

Tikuda Vs. State and ors.

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Court : Rajasthan

Decided On : May-09-1961

Reported in : AIR1961Raj216

Judge : J.S. Ranawat,; D.S. Dave and; Jagat Narayan, JJ.

Acts : [Code of Criminal Procedure \(CrPC\)](#) , , 1898 - Sections 145, 145(1), 145(4) and 146(1)

Appeal No. : Criminal Revn. No. 367 of 1959

Appellant : Tikuda

Respondent : State and ors.

Advocate for Def. : Raj Narain, Asst. Govt. Adv. and; D.K. Soral, Adv.

Advocate for Pet/Ap. : P.N. Dutta, Adv. for Tikuda, Adv.

Judgement :

Dave, J.

1. This is a reference arising out of an application in revision by one Tikuda against the order of the Additional Sessions judge, Jaipur District, dated the 15th Of October, 1959.

2. The facts giving rise to it are that on the 24th of June, 1959, the petitioner presented an application to the Superintendent of Police, Amber, requesting him to take proceedings against Ghasi Balai and 6 others under Section 107 of the Code of Criminal Procedure. The Superintendent of Police forwarded that application to the Station House Officer, Police Station, Govindgarh. After investigation, the Station House Officer, Govindgarh, presented a report in the court of the Sub-Divisional Magistrate, Amber, requesting him to take proceedings against Ghasi and 6 others under Section 107 of the Code of Criminal Procedure.

It was stated in the said report that a field (Khasra No. 24), appertaining to what was known as Kothi Nadiawali, was in the possession and cultivation of the petitioner Tikuda since Samvat year 2009, that on the 23rd of June, 1959, the petitioner had to put in a few cart-loads of manure in the said field, that the non-petitioners Ghasi and his six companions went to the said field armed with lathies and restrained the petitioner from manuring and cultivating the field by show of force.

It was, therefore, prayed that the seven non-petitioners should be bound down to keep peace under Section 107 of the Code of Criminal Procedure. It was further prayed that immediate measures were necessary for the prevention of breach of the peace and, therefore, pending the completion of the inquiry, the non-petitioners should be directed to execute bonds for keeping the peace under Section 117 of the Criminal Procedure Code.

On receipt of this report on the 29th of June, 1959, the Sub-Divisional Magistrate passed an order under Section 112 of the Criminal Procedure Code and directed notices to be issued to the non-petitioners to appear on the 7th of July, 1959, and show cause why they should not be ordered to execute bonds in the amount of Rs. 500/- each with one surety for the like amount for keeping peace for a period of one year.

On the 7th of July, 1959, the petitioner presented another application to the Magistrate requesting him again to pass an order under Section 117(3) of the Code of Criminal Procedure. The case was, however, adjourned five times for one reason or the other which need not be narrated here. Eventually when the case

came up before the Magistrate on the 27th of July, 1959, the Prosecuting Sub-Inspector and counsel for the petitioner both pressed their request for taking immediate measures under Section 117(3) of the Code of Criminal Procedure.

Counsel for the non-petitioners contested that application and suggested that the court should proceed under Section 145 of the Criminal Procedure Code, that the property should be attached under section 146 of the Code of Criminal Procedure and the case should be referred to the revenue court, where a suit for declaration and permanent injunction in respect of the disputed property filed by the petitioner was already pending.

This suggestion found favour with the Magistrate and he converted the previous proceedings under Section 107 to those under Section 145 of the Code of Criminal Procedure. Then, relying on *Bugga Natha v. Moona Nanda*, ILR (1959) 9 Raj 381: (AIR 1959 Raj 153 (1)) he passed an order for attaching the property in dispute, appointed the Tehsildar as-a receiver and referred the case under Section 146 of the Code of Criminal Procedure to the revenue-court where a suit for declaration and permanent injunction was pending.

Aggrieved by this order, the petitioner filed a revision application in the court of the Sessions Judge, Jaipur District. It was heard by the Additional Sessions Judge, Jaipur District, and dismissed-by him on the 15th of October, 1959. The petitioner then filed the present revision application-in this Court. It came for hearing before a learned Single Judge on the 25th of January, 1961.

