

Rakesh Nanda Vs. the State and ors.

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Court : Delhi

Decided On : Oct-09-1987

Reported in : 1987(3)Crimes733; 33(1987)DLT288

Judge : Malik Sharief-ud-Din, J.

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

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 1033 of 1986

Appellant : Rakesh Nanda

Respondent : The State and ors.

Advocate for Pet/Ap. : P.P. Grover,; R.M. Tufail,; D.D. Thakur,;

Judgement :

Malik Sharief-Ud-Din, J.

(1) A dispute in respect of the possession of property No. 5229-31, consisting of a big hall, two rooms on the ground floor inside Sarai Hafiz Banna, Gandhi Market, Sadar Bazar, Delhi, between the parties was taken to the court of Shrimati Nutan Guba Biswas, S.D.M. Kotwali, Delhi under Sections 145 and 146 of the Code of Criminal Procedure. The application was moved on 8th August 1985 and on 9th August 1985 the property was sealed in pursuance of an order of attachment which was passed by the learned Magistrate on the ground that there is grave

apprehension of breach of peace and an emergent situation was in existence.

(2) Against this order a revision was preferred before the High Court on 20th August 1985 by the respondent herein and the order was quashed by this court on 30-10-1985 primarily on the point that the learned Magistrate had not expressed any satisfaction about the breach of peace and the civil court was seized of the matter. Thereafter, on 4-11-1985 the respondent makes an application to the Court of the S.D.M. for restoration of possession. In fact, both the parties make such application. On 5-11-1985 the learned Magistrate called a report from the police as to who was in possession on the date of attachment. On 7-11-1985 Anant Ram respondent made a detailed application indicating as to how he was in possession on the date of attachment and requesting the learned Magistrate to verify herself the facts mentioned in the application. The police made a report that it was not possible for it to state as to who was in possession on the date of attachment. Consequently, on 15th of November 1985 another application was made to the learned Magistrate to summon the report from the vigilance department. It appears that the petitioner had made a complaint against some S.I. and this enquiry was conducted in respect of that complaint. This enquiry was in fact directed into the conduct of the S.I. Mahinder Chandra who had enquired into the complaint under section 448 Indian Penal Code . wherein allegations of trespass of this property were made against the petitioner. The enquiry revealed that the petitioner had trespassed. The petitioner was arrested and the possession of the property was restored to the attorney of the respondent. On 9th of December 1985 the learned S.D.M. passed an order restoring the possession of the premises to the respondent and this order was complied with on 10th of December 1985. The learned Magistrate in her order has stated that she was not deciding the factum of possession but was merely obeying the orders of the High Court and on the basis of the report of the vigilance department of the Delhi Police she restored the possessions as in her view the local police reports and the submissions made by the parties before her were highly confusing and were of no assistance in determining as to who was in possession at the time of attachment. Against this order the petitioner preferred a revision petition before the court of sessions which was withdrawn after the counsel for the petitioner made a statement that since the S.D.M.'s order was an offshoot of the order passed by the

High Court the order will be challenged before the High Court only. It was thereafter that this petition under section 482 of the Code of Criminal Procedure was made.

(3) The crucial question that arises for determination is whether after the order under section 145(1) and 146, Cr. P.C. was quashed the Magistrate had the power to restore status quo ante; if so, what material could be taken into consideration by the Magistrate in determining the crucial question as to who was in possession at the time of attachment. The learned counsel for the parties are agreed that the Magistrate has the power to restore possession to the party from whom the possession was taken at the time of attachment. Mr. Grover urges that in doing so the Magistrate could not base its judgment on the secret report of the vigilance department, particularly in view of the fact that this report has been made behind the back of the petitioner and without giving him a chance of hearing. Mr.D.D.Thakur is of the view that this is a public document and could be made use of. The other aspect of the case is that in case the material available at the time of attachment is of no assistance to determine as to who was in possession at the time of attachment and from whose possession the property was attached what should the Magistrate in such a situation do. Mr.P.P. Grover contends that in such a situation the Magistrate ought to keep the property under attachment and ask the parties to go to a civil court or least the Magistrate could do was to retain the property in trust and ask the parties to get the dispute resolved in a civil court and thereafter act in pursuance of a decree of the civil court. Mr. Grover, placing reliance on Prem Chand v. Union of India, (1981) 19 DLT 118, states that vague allegations and secret hearings are gross violations of Articles 14,19 and 21 of the Constitution. Mr. Grover has also placed reliance on Smt. Kaniz Fatima Bibi v. State of Uttar Pradesh and others, : AIR1963 All148 , in support of his contention that if the Magistrate is unable to find from the material existing at the time of the attachment as to who was in possession he should not pass any orders.

