

Girwar Dan Vs. Ram Prasad

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SooperKanoon Citation : sooperkanoon.com/756578

Court : Rajasthan

Decided On : Jan-20-1984

Reported in : 1985CriLJ2; 1984()WLN451

Judge : N.M. Kasliwal, J.

Appellant : Girwar Dan

Respondent : Ram Prasad

Advocate for Pet/Ap. : Mr. Soral

Judgement :

ORDER

N.M. Kasliwal, J.

1. This criminal revision has been filed by Girwar Dan Laxman Dan and Girdhar Singh (hereinafter referred to as 'the party No. 1') against non-petitioner Ram Prasad (hereinafter referred to as 'the party No. 2') challenging the 'order of learned Sessions Judge Tonk dated 16th Aug. 1982, whereby he set aside the order of the learned Sub-Divisional Magistrate, Malpura, dated 24th July, 1982.

2. Brief facts leading to this revision are that the party No. 1 submitted an application Under Sections 145 and 146 Cr.P.C. against party No. 2 on 16th July, 1982, on the allegations that one Mst. Bhoori had sold agricultural land measuring

29 Bighas 8 Biswas in village Rajpura Tan Tordi Tehsil Malpura in favour of the party No. 1 and also handed over actual possession over the land in question. Subsequently, party No. 2 and Mst. Bhoori collusively wanted to dispossess the party No. 1. On July 15, 1982, they tried to dispossess the party No. 1 by force and on that account there was a danger as to breach of peace. It was, therefore, prayed that possession of party No. 1 be declared over the land in question and the same be attached and a receiver be appointed so that peace may not be disturbed. The learned Sub-Divisional Magistrate sent the complaint to the police for investigation. The Station House Officer Police Station, Malpura, recorded statement of the witnesses of both the parties and sent a report that there was imminent danger of breach of peace and life of both the parties was in danger and the Station House Officer prayed that it was a case of emergency and action should be taken Under Section 146 Cr.P.C. The learned Sub-Divisional Magistrate after perusing the report of the police passed an order on 24th July, 1982 attaching the land in dispute Under Section 146(1) Cr.P.C. The learned Sub-Divisional Magistrate appointed Tehsildar, Malpura, as receiver to take immediate possession of the land in question.

3. The opposite party No. 2 aggrieved against the order of the learned Sub-Divisional Magistrate filed a revision in the court of Sessions Judge, Tonk. The learned Sessions Judge, by his order dated 16th Aug. 1982, allowed the revision and set aside the order of the learned Sub-Divisional Magistrate attaching, the property Under Section 146(1) Cr.P.C. The learned Sessions Judge took the view that the learned Sub-Divisional Magistrate had no jurisdiction to pass a composite order Under Section 145(1) as well as Section 146(1) Cr.P.C. The learned Sessions Judge did not consider the matter on merits and left it for fresh determination by the learned Sub-Divisional Magistrate.

4. In these circumstances the party No. 1 has filed the present revision. It was contended by Mr. Soral, learned Counsel for the petitioners, that the learned Sub-Divisional Magistrate in his order had arrived at the conclusion that there was dispute regarding immovable property and there was danger as to breach of peace and had passed the preliminary order as contemplated Under Section 45(1) Cr.P.C. The learned Sub-Divisional Magistrate was also satisfied regarding

emergency and it was considered necessary to attach the property and there was nothing wrong or illegal on the part of the learned Sub-Divisional Magistrate, if both the above orders were passed simultaneously in the same order. It was contended by Mr. Soral that the main crux of the matter is that the Magistrate should be satisfied on the material placed before him for drawing the preliminary order as well as an order Under Section 146(1) and it is immaterial whether these two orders are passed separately or contained in the same order. Reliance in this regard is placed on *Tejsingh v. Ramla* 1953 Raj LW 373, *Theophil Xess v. Chuyan Ekka* 1977 Cri LJ (NOC) 192. *Gaya Singh v. Deman Singh* : AIR1979 Pat246 and *Mathuralal v. Bhanwarlal Lal* : 1980 CriLJ1 .

