and wrongfully dispossessed of the shops.

(13) Mr. Bhalla for the party No. 1 contended that the dispute between the party No. 1 and party No. 2 is mainly on the right to manage the society and this dispute does not come within the purview of Section 145 of the Code of Criminal Procedure and, therefore, the order under Section 145 as well as under Section 146 is without jurisdiction. I have in the earlier parts of the judgment tried to bring out the real dispute between the parties and to me it appears that the real dispute is regarding the right to possess and manage the shops. Each party is claiming itself to be the managing members of the society. The question as to which of the parties is competent to act on behalf of the society is incidental to the first dispute. In my view the Sub-Divisional Magistrate was competent to act under Section 145 and 146 the Code of Criminal Procedure.

(14) Mr. Bhalla next contended that the order dated 6th January, 1981 passed by the Sub-Divisional Magistrate under Sections 145(i) and 146(i) is a composite order and such an order under Section 146 could only be made after an order under Section 145(1) had been made. I find no force in this contention. It is true that the order passed by the Sub-Divisional Magistrate on 6th January, 1981 is both under Sections 145 and 146 but from a reading of the order it is clear that the Sub-Divisional Magistrate had passed the order of attachment only after making an order under Section 145(1). The relevant portion of the order dated 6th January, 1981 reads as under:

'SIMULTANEOUSLY, after passing of the preliminary order, I am also convinced that the two parties in this case are poised for confrontation and there is imminent danger of breach of peace in this case. Proceedings u/s. 107/150 Cr.P.C. are already pending between the two parties. Since it is a sensitive area and a mosque, tempers can become inflamed at any moment, I, therefore, order that 7 shops be sealed under the first limb of Section 146(1) Cr.P.C. till a competent

court has decided the rights of the parties with respect to the persons entitled to the possession thereof.'

From the above, it is clear that the Sub-Divisional Magistrate was of the view that the situation has become explosive and if an order under Section 145 is not made things may go worse. To my mind, in the situation of the case, the Sub-Divisional Magistrate was justified in making the order under Section 146 after he was satisfied that a dispute existed between the parties regarding the possession over the shops which was likely to result in breach of peace. In my opinion, no legal flaw can be found in the passing of the order under Section 145 as well as under Section 146 simultaneously.

(15) Mr. Bhalla next contended that party No. 3 through party No. 1 had come into possession of the shops in September or October, 1980 and in the circumstances of the case it cannot be said that the society who otherwise is admittedly the owner of the shops was illegally and forcibly dispossessed of the shops.

(16) Under the proviso to Sub-section (4) of Section 145 of the Code of Civil Procedure a Magistrate has to find out as to which of the party was forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under Sub-section (1). During the construction of the shops and after the construction was complete the Society in the eye of law would be in possession of the shops. As already observed, the civil court in the suits filed by the third party had prima facie found that Bhaiya Abdul Salam had no authority to induct tenants in the shops. If any person secretly and without any authority of the real owner occupies the property, in such a situation the law shall presume that the real owner has been illegally and forcibly dispossessed of the property. It is not necessary that force in fact is used to deprive the owner of the possession. See : B. M. Bhutani v. Miss Mani J. Desai, : 1969 CriLJ13 . On the facts noticed, in this case the Sub-Divisional Magistrate shall have to find out as to who was in possession within two months of the report of the police officer as laid down in the proviso to Sub-section (4).

(17) Mr. Bhalla next contended that before the commencement of the criminal proceedings the parties had gone to the civil court and in the face of the civil proceedings the starting of parallel proceedings under Section 145 of the Code of Criminal Procedure is an abuse of the process of law. Mr. Bhalla further contended that in case there was any apprehension of breach of peace the criminal court should have had recourse to Section 107 of the Code of Criminal Procedure. I do not agree in the above submissions of the counsel. The record shows that serious disputes between the parties over the possession of the shops had arisen before the third party filed suits in the civil courts and reports to the police regarding the dispute had been made. There is a report on the record showing that on 19th November, 1980 a case was registered against party No. 1 under Sections 147, 148, 149, 186, 353 and 395 of the Indian Penal Code. In the said report allegations were made that Bhaiya Abdul Salam and his associates had attacked the police and snatched the revolver of Sub-Inspector Mohinder Singh. The police had reported the matter to the Sub Divisional Magistrate on 11th December, 1980. The mere fact that party No. 3 had filed some suits before the order under Section 145(1) was passed would be no ground to stop or quash the proceedings started under Sections 145 and 146 of the Code of Criminal Procedure.

(18) Mr. Bhalla lastly contended that until a competent court determines as to which of the parties is entitled to the possession of the shops the party No. 3 may be allowed to remain in possession of the shops and a Receiver may be appointed to manage the property and receive the rents. In my opinion, in the circumstances of this case, the best course would be to keep the property under attachment until it is determined as to which of the parties is entitled to the possession of the shops.

(19) In the view I have taken of the whole case, a case is made out for an action under Sections 145 and 146 of the Code of Criminal Procedure. The learned Sub-Divisional Magistrate was of the view that there is imminent danger of breach of peace and he, therefore, had passed an order for the attachment of the shops under Section 146(1) of the Code of Criminal Procedure. There can be little doubt that the case is one of emergency. I am of the considered view that the order passed by the Sub-Divisional Magistrate under Section 146(1) should stay until a

competent court determines as to which of the parties is entitled to possess the shops. The third party shall also be a party to the proceedings under Section 145 of the Code of Criminal Procedure and they shall also file their written statements, affidavits, etc.

(20) The Supreme Court in the case Mathura Lal v. Bhanwar Lal and Ors , : 1980 CriLJ1 , has held that by making an order under Section 146 of the Code of Criminal Procedure the enquiry under Section 145 does not come to an end and that the Magistrate is to proceed with the enquiry as prescribed by Section 145 Sub-section (4). The Sub- Divisional Magistrate shall, accordingly, proceed with the enquiry in accordance with law. The learned Sub-Divisional Magistrate shall make an effort to dispose of the proceedings within four months.

(21) In the result. Criminal Revision Petition No. 31 of 1981 is allowed and the order of the Additional Sessions Judge dated 31 it January, 1981 is set aside. Criminal Miscellaneous (Main) No. 91 of 1981 is dismissed with the observation that party No. 3 shall also be a party to the proceedings under Sections 145 and 146 of the Code of Criminal Procedure.

(22) The records be sent back immediately to the concerned Sub-Divisional Magistrate.