

Nahar Singh Vs. the State

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Court : Rajasthan

Decided On : May-10-1951

Reported in : AIR1951Raj156

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 107, 112, 113, 118, 145, 145(6), 145(10) and 146

Appeal No. : Criminal Revn. No. 14 of 1951

Appellant : Nahar Singh

Respondent : The State

Advocate for Def. : Mansha Ram, Govt. Adv.

Disposition : Reference accepted

Judgement :

1. This revision has arisen out of a reference by the Ses. J. of Tonk in a revision before him out of proceedings under Sections 145 and 107, Criminal P.C. When the matter came up before the learned single Judge of this Court, he referred the following three points for decision by a Division Bench:-

(1) 'Whether a Magistrate was competent to initiate proceedings under Sections 107 & 145 Cr.P.C. simultaneously;

(2) In case the Magistrate finds after enquiry under Section 145 Cr.P.C. that the property in dispute was in joint possession of the parties then (a) what should be the nature of the order if one would be passed under Section 145 Cr.P.C. or (b) should the Magistrate proceed to pass an order under Section 146 Cr.P.C., &

(3) In case the finding of the Magistrate was under Clause (2) above, & he apprehended a breach of peace between the parties while each attempted to oust the other, was he competent to ask for security to keep the peace under Section 107 Cr.P.C. where (a) the proceedings were initiated under Section 145 & 107 Cr.P.C. & (b) where the proceedings were taken exclusively under Section 145 Cr.P.C.

2. A brief reference to the facts of this case may be given at the outset. The case started on two reports of the police of Thana Kili - one under Section 145 & the other under Section 107 - as the dispute between two parties was about certain immovable property. The report under Section 107 was against both parties. The Magistrate who tried the case instead of taking separate proceedings - & there should have been three proceedings, namely, one under Section 145 & another under Section 107 against one party & the third under Section 107 against the second party - mixed up everything in one proceeding. It appears that the learned Magistrate gave notice to the parties under Section 145 & also asked them to show cause why security should not be taken from them. But it seems that the notice under Section 112. Criminal P.C. was not read over to the parties when they appeared in court. The case related to two Baras. So far as one Bara is concerned, the Magistrate found in favour of one party & passed an order under Section 145. So far as the second Bara is concerned, the Magistrate found that both parties were jointly in possession & directed them to get their rights determined by a civil Court within three months. He also held that there was a likelihood of a breach of the peace &, therefore, ordered the parties to execute bonds to keep the peace for a period of three months.

3. We now come immediately to the three questions that have been put to us for reply. The first question is whether a Magistrate is competent to initiate proceedings under Sections 107 & 145, Cr.P.C. simultaneously. Whatever may

have been the uncertainty of the law in this connection, the matter is set at rest by the introduction of Sub-section (10) in Section 145 by the legislature by the Criminal P.C. (Amendment) Act 1923 (XVIII (18) of 1923). This Sub-section reads as follows:

'Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107.'

This was in accordance with the view taken by a five Judges' Bench of the Calcutta High Court in 'Emperor v. Abbas', 39 Cal. 150, where it was held:

'There is no conflict between Sections 107 & 145, Criminal P.C. & the fact that there is a dispute concerning land, likely to cause a breach of the peace, does not deprive a Magistrate of jurisdiction under Section 107, Criminal P.C. where he is informed that any person is likely to commit a breach of the peace or disturb public tranquillity, or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity.'

It is, therefore, within the discretion of a Magistrate to proceed simultaneously or not under Sections 145 & 107, Criminal P.C. in cases in which there is a dispute between two parties about immovable property. As pointed out in the Calcutta case, referred to above, it will depend upon the circumstances of each case whether action should be taken simultaneously or not. We should, however, make it clear that even where action is taken simultaneously, there should be two separate proceedings - one under Section 145 & the other under Section 107 Cr.P.C. & the procedure adopted by the Magistrate in this case of having one proceeding was not right. Our answer, therefore, to this question is that a Magistrate is competent to initiate proceedings under Sections 107 & 145, Cr.P.C. simultaneously in suitable cases.