5. On the other hands, it was contended by Mr. Tikku, learned Counsel for the non-petitioner, opposite party No. 2, that a composite order cannot be passed with regard to Sections 145(1) and 146(1) Cr.P.C. It is submitted by Mr. Tikku that in the scheme of Sections 145 and 146 after the amendment in the Criminal P.C. in 1973, an order Under Section 146(1) can only be passed after making an order under Sub-section (1) of Section 145 Cr.P.C. It is contended that the Magistrate assumes no jurisdiction to pass any order Under Section 146(1) till he has made any order under Sub-section (1) of Section 145 Cr.P.C. It is further submitted that the Magistrate should not pass an order of attachment considering the case to be one of emergency in a mechanical manner and he must apply his mind separately and after making an order under Sub-section(1) of Section 145 Cr.P.C. he should consider the case to be one of emergency, It is pointed out that in the present case the learned Sub-Divisional Magistrate did not pass an order Under Section 145(1) Cr.P.C. and before completing the same he started considering the question of emergency and passed an order Under Section 146(1) and subsequently, he gave a direction to register the case and called upon the party No. 2 to appear before him on Aug. 11, 1982, It is contended that such an order is clearly illegal and without jurisdiction and the learned Sessions Judge was right in setting aside such order and in giving a fresh direction to the learned Magistrate to pass an appropriate order on merits. Reliance in support of his contention is placed on *Laxman Bhikaji Pawar v. Bahimkhan Balekhan Dalwai* 1976 Cri LJ 1492 (Bom). *Narainram v. Shankar Lal* 1977 Raj LW 421, *Chhagan Singh v. State of Raj.* 1976 WLN 224, *Kottarthil Mavunni v. Suite of Kerala* 1982 Cri LJ 468 (Ker)

and Mahendra Tiwary v. Mt. Lal Pari Devi 1982 Cri LJ 17 (Pat).

6. I have given my careful consideration to the arguments advanced by learned Counsel for both the parties and have thoroughly perused the record.

7. The Orissa High Court in Thaophil Xess's case (1977 Cri LJ NOC 192) (supra) held that a Magistrate who wants to pass an order Under Section 146(1) had first to pass an order Under Section 145(1) Cr.P.C. in order to assume jurisdiction to attach the property Under Section 146(1) Cr.P.C. There is nothing in the said two sections or in the Criminal P.C. to prevent a Magistrate to pass the said two orders in the same strain and in the same sitting or the order Under Section 146(1) just following the order Under Section 145(1) of the Code.

8. In Tejsingh's case (1953 Raj LW 373) (supra) a Division Bench of this Court held that if there is some material before the Magistrate, and if on the basis of that material he has come to the decision about the existence of the state of emergency then the law gives him very wide discretion and it would not be proper for a revisional-court to interfere only because another court can arrive at a different finding on the same material.

9. The above case was before the amendment made in the Criminal P.C. in 1973. That apart, the controversy now sought to be raised in the present case was neither considered nor determined. It was nowhere decided in the above case whether an order Under Section 145(1) and 146(1) can be made in a composite manner or separately.

10. In Mahant Bhagwandas v. Suggan 1965 Raj LW 1 1965 (2) Cri LJ 242, it was observed as under (at p. 245) :

There may conceivably be cases of emergency where it may be dangerous to wait for the formality of serving the preliminary order on the parties before issuing an order of attachment. In such cases a Magistrate is competent to issue an order of attachment along with the preliminary order without it being first served on the parties. A magistrate while passing an order of attachment should clearly indicate how he considers a case of emergency and how he considers the emergency of

such a nature that an ex parte attachment should be ordered without giving an opportunity to the other side whose interests are likely to be affected.

In my opinion the above case is also prior to the amendment in the Criminal P.C. 1973 and does not give any assistance in deciding the pointed controversy raised in the case before me.

11. A Full Bench decision of the Patna High Court in Gaya Singh's case 1979 Cri LJ 1110 (supra) held that an order of attachment without hearing parties was permissible. Even Mr. Tikku, learned Counsel for the party No. 2, has not made any argument that any order of attachment could not have been made by the Magistrate without hearing parties if he considered that it was necessary to attach the property as emergency existed. His only contention is that a composite order cannot be passed and in any case the order Under Section 146(1) should follow and not precede the order Under Section 145(1). Mr. Soral, learned Counsel for the party No. 1 laid emphasis on the following observations made by the Full Bench of the Patna High Court (at p. 1113) :

In view of this pronouncement, it has to be held that even under the new Code it is open to the Magistrate while initiating a proceeding Under Section 145 to attach the subject matter in dispute without hearing the other side and this attachment is to last till the proceeding Under Section 145 is decided in favour of one party or the other. After that, the attachment has to be withdrawn in accordance with the aforesaid proviso to Sub-section (1) of Section 146 of the new Code, because after the decision there would be no longer any likelihood of breach of the peace with regard to the subject of dispute. The attachment according to the aforesaid judgment of the Supreme Court, is to continue till the matter is decided by a competent court only under two contingencies, i.e. (i) when the Magistrate decides that none of the parties was in possession of the disputed property, or (ii) he is unable to satisfy himself as to which of them was in such possession of the subject in dispute.