(4) In my view, the present case, however, is distinguishable. After the proceedings under section 145 were quashed by this court the order of attachment also stood quashed. The Magistrate essentially derives his jurisdiction to attach only after an order under sub-section (1) of section 145 Cr. P.C. is passed and

once the order is quashed the attachment order is not in existence and the property will have to be restored to the person from whom the possession was taken at the time of attachment. Under section 146 there are two situations in which the attachment could be made. The Magistrate is empowered to attach the property simultaneously with the order under sub-section (1) of section 145, Cr. P.C. if he finds the case to be of emergent nature and the breach of peace can only be prevented by attachment of the property. The other situation in which the property could be attached is if at the time of final disposal of the proceedings under section 145 the Magistrate is unable to decide as to which of the parties was in possession, in that event he is also empowered to attach the property and ask the parties to have their dispute regarding the possession resolved by a civil court. This the Magistrate is entitled to do in either of the situations if he is unable to determine as to which party was in possession. Here, in this case the situation is altogether different inasmuch as the proceedings have been quashed and the order of attachment is no more in existence. There is no law empowering the Magistrate to retain the property either in trust or keep it under attachment. He has, therefore, necessarily to pass an order and restore the possession to the party from whom the possession was taken at the time of attachment. In such a situation if the material available at the time of attachment is not sufficient to determine as to from whom the possession was taken it cannot be argued that the Magistrate is not entitled to collect material and to find out who was entitled to restoration of possession. That the Magistrate should pass no orders is also not logical. The jurisdiction to attach under section 146, Cr.P.C., is only vested in the Magistrate by virtue of assumption of jurisdiction under section 145 Cr.P.C. If the very basis for attachment is quashed the Magistrate has no further power to keep the property under attachment and must undo the mischief by restoring the possession to the person from whom the possession was taken. In a case such as this the Magistrate had to pass such an order on the basis of reliable material in the absence of any record as to from whom the possession was taken at the time of attachment.

(5) The next contention urged by Mr. Grover is that there is an order of status quo against the respondent passed by a civil court and that it was not legal for the learned Magistrate to order restoration of possession to the respondent. Reliance

in this regard is placed by Mr. Grover on Sajjan Singh v. Sajjan Singh, unreported judgments (Supreme Court) li (1970) page 75. Mr. Thakur has met this argument by submitting that the order of status quo is an innocuous order and that it was the duty of the petitioner to get this clarified and explained before he can take advantage of this contention.

(6) Mr. Grover adverting to the impugned order has vehemently urged that the secret report of the vigilance cell is no evidence and the Magistrate has committed an illegality by passing an order based on this document. This he has stated in the alternative as in his view the only material that could be used for determining as to who was in possession was the material which was in existence at the time of attachment. It would be seen that this report of the vigilance department came into existence on the basis of a complaint made by the petitioner against a police officer. The respondent was not a party to it and in this report there is a detailed narration as to how the vigilance department came to the conclusion that the respondent was in possession. The Magistrate had to base the order on some material. This document in her view was reliable enough to determine as to who was in possession. In this view, therefore, it is not a case where the impugned order was passed by the Magistrate without any basis and justification. It is an order which is in fact based on material and the least that can be said is that it has not resulted in failure of justice particularly in view of the following circumstances.

(7) It was the petitioner who went to the court of the learned Magistrate with proceedings under section 145 Cr.P.C. and got the property attached. Normally, no person in actual physical possession would ask for his dispossession by way of attachment. The record shows that the petitioner never made a grievance thereafter against the order of attachment. The petitioner had filed a suit for injunction on the basis of rent deed of 1st November 1984 in which he asked for an order of status quo. In that suit the respondent on making an application was given permission by the court to repair the premises. In normal course, if the petitioner had been dispossessed he would be first to make a grievance about it. In the present case, it was in fact the respondent who felt aggrieved of attachment and got the entire proceedings quashed by this court. The petitioner admittedly had also filed a suit under section 6 of the Specific Relief Act in respect of the

same property which was admittedly dismissed. The petitioner has placed before me the record that this property was in fact being used by him as a Sarai and he has a license for running the same. Mr. Grover states that this the court cannot take into account at this stage. I am not in agreement with Mr. Grover for the simple reason that this court will only interfere under section 482 Cr.P.C. at this stage in case there has been a failure of justice. The above tabulated circumstances clearly go to indicate that there has been no failure of justice. In any case, the parties are contesting their respective claims regarding possession in a civil court. Keeping the peculiar circumstances of this case in view I am of the opinion that the impugned order has not occasioned any failure of justice and this court would not like to interfere in such matters particularly in the light of the fact that the question as to who is entitled to possession in being contested by the parties before a civil court. In the light of these circumstances I am of the view that there is hardly any scope for this court to interfere in this matter. The petition is dismissed.