

Rudi and ors. Vs. Ram Kumar

Rudi and ors. Vs. Ram Kumar

SooperKanoon Citation : sooperkanoon.com/755747

Court : Rajasthan

Decided On : Sep-10-1954

Reported in : AIR1955Raj75; 1955CriLJ734

Judge : Sharma, J.

Appellant : Rudi and ors.

Respondent : Ram Kumar

Judgement :

ORDER

Sharma, J.

1. This is a reference by the learned District Magistrate, Alwar recommending that the order of the learned Extra Magistrate First Class, Alwar, dated 21-11-1953 attaching the well in dispute be set aside. When the case was pending in revision in the court of the learned District Magistrate, an application was made on behalf of Rudia and other (hereinafter to be referred to as the applicants) that the order of attachment be not given effect to pending the application for revision made by him.

This application was rejected by the learned District Magistrate on 30-12-1953 and against that order too, the applicants have come in revision to this Court. This revision is No. 21 of 1954. As the said revision is an off shoot of the revision in which reference has been made, I have heard both the cases together and they

are being disposed of by this single judgment.

2. Taking up the reference first, it was argued by Mr. G. L. Yadav supporting the reference that the case was Under Section 147, Criminal P. C., and in such a case an order of attachment cannot be made. It was argued that provisions of Section 145 have been made applicable to a case Under Section 147 only as far as may be.

As there is no dispute about possession of property in proceedings Under Section 147 and no order can finally be made with respect to possession in such a case, no order Under Section 145(4) for interim attachment can be made. Reliance has been placed upon the cases of - 'Chelliah Filial v. Ramiah Thevar' AIR 1942 Mad 77 (A) and - 'Mathai Jacob v. Ravivarman Thirupad' AIR 1953 Trav-C 202 (B). It was argued that this order of attachment is being interpreted by the learned Magistrate as meaning that the applicants have been restrained from taking water from the well pending the proceedings Under Section 147, Criminal P. C, and this is creating unnecessary hardship to the applicants.

3. On behalf of Ram Kumar (hereinafter to be referred to as the opposite party), it has been argued by Mr. R. A. Gupta that the proceedings in the Magistrate's court were not only Under Section 147, Criminal P. C, but also Under Section 145, Criminal P. C, and therefore, the learned Magistrate was perfectly entitled to order attachment of the property.

It was further argued that even if the proceedings be taken to be Under Section 147, Criminal P. C, the provisions of Section 145 have been made applicable to proceedings Under Section 147 and as there is a provision for interim attachment Under Section 145 (4), such attachment can be made also Under Section 147, Criminal P. C.

Reliance was placed upon a ruling of Calcutta High Court in the case of - 'Khoda Bux v. Moza-harul Haque' AIR 1940 Cal 330 (C). It was argued that if the applicants Continued taking water during the pendency of the proceedings Under Section 147 there was likelihood of the breach of the peace and therefore it was necessary that an order of attachment should be made.

4. I have considered the arguments of both the learned Counsel. I am perfectly clear in my mind on a perusal of the learned Magistrate's preliminary order dated 15-7-1953 that the order is Under Section 147 and not Under Section 145. In the heading, it is clearly mentioned that the order is Under Section 147 and from the language used in the body also, it is quite clear that the proceedings are being taken Under Section 147, Criminal p. C, and the parties have been required not to file written statements of their respective claims as respects the fact of actual possession of the subject of dispute which is required by S. X45 (1).

The parties In this case have been ordered to put in their written statements with respect to the alleged right of user of water from the well in dispute. This is clearly covered by the provisions of Section 147 (1). learned Counsel for the opposite party argued that in the notice which has been issued, Section 145, has also been mentioned. Assuming that it has been done, it is only a clerical mistake because so far as the order of the Magistrate is concerned, it is clearly Under Section 147 only and not Under Section 145.

5. The next question that comes up is whether in proceedings Under Section 147 an order of interim attachment of the property about the use of water of which there is a dispute between the parties, can be made. There is no clear provision about this in Section 147. learned Counsel for the opposite party has however, relied upon the use of the words 'shall, thereafter, inquire into the matter in the manner provided Under Section 145 and the provisions of that section shall, as far as may be applicable in the case of such inquiry'.

It has been argued that as provisions of Section 145 have been made applicable to a case Under Section 147, the provisions of Section 145 (4) which provides for interim attachment are also applicable to a case under &. 147.

I am not prepared to agree to this contention of the learned Counsel. The legislature has advisedly used the words 'as far as may be' and this clearly means that provisions of Section 145 cannot be applied to proceedings Under Section 147 in their entirety. They can be only used, as far as they are applicable.

In a case Under Section 145 dispute is with respect to actual possession of the property. It has therefore, been provided that written statements will be regarding actual possession of the subject of dispute. It has also been provided In Sub-section 6 that if the Magistrate decides that one of the parties was in possession of the subject of dispute at a particular time, he would be put in the possession of the property and the other party would be forbidden any disturbance of such possession until the unsuccessful party gets an order of a civil court regarding the eviction of the successful party in Section 145 case.