Learned Counsel for the petitioner raised twofold contentions on that date. It was urged, in the first instance, that the provisions of Section 146(1) could be applicable only after an inquiry under Section 145 of the Criminal Procedure Code, if the Magistrate was of the opinion that none of the parties was in possession of the disputed property on the date of the preliminary order or he was unable to decide as to which of the parties was in possession of the said property on that date.

It was urged that in the present case the par-ties were not called upon to file their written statements, affidavits or documents, that no inquiry as contemplated by

Section 145 of the Criminal Procedure Code was ever made and, therefore, the Magistrate had committed a mistake in proceeding under section 148(1), Criminal Procedure Code. The second contention was that under Section 146(1) the reference could be made only to a civil court and not to a revenue court and therefore the reference was illegal.

The learned Judge thought that although the first contention was covered by a decision of a Division Bench of this Court in Rugga's case, ILR (1959) 9 Raj 381: (AIR 1959 Raj 153(1)), there was a difference of opinion about the second contention in Ghisa v. State, ILR (1959) 9 Raj 673 and State v. Kesva Sen, ILR (1960) 10 Raj 945: (AIR 1960 Raj 279). He, therefore, considered it proper to refer the matter to a Division Bench.

The case then came for decision before a Division Bench on the 22nd of February, 1961. It was held by the Division Bench that the difference of views expressed by two learned Single Judges in ILR (1959) 9 Raj 673 and ILR (1960) 10 Raj 945: (AIR 1960 Raj 279) was set at rest by a Division Bench decision of this Court in Ramratan v. Madho, Criminal Ref. No. 286 of 1960 decided on 19th of January, 1961.

The Division Bench approved the view taken in Ghisa's case, ILR (1959) 9 Raj 673 and dissented from the view taken in ILR (1960) 10 Raj 945: (AIR 1960 Raj 279). In other words, it was held in Ramratan's case, referred above that the term 'civil court' appearing in Section 146(1), Criminal Procedure Code, did not include a revenue court.

The Court, however, found it difficult to agree with the view taken in Rugga's case, ILR (1959) 9 Raj 381: (AIR 1959 Raj 153 (1)) on the first point and therefore it considered it proper to refer the matter to a Full Bench. This is how the case has come before us.

3. Now the first question which arises for determination by this Court is, whether in a case where a dispute about a certain immovable property is pending before a revenue court, if an application under Section 145, Criminal Procedure Code, is presented by one of the parties before a Magistrate, he should not call upon the

parties to file their written statements or affidavits in support of their respective possession over the disputed property and whether he should not decide the question as to which of them was in possession of the disputed property on the date of the preliminary order and whether the proper course in such a case for the Magistrate is just to pass an order of attachment under Section 146(1), Criminal Procedure Code, and refer the matter to the revenue court.

In Rugga's case, ILR (1959) 9 Raj 381 : (AIR 1959 Raj 153(1)) a suit for permanent injunction was brought by Rugga in the court of Assistant Collector, Nawa, restraining Ratna and others from interfering with his possession over certain fields. The Assistant Collector granted a temporary injunction in favour of Rugga and also confirmed it. Ratna filed an appeal to the Additional Commissioner, who stayed the operation of the temporary injunction.

It may be mentioned here that eventually the Additional Commissioner dismissed the appeal and the same order was upheld by the Board of Revenue, but during the period intervening between the vacation of the temporary injunction: and the disposal of the appeal by the Additional Commissioner Ratna sought to dispossess Rugga and therefore Rugga had to file an application under Section 145, Criminal Procedure Code, in the court of the Magistrate. This application was decided by the Magistrate against him and therefore he filed a criminal revision.

When the case came before a division bench of this Court it was held that since a suit in the revenue court was already proceeding about the field in dispute, the Magistrate should not have proceeded to enquire into the factum of possession and that he should have proceeded after attaching the field as provided in the latter part of Section 146(1) of the Code of Criminal Procedure, namely, that he should have referred the matter to the revenue court for decision as a suit was already pending there in which both the questions of title and of possession were to be decided. The Magistrate was directed to attach the field again, and to appoint a receiver till the revenue suit was decided.

4. We have given our earnest consideration to the question set out above and the view expressed in Rugga's case, ILR (1959) 9 Raj 381; (AIR 1959 Raj 153(1)) and which has been reproduced above. It may be observed that if a dispute about a

certain immovable property is pending before a revenue or a civil court and if one of the parties to that suit moves a Magistrate to take proceedings under section 145 of the Criminal Procedure Code about the same immovable property which is involved in the suit, the Magistrate should not lightly proceed in the matter.