4. We now turn to the second question. In this question it is presumed that the Magistrate after enquiry under Section 145 finds that the property in dispute is in the joint possession of the parties. The facts in the present case to which we have referred also show that one of the findings of the Magistrate is that one of the Baras is in the joint possession of the parties. We are then asked to reply what

order should be passed by a Magistrate in such circumstances. The question suggests two possibilities: (1) Whether the order should be under Section 145, Cr.P.C. & if so what, or (2) Whether the order should be under Section 146, Criminal P.C. It is not necessary for us to quote authorities so far as the first part of the question is concerned for all the High Courts are agreed that where a court comes to the conclusion that the parties before it are in joint possession of the property in dispute on the date of the order no order under Section 145 in favour of any party declaring him to be entitled to possession until evicted in due course of law & forbidding all disturbances of such possession until such eviction, can be passed under Sub-section (6) of Section 145 Cr.P.C. The question then arises is whether an order should be passed dismissing the case under Section 145 or the Magistrate should proceed under Section 146 Sub-section (1), Criminal P.C. That Sub-section reads as follows:

'If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof.'

Under that Sub-section, a Magistrate can attach the property in either of two cases (1) when he finds that none of the parties before him is in such possession or (2) when he is unable to decide which of the parties before him is in possession of the subject-matter of dispute. But we must make it clear that if, while finding that none of the parties was in possession of the property, the Magistrate also comes to a conclusion that a third person who is no party to the proceeding is in actual possession, he should not disturb the possession of that third person by attaching the property. The question, however, still remains whether in a case where the Magistrate is of the opinion that both the Parties before him are in joint possession of the property, it can be said that he has decided that none of the parties was in such possession or is unable to satisfy himself as to which of them was in possession. It is clear that where the Magistrate holds that both parties are in joint possession, it is not a case where he can be said to have decided that none of them were in possession. Is it then a case in which it can be said that he is unable to satisfy himself as to which of them was in possession? The answer to our mind

is obviously in the negative. Where the Magistrate holds that both parties are in possession, it cannot, in our opinion, be said that he was unable to satisfy himself as to which of the parties was in possession. There is only one case which we have been able to find which takes a different view namely 'Chiranji Lal v. Mahadeo Prasad', A.I.R. (19) 1932 All. 683. In that case Bennet J. held that if there were two joint owners in possession jointly it was a case where the Magistrate could not decide which of them was in exclusive possession. He, therefore, went on to hold that in such a case Section 146 would apply. With all respects, we are unable to agree with this view. Therefore, our answer to question 2 (a) is that where a Magistrate finds after enquiry that the parties were in joint actual possession of the property in dispute, he should drop the proceedings under Section 145 Cr.P.C. Our answer to question 2 (b) is that in such a case, the Magistrate cannot proceed to pass an order under Section 146 Cr.P.C.

5. We now come to the third question. This question also pre-supposes that the Magistrate has come to a finding that the property was in the joint actual possession of the parties, The question further pre-supposes that the Magistrate apprehends a breach of the peace between the parties on account of this. We are then asked whether the Magistrate is competent to ask for security to keep the peace under Section 107 Cr.P.C in two circumstances namely, (a) where the proceedings were initiated under Sections 145 & 107, Criminal P.C. and (b) where the proceedings were taken exclusively under Section 145 Cr.P.C. We have already indicated that there should not be a mixed proceeding both under Sections 145 & 107. Properly speaking, proceedings under Sections 145 & 107 should be separate. If they are separate, the Magistrate can drop the proceedings under Section 145 & pass such order as he thinks fit in the proceedings under Section 107. If, however, the Magistrate has taken the irregular course of having mixed up proceedings under Section 145 & 107 Cr.P.C. he can drop those proceedings & by a separate order commence proceedings under Section 107. Where, however, proceedings have been taken exclusively under Section 145 Cr.P.C., the Magistrate cannot pass an order under Section 107 Cr.P.C. in those very proceedings & they must be dropped but as stated above it is open to him to start fresh proceedings by order under Section 107 Cr.P.C., if he is satisfied that such action is necessary & to proceed according to law. This is our answer to question

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6. The learned Judge who referred these points has also referred the reference by the Ses. J. to us for decision. The Ses. J. has said that the order of the Magistrate relating to Bara No. 2 to the effect that the parties would remain in joint possession of that Bara should be set aside as no such order can be passed under Section 145 Cr.P.C. We accept the reference so far as this is concerned because the law is well settled that an order under Section 145 can only be passed in favour of a party in exclusive possession of the property & no declaration of joint possession can be made under Section 145 Cr.P.C.

7. The next point referred by the Ses. J. is that the Magistrate could not bind over the parties under Section 107, Criminal P.C. when he practically took no proceedings under that Section. We are of opinion that in this view also the Ses. J. is right because we do not find even an order under Section 112 Cr.P.C. on this record, nor do we find that any compliance was made with the provisions of Section 113. The proceedings, therefore, culminating in the order under Section 118 read with Section 107, were, in our opinion, completely irregular & we, therefore, set aside the order under Section 107 Cr.P.C. passed by the Magistrate. The reference is therefore accepted.

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