12. In my view the above observations do not decide the precise controversy raised in the case before me and as such much assistance cannot be sought from the above observations made by the Full Bench of the Patna High Court.

13. In Mathura Lal's case 1980 Cri LJ 1 (SC) (supra) it was held that in a case of emergency a Magistrate may attach the property at any time after making the preliminary order Under Section 145(1). There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor has it implied. Far from it. The obligation to proceed with the inquiry as prescribed by Section 145(4) is against such implication. The only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

14. In the above case before their Lordships of the Supreme Court there was no controversy regarding a composite order passed Under Sections 145(1) and 146(1).

15. The Bombay High Court in Laxman Bhikaji Pawar's case 1976 Cri LJ 1492 (supra) observed that :

Section 146(1) is quite explicit. It postulates the making of an order Under Section 145(1) in the first instance and thereafter giving directions such as attachment of property or appointment of a receiver. The stage to determine the factum of possession can arise only after the parties have filed their written statements on due service of notice. No doubt the Magistrate is armed with a power to attach the property in cases of emergency ; but to make out a case for emergency there must be some material before the Magistrate coming forth on the record from the statements of parties, documents produced by them or such other evidence as they may choose to adduce, and not upon the personal impressions carried by the Magistrate.

16. In the above case the learned Sub-Divisional Magistrate had passed a composite order on 24th June, 1975. The first part referred to the making of the order Under Section 145(1) directing both the parties to remain present at 11 a.m. on 27th June, 1975 with their written statement and evidence as regards their possession. The latter part of the order has been produced in the above report as

under which was severely attacked.

In view of the facts that now being the season of transplantation operations of rice and as both parties are going in the field and therefore there being likelihood of riots and breach of peace, I order, Under Section 146(1) of the Cr.P.C. that I have attached the lands in dispute and given them in possession of Circle Inspector, Chiplun, and I am appointing the said Circle Inspector as the Receiver, I have given this order under the seal and my signature.

17. While dealing with the above point it was observed as under (at p. 1498) :

This brings me to the turning point in the entire case as to whether a composite order made by the learned Magistrate, without observance of the statutory requirement, could be sustained. As noted above, under the old Code, third proviso of Sub-section (4), the Magistrate is empowered to make an order of attachment, but even then it proceeded with the expression 'then' which means after the compliance of the provisions contained in Sub-section (1) of Section 145 of the old Cr.P.C. Sub-section (1) of Section 146 of the new Code is quite explicit. It postulates the making of an order under Sub-section (1) of 145 in the first instance and thereafter gives direction such as attachment of property or appointment of a receiver. The stage to determine the factum of possession can arise only after the parties have filed their written statements on the service of notice. No doubt, both under the old Code and the new Code the Magistrate is armed with a power to attach the property in cases of emergency ; but to make out a case for emergency there must be some material before the learned Magistrate coming forth on the record from the statements of the parties, documents produced by them or such other evidence as they may choose to adduce and not upon the personal impressions carried by the learned Sub-Divisional Magistrate on lending his ears to those who are present at the village . Chavdi during the course of his visit. The powers conferred by Sub-section (1) of Section 145 cannot be so enlarged by the learned Magistrate as to do away with the statutory safeguards which are quite salutary.

18. In Mahendra Tiwary's case 1982 Cri LJ 17 the Division Bench of the Patna High Court observed as under :

In case of a dispute concerning the land if the Court is satisfied that there is likelihood of a breach of peace, the Court can pass an order of attachment but only after making an order Under Section 145(1) for the concerned parties to file their written statement. Both the orders cannot be passed simultaneously.

In the above case the two Supreme Court cases reported in *Chandu Naik v. Sita Ram B. Naik* : 1978 CriLJ356 and *Mathuralal v. Bhanwarlal* 1980 Cri LJ 1 (supra) were taken into consideration. After considering these cases it was observed as under (at p. 18) :