He should weigh and consider whether there is a real apprehension of the breach of peace and even if there is such an apprehension, whether the same cannot be averted by proceeding under Section 107, Criminal Procedure Code. For instance, in a case like that of Rugga where a suit for declaration and injunction is pending in a revenue court or if a similar case is pending in a Civil Court, and if a temporary injunction against one party has already been given by that court, then it is evident that the said court has already considered that party in possession of the immovable property in whose favour the injunction has been granted and if in spite of that temporary injunction the other party is bent upon dispossessing the first party and a breach of peace is imminent, then the proper course is to bind down the party which is not in possession of the property, to keep peace for the requisite period.

This does not, however, mean that the jurisdiction of the Magistrate to proceed under Section 145 of the Code of Criminal Procedure is ousted simply because a suit about the same immovable property is already pending in a revenue or civil Court. What we only mean to say is, that in such cases the Magistrate must proceed with care and caution, after ascertaining full facts from the party which moves the application, under Section 145, Criminal Procedure Code.

There may be cases where a Magistrate may not come to know even by the time he passes a preliminary order under Section 145 whether a case about the same property is pending in some other court. Section 145 of the Code of Criminal Procedure lays down that whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction, he should make an order in writing.

This order is called a preliminary order. The law requires that in this preliminary order the Magistrate should set out the grounds of his being satisfied about the existence of the dispute which is likely to cause the breach of the peace and then he should require the parties concerned in such dispute to attend his court in person or by pleader within a time to be fixed by him.

He should further require the parties to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Lastly, he should ask them in the same order to put in such documents or to adduce by putting in affidavits the evidence of such persons as they rely upon in support of their claims. This order should be served in the manner provided by the Code of Criminal Procedure for the service of summonses and a copy thereof should also be affixed to some conspicuous place at or near the subject of dispute.

Sub-section (4) of Section 145 then enjoins upon the Magistrate that he should without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, which are put in by the parties. He should hear the parties and conclude the inquiry so far as possible within a period of two months from the date of the appearance of the parties before him.

After perusing the statements, documents, affidavits etc. put in by the parties, he should decide the question whether any or which of the parties was on the date of the preliminary order in possession of the property in dispute.

5. The second proviso to Sub-section (4) of Section 145 Criminal Procedure Code, lays down that if it appears to the Magistrate that any party has within 2 months next before the date of the preliminary order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession on the date of the preliminary order.

It is thus crystal clear from the provisions of Sub-section (4), that after the Magistrate has drawn up the preliminary order, it is his bounden duty to peruse the written statements of both the parties and also the affidavits and other evidence which has come on the record. He cannot proceed under Section 146(1), Criminal

Procedure Code, unless he is of opinion that none of the parties was in possession of the disputed property on the date of the preliminary order or unless he is unable to decide as to which of them was in such possession of the subject of dispute on the date of the preliminary order.

This is apparent from the opening sentence of Section 146 itself. We are, therefore, of the opinion that the view taken in Rugga's case, ILR (1959) 9 Raj 381: (AIR 1959 Raj 153(1)) to the effect that the Magistrate need not peruse the written statements or affidavits or documents produced before him, that he should not decide the question of possession of the parties on the date of the preliminary order and that he should at once proceed to attach the property in dispute and refer the matter to the revenue or civil court is not technically correct,

It may be pointed out that there are only two provisions -- one in Section 145(4) and another in Section 146(1) of the Code of Criminal Procedure, which empower the Magistrate to attach the property which is the subject of dispute. The third proviso to subsection (4) of Section 145 lays down that if the Magistrate considers the case as one of emergency, he may at any time attach the subject of dispute pending his decision under Section 145.

It is obvious that this authority has been given to the Magistrate to be used only in cases of emergency and not as a matter of routine. It is also clear that this attachment does not absolve him from his duty to decide the question as to which of the contending parties was in possession of the disputed property on the date of the preliminary order or whether anyone of them was forcibly and wrongfully dispossessed within two months next before the date of the preliminary order.

It would, therefore, be wrong on his part if he uses this provision in the absence of an emergency, and attaches the property as a matter of routine and then refers the matter to a civil court without deciding the matter as required by subsection (4) of Section 145, Criminal Procedure Code.