Now the above mentioned provisions cannot certainly apply to a case Under Section 147 & therefore words 'as far as may be' have been used. As there a dispute about the actual possession in a case Under Section 145, a provision has been made in Sub-section 4 for interim attachment of the property in cases of emergency. As in a case Under Section 147 there is no dispute with respect to possession, the provisions in Section 145 regarding interim attachment cannot be applied to such proceedings.

learned Counsel for the applicant has drawn my attention to the ruling of Madras High Court in the case of - 'Chelliah Pillai v. Ramiah The-var' (A), in order to show that provisions of Section 146 regarding attachment are not applicable to proceedings Under Section 147. It is true that this ruling cannot directly apply to the facts of the present case, but the reasoning does apply. It has been held in that case that Section 146 does not apply to a case Under Section 147 for an order such as envisaged by Section 146 can be passed only where there-is a dispute with regard to immovable property that can be dealt with Under Sections 145 and 146, Criminal P. C.

The interim order Under Section 147 regarding transfer of possession by attachment too, can be made only when there is dispute about actual possession of it and not with respect to any right by way of easement or otherwise in the said property.

learned Counsel for the applicants has produced a ruling of Travancore Cochin High Court which has a direct bearing upon the point now before me. In that case proceedings were Under Section 147 and the Magistrate attached the property

and appointed a receiver and a direction was also made permitting the second party to exercise a right of fishing in the disputed property. It was held that there was no provision in Section 147 regarding such permission to exercise the right pending the proceedings Under Section 147 or to order attachment of the property and appoint a receiver.

Learned Judge who decided the case, considered the authorities which were placed before him, and if I may say so with respect, gave a very careful decision. It was held that

the matter to be inquired Under Section 147 is different from the matter for inquiry Under Section 145, and the provisions of Section 145 whose application for purposes of the enquiry is sanctioned by Section 147 would therefore, be only those provisions-which are germane to the matter for enquiry Under Section 147, that is to say, the manner of enquiry will depend upon the matter for enquiry

The matter for enquiry Under Section 147 is an abstract right though that abstract right has-relation to the use of immoveable property. The right itself is abstract and has no concrete existence and does not, therefore, admit of being possessed physically. Possession of immovable-property is not within the ambit of Section 147; that comes within the ambit of Section 145.

It was further observed that

under proviso 2 Clause 4 of Section 145, the court is entitled to attach immovable property and appoint a receiver for its management. At the conclusion of the enquiry if the court is able to find possession with one or the other of the parties; such possession may be made over to the successful party who would be entitled to retain it until dispossessed in execution of a decree of a civil court resort to which is permitted Under Section 145.

If however, a Magistrate is not able to find possession in one or the other of the parties, then Section 146 enables the court to keep the property under attachment until a competent civil court shall have determined the rights of the parties and the persons entitled to possession. When possession of property is assumed by the

Court it must be able to retain it until determination of the party entitled to it or its possession. Section 145 contemplated the said determination as also, inability to make that determination and the next section provides for the contingency of the Court being unable to find possession in one or the other of the parties.

The cases of - 'Rahim Baksha v. Abdul Waned', ILR (1948) 1 Oal 374 (D), and - 'Cillelliah Pillal v. Ramiah Thever' (A), in which it was held that a Magistrate has no power Under Section 147 to ;make attachment of the property and appoint a receiver, were considered and it was observed that

the ratio of the decisions in the above Calcutta and Madras cases applies equally well to the state of things as at the commencement of the enquiry as well as at the stage of its conclusion. If possession of immovable property is not within the scope of the provisions Under Section 147, it is difficult to conceive how there could be either attachment of immovable property or appointment of a receiver.

I fully endorse the view taken in the above case by Travancore Cochin High Court and hold that in proceedings Under Section 147 a Magistrate has got no power to attach the property in dispute.

learned Counsel for the opposite party relied on -certain observations of Calcutta High Court in the case of - 'Khoda Bux v. Mozaharul Haque' (C). These observations are as follows:

Should it appear to him (Magistrate) to be necessary to pass an ad interim order of any kind he may do so in the manner provided by Section 145, 01. 4, proviso 2, Criminal P. C.

In that case a preliminary order had been made by the Magistrate in proceedings Under Section 147. An interim order had been made in those proceedings prohibiting the second party from interfering with the right of the first party until the matter was finally decided. It was held that such an -order was illegal. After expressing this view, the learned court made the observations which have been quoted above.

With respect to the learned Judges who decided that case, the observations appear only to be 'obiter dicta'. I do not think that by the said expression the learned Judges meant that the property can be attached in proceedings Under Section 147. But if they meant so, I differ from the view of the learned Judges in this respect. This case has been fully considered in the Travancore Cochin case quoted above, and good reasons have been given why if the learned Judges of Calcutta High Court held that view, it could not be supported. I am therefore, quite clear in my mind that the order of attachment made in this case was beyond the competence of the Magistrate.

The applicants in this case do not claim any title or possession over the property in dispute. The order of attachment therefore, could not affect them if it had not been taken to mean by the learned Magistrate that the persons who claimed the right of use of water could be prohibited from doing so under the said order. Under these circumstances I am not prepared to maintain the order of the learned Magistrate which is clearly illegal.

6. I accept the reference & set aside the order of the learned Magistrate regarding attachment of the property dated 21-11-1953. If the Magistrate fears that there would be serious breach of the peace if the parties are allowed to take water from the well during the pendency of the case, he should consider some other provisions of law if there be any. If there is no such provision then it is not the function of the Magistrate to read such provisions which do not exist in Law. The courts are to interpret laws and not to add to or subtract from them. If any sort of interim order is necessary in a case Under Section 147, it is for the legislature to see that such a provision is inserted.

7. Coming to the revision No. 21 of 1954 it becomes unnecessary to decide it in view of the decision in the reference itself.

8. The application for revision in case No 21 of 1951 is therefore dismissed.