From discussion of the above cases this much is clear that an order of attachment cannot be passed simultaneously in the sense that a magistrate, while initiating a proceeding Under Section 145 of the Code cannot, at the same time also make an order of attachment. An order of attachment has got to be made subsequent to the initiation of the proceedings in the circumstances mentioned in Section 145(1) of the Code. Sufficient support can be derived for this view from the second case of the Supreme Court mentioned above. Learned Counsel for the petitioner, however, sought to seek support from the decision of a learned single Judge of this Court in the case of *Amrit Singh v. Gyandeo Sharma* 1978 Cri LJ 571 where it was observed that the order of attachment must indicate circumstances, why the magistrate thought it so, otherwise the order cannot be sustained. The learned Judge himself in the judgment has observed that : 'It may be that even in such cases where the Magistrate does not say that the case is one of emergency but if the circumstances are such that the superior court thinks that the case was one of emergency, then that court may not interfere.' In the case before the learned single Judge the Magistrate had merely said that 'breach of the peace might take place any time'. Inasmuch as apprehension of the breach of the peace was a jurisdictional fact and condition precedent for initiation of the proceedings, if I may say so, the learned Judge rightly thought that mere observation in the order of attachment was not sufficient for passing the order of attachment, as no indication of emergency was indicated. In the case before us I had already referred to the additional and subsequent materials which were brought on the record by the first party to impress upon the learned Magistrate that a grave situation might arise in case no order of attachment was passed. Therefore, although the impugned order

is not explicit in disclosing those facts in detail as the ground for passing an order of attachment, having examined the material on the records. I do not find any reasonable ground for interfering with the order of the learned Magistrate. I do not find any substance in the other arguments of the learned Counsel, which was directed towards the observation made in the impugned order that the learned Magistrate was unable to decide the possession of the parties on account of legal difficulties. That was a casual observation and this position could arise only when the final order was to be passed at the close of the proceeding. The order of attachment apparently was based upon the allegations, which were made by the first party as already indicated above. Therefore, nothing would turn upon the validity of the order with reference to this further observation in the impugned order.

A composite order under Sub-section (1) of Section 145 and under Sub-section (1) of Section 146 cannot be passed and an order of attachment under Sub-section (1) of Section 146 can be passed only after the preliminary order under Sub-section (1) of Section 145 had already been passed by the Magistrate.

Where the Magistrate made a preliminary order Under Section 145 and stated that he was satisfied that there were sufficient grounds for taking proceedings as there exists serious likelihood of breach of peace concerning the disputed property and further by the later part of the decree he placed the disputed property under attachment Under Section 146(1), his order regarding later part would be without jurisdiction.

In the above case an earlier case of the same Court Lilly Frankin v. Wilson 1977 Ker LT 871 was considered in which it was held that the order Under Section 145(1) becomes complete only when the Magistrate puts his signature therein. It is only thereafter that he is expected to consider whether it is a case of emergency requiring attachment of property.

20. A perusal of the above authorities shows that there is some divergence of opinion between the different High Courts on the question in controversy raised in the present case. A bare perusal of Sections 145(1) and 146(1) Cr.P.C. shows that the ambit and scope of the two sections is entirely different. Section 145(1)

requires that whenever an executive Magistrate is satisfied from a report of the police officer or upon other information that the dispute likely to cause a breach of peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend the court in person or by pleader, on a specified date and time, and to put in written statement of their respective claim as respects the fact of actual possession of the subject of dispute. This provision shows that the Magistrate assumes jurisdiction for proceeding in the matter only after drawing a preliminary order contained in Section 145(1) Cr.P.C. In this regard he must be satisfied that a dispute likely to cause a breach of the peace existed concerning any land or water or the boundaries thereof within his local jurisdiction. Section 146 then deals with the power of the Magistrate to attach subject of dispute and to appoint receiver. Under Section 146(1) if the Magistrate at any time after making the order under Sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof. Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

21. The language of above provisions leaves no manner of doubt that an order Under Section 146(1) can only be passed after making an order under Sub-section (1) of Section 145. There is no restriction with regard to the period or time for passing such order as the language used is that at any time after making the order under Sub-section (1) of Section 145 such order can be passed Under Section 146(1). In my view, there is no restriction on the power of the Magistrate that he cannot pass any order simultaneously Under Section 146(1) with the order Under Section 145(1). The only restriction is that the order Under Section 146(1) should follow and not precede the order Under Section 145(1) Cr.P.C. It is also necessary on the part of the learned Magistrate to apply his mind independently to the question of emergency and should not pass an order as a matter of routine along

with an order Under Section 145(1) Cr.P.C. It would depend upon the facts and circumstances of each case whether the emergency was such that attachment of the property was required along with the preliminary order passed Under Section 145(1). The Magistrate should apply his mind to the fact whether it was a case of such emergency to attach the property and appoint a receiver that even the service upon the opposite party and the time to hear him would endanger the breach of the peace to such an extent that the opportunity of hearing could not be given.