6. The next power of attachment is given by Sub-section (1) of Section 146, Criminal Procedure Code. Even a cursory glance at the language of this subsection will show that the Magistrate is empowered to attach the disputed

immoveable property under this section only after his applying mind to the evidence on record, he comes to the conclusion that none of the parties was in possession of the disputed property on the date of the preliminary order or if he is unable to decide on the basis of the evidence before him as to which of the parties was in possession of the subject of dispute on the date of the preliminary order.

It is only in these two cases that the law empowers him to attach the property, draw up a statement of the facts of the case and then to forward the record of the proceedings to a civil court of competent jurisdiction to decide the question whether any or which of the parties was in possession of the subject of dispute on the date of the order as explained in Sub-section (4) of Section 145. We, therefore, hold that the view taken in Rugga's case, ILR (1959) 9 Raj 381: (AIR 1959 Raj 153(1)) was not in accordance with law and the Magistrate was misled thereby.

7. In the present case, the proceedings before the Magistrate were initiated under Section 107, Criminal Procedure Code. The police report was to the effect that the petitioner was in possession of the disputed field from Samvat Year 2009 onwards, that the non-petitioners were trying to dispossess him by the use of criminal force and that they were going to commit the breach of peace.

The Magistrate had passed an order under section 112, Criminal Procedure Code, calling upon the non-petitioners to show cause Why they should not be bound to keep peace for one year. Under these circumstances, he should have proceeded to complete this inquiry as required by Section 117, Criminal Procedure Code. He should not have converted the proceedings from Section 107 to Section 145, Criminal Procedure Code, and attached the property simply because this suggestion was put forward by the opposite party.

If he thought that there were circumstances for converting the proceedings from Section 107 to Section 145, Criminal Procedure Code, he should have stated those grounds in his preliminary order. Then, if he wanted to proceed under Section 145, he should have directed both the parties to put in their written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

He should have gone into the evidence after it was put on record and then decided the matter under Sub-section (4) of Section 145. He ought not to have proceeded to attach the property without giving the grounds of emergency. At any rate, it was wrong on his part to ignore all the provisions of Section 145 and at once proceed under Section 146 (1), Criminal Procedure Code. The order of attachment under Section 146(1) and a reference to the revenue court were thus obviously illegal and cannot be supported.

8. The next point for consideration is whether the term 'civil court' appearing in Section 146(1), Criminal Procedure Code, also includes a revenue court. In ILR (1960) 10 Raj 945: (AIR 1960 Raj 279) it was held by a learned Single Judge that the term 'civil court' included a revenue court. His attention was, however, not drawn to an earlier decision in Ghisa's case, ILR (1959) 9 Raj 673 given by another learned Judge sitting singly.

In Ghisa's case, ILR (1959) 9 Raj 673 it was held that the reference contemplated in Section 146(1) was a reference to a civil court and not to a revenue court. It was observed that this position was quite clear from the further provision made in Section 146(1-E) wherein it was laid down that an order under the earlier part of the section shall be subject to any subsequent decision of a court of competent jurisdiction. If a dispute about certain immoveable property is exclusively triable by a revenue court under a revenue law the matter may be agitated before that revenue court under Section 146(1-E).

The decision of the civil court under Section 146(1A) and that of the Magistrate based thereon under subsection 146(1B) would be subject to a decision of a court of competent jurisdiction according to Subsection 146(1E) and thus a revenue court may come into the picture under Section 146(1-E), but the term 'civil court' appearing in Section 146(1) does not include a revenue court. This position has been made quite clear in a division bench decision of this Court in Ramaratan's case, Criminal Ref. No. 286 of 1960 (Raj) referred above and we need not repeat the reasons given therein, since we agree with the view taken in that case.

9. The reference is answered accordingly. The revision application is allowed. The order of the Magistrate dated the 27th of July, 1959, is set aside. We also set aside

his earlier order converting the proceedings under Section 107, Criminal Procedure Code, into proceedings under Section 145, Criminal Procedure Code, and direct him to continue the proceedings under Section 107, Criminal Procedure Code, unless he comes to the conclusion that proceedings under Section 145, Criminal Procedure Code, are necessary. In the latter case he should give his reasons, record a proper preliminary order and then proceed in the matter according to law.

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