22. I see no bar under the provisions of Section 146(1) that in case the Magistrate on the basis of the material available before him considers the case of such imminent urgency that even the service of notice on the opposite party would cause a serious danger as to the breach of peace, even then he had no jurisdiction to pass both the orders simultaneously. Neither there is any such bar in the language of Section 146(1) nor it can be the intention of the legislature to debar a Magistrate to pass such an order if he considers the matter to be of such grave emergency. I see no valid objection in this regard that the Magistrate cannot pass a composite order even if he is satisfied that a grave and urgent emergency requires to attach the property and appoint receiver along with the preliminary order. I see no valid reason for the view taken by Kerala High Court in this regard that the order passed Under Section 145(1) should be signed and thereafter, a separate order should be drawn and signed Under Section 146(1). In my view such objection would be highly technical if an order passed by the Magistrate is held to be illegal merely on this account that he has passed both the orders Under Sections 145(1) and 146(1) in the same order and thereafter he has put his signatures in the end, However, I do not want to lay down by this that the order Under Section 146(1) may be passed in a mere mechanical manner without applying the mind regarding emergency. It must be clearly borne out from the order of the Magistrate, even if he passes a composite order that he was satisfied separately with regard to the conditions existing for drawing the preliminary order and for order Under Section 146(1). It may be appropriate if the Magistrate passes the two orders separately so that it may be clearly indicated that he had applied his mind to the circumstances for passing an order Under Sections 145(1) and 146(1), but in case the circumstances are spelt out separately in the same order,

then the order cannot be declared illegal or without jurisdiction. The Magistrate while passing an order Under Section 145(1) should act with circumspection and apply his mind whether it was a case of such an emergency that even the notice to the opposite party will defeat the ends of justice or will endanger a serious breach of peace. This is necessary because if the property is attached and a receiver is appointed, then the person who is in actual possession of such property is removed from such possession and it goes in the hands of the receiver.

23. It is well settled that proceedings Under Sections 145 and 146 do not decide the question of title relating to immovable property and the Magistrate on the spot is given powers to prevent breach of the peace relating to dispute of possession over an immovable property. The Magistrate on the spot can be satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any immovable, property.

24. In the present case a perusal of the order of the learned Sub-Divisional Magistrate dated 24th July, 1982, shows that the learned Sub-Divisional Magistrate first considered the conclusions as drawn by the police in its report. Thereafter, it has been observed that the learned Sub-Divisional Magistrate considered the record and the report of the police according to which both the parties were bent upon cultivating the land considering the same belonging to them. There was a serious tension between the parties and there was a possibility of the breach of the peace and happening of untoward incident with regard to cultivating the land. In these circumstances the learned Sub-Divisional Magistrate observed that he was satisfied to draw a preliminary order as contemplated Under Section 145 Cr.P.C. and gave direction to issue notice to both the parties to produce oral and documentary evidence in support of their possession over the land. Thereafter, in the same order the learned Sub-Divisional Magistrate considered the question regarding emergency and appointing receiver Under Section 145(1). In this regard the learned Sub-Divisional Magistrate passed the following order in one sentence :

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The above order cannot be considered fulfilling the requirement of Section 146(1) that the Sub-Divisional Magistrate was satisfied that the emergency was of such kind that even notice to the opposite parties could not have been given and even prior to that it was necessary to attach the land and appoint a receiver. The learned Sub Divisional Magistrate has not pointed out any circumstances which were considered necessary by him to resort to an action Under Section 146(1), As already observed above such order should not be passed as a matter of routine and it must be indicated in the order by the Magistrate that he was considering the matter of such emergency that even the notice of short duration was not possible in a given case and in his view the land was required to be attached along with the preliminary order passed Under Section 145(1). Very often, it comes to the notice of this Court that Magistrates pass an order of attaching the property and appointing a receiver along with the preliminary order passed Under Section 145 Cr.P.C. in a routine manner. This is not the intention of the legislature in making a separate provision Under Section 146(1). The Magistrates are required to apply their mind separately with regard to existence of emergency and should pass an order with great circumspection Under Section 146(1). It must be clearly borne out from their order that such emergency exists in the facts and circumstances of that given case.

25. In the result, the order remanding the case to the Sub-Divisional Magistrate, Malpura, by the learned Sessions Judge is maintained. So far as the attachment and appointment of receiver is concerned, the learned Sub-Divisional Magistrate shall consider the question in accordance with the observations made above and pass a fresh order according to law.