

Roshan and anr. Vs. the State of Rajasthan and anr.

Roshan and anr. Vs. the State of Rajasthan and anr.

SooperKanoon Citation : sooperkanoon.com/761691

Court : Rajasthan

Decided On : Oct-09-1995

Reported in : 1996CriLJ2286

Judge : Arun Madan, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 145, 145(1), 145(5), 145(6), 146, 146(1), 146(2), 397 and 482; [Code of Civil Procedure \(CPC\) , 1908](#)

Appeal No. : Cr. Misc. Petition No. 656 of 1995

Appellant : Roshan and anr.

Respondent : The State of Rajasthan and anr.

Advocate for Def. : S.S. Sunda, Adv. for Respondent No. 2

Advocate for Pet/Ap. : Jinesh Jain, Adv.; Paker Farooq, P.P.

Disposition : Petition allowed

Judgement :

ORDER

Arun Madan, J.

1. This Cr. Misc. petition under Section 482, Cr. P.C. has been filed by the above-named petitioner in this Court for quashing the order dated 20th July, 1995 passed

by the learned Addl. District and Sessions Judge, Rajgarh, Camp Laxmangarh, District Alwar, by which the revisional Court has stayed the order of the learned Executive Magistrate, Kathumer passed under Section 145, Cr. P.C. directing the attachment of the property in question.

2. The facts giving rise to the filing of this Misc. Petition under Section 482, Cr. P.C. briefly stated, are that a complaint was lodged by the petitioners under Section 145, Cr. P.C. before the learned Executive Magistrate, Kathumar, regarding Khasra No. 1664 Rakba 2 Bigha 4 Biswa, Khasra No. 1700 Rakba 1 Bigha 5 Biswa, Khasra No. 1702 Rakba 3 Bigha 6 Biswa and Khasra No. 1703 Rakba 2 Bigha 6 Biswa situated in village Samuchi and that the petitioners are in peaceful possession of the land and is also cultivating the same. Respondent No. 2 and his family members wanted to get forceable possession of the land from the petitioners and it is under these circumstances that a complaint was made by the petitioners before the learned Executive Magistrate, Kathumar praying that respondent No. 2 be restrained from depriving the petitioners of their lawful possession. The learned Executive Magistrate called for the report from the local police and the concerned SHO submitted the report to the Executive Magistrate. On the basis of the report, the learned Executive Magistrate appointed Addl. Tehsildar, Kathumar, as receiver of the said land on 18-7-1995.

3. That being aggrieved by the order of the learned Executive Magistrate, respondent. No. 2 preferred a revision petition before the learned Addl. District & Sessions Judge, Rajgarh, who has stayed the order of the Executive Magistrate dated 18-7-1995 on 20-7-1995. Aggrieved by the said order, the petitioners have preferred this Misc. Petition under Section 482, Cr. P.C.

4. During the course of hearing, it was contended by the learned counsel for the petitioners that the revisional Court has gravely erred in passing the impugned order dated 20-7-95 staying the order of the Executive Magistrate dated 18-7-95 by ignoring the police report as well as the evidence on record on the basis of which it was clearly established that there was apprehension of breach of peace if the attachment was not effected and keeping this aspect in view that the learned Executive Magistrate had passed the order under Section 145(1) read with Section

146(1) Cr. P.C. by directing the attachment of the property in question until a competent court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof. Looking to the urgency of the matter, the learned Executive Magistrate directed the Addl. Tehsildar to act as receiver in exercise of its powers under Section 146(2) Cr.P.C. and had further directed to take charge of the said property.

5. It has been further contended by the learned counsel for the petitioners that the revisional Court has ignored the material aspects of the case, as referred to above and notwithstanding the fact that there is clear evidence on record regarding apprehension of breach of peace, should not have stayed the order of the learned Executive Magistrate in as much as no reason has been assigned by the learned revisional Court for staying the order of the learned Executive Magistrate. It has been further contended by the learned counsel for the petitioners at the Bar that the learned revisional Court has totally ignored the report of the SHO of the police station concerned in which it has been clearly stated that there is a dispute and apprehension likely to cause breach of peace concerning the above noted land since the learned Executive Magistrate has mentioned all the reasons for which the receiver had been appointed. It has been further contended at the Bar that the revisional Court is not competent to go into the question of sufficiency or otherwise of the material on the basis of which the subjective satisfaction of the learned Executive Magistrate is based in passing the order under Section 145 read with Section 146(1), Cr. P.C.

6. In support of his contentions advanced at the Bar, reliance has been placed by the learned counsel for the petitioners on the judgment of Surendra Mishra v. B. Trinath Rao, reported in 1985 Cr LJ (Orissa) 1850 and in the matter on R.H. Bhutani v. Miss Mani J. Desai, reported in AIR 1968 SC 1444 :(1969 Cri LJ 13).

7. In the matter of Surendra Mishra (supra) the question which had arisen for consideration of the Orissa High Court was as to whether the High Court or the Session Judge in revision was competent to go into the question pertaining to the sufficiency or otherwise of materials on the basis of which the satisfaction of the Magistrate in passing the order of attachment under Section 145, Cr. P.C. was

based. While placing reliance upon the judgment of the Apex Court in the matter of *Rajpati v. Bachan*, reported in 1980 Cr LJ 1276, wherein it was held by the Apex Court as under (AIR 1981 SC 18) :-

Once a preliminary order drawn up by the Magistrate sets out the reasons for holding that a breach of the peace exists, it is not necessary that the breach of peace should continue at every stage of the proceeding unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of Sub-section (5) of Section 145 of the Code of Criminal Procedure. Unless such a contingency arises the proceedings have to be carried to their logical end culminating in the final order under Sub-section (6) of Section 145.

The High Court of Orissa has held as under:-

Once the Magistrate is satisfied regarding the existence of a breach of the peace and has recorded his satisfaction in the preliminary order, neither High Court nor the Sessions Judge in revision can go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. Therefore, in the present case the impugned order cannot be sustained and must be set aside.

8. In the matter of *R.H. Bhutani v. Miss Mani J. Desai* 1969 Cri LJ 13 (SC) (supra), similar question had arisen for consideration of the Apex Court regarding competency of the revisional Court in going into the question of sufficiency of materials available before the learned Executive Magistrate on the basis of which the order of attachment is passed by the Magistrate under Section 145(1) Cr. P.C. It was held by the Apex Court as under:-

The satisfaction under Sub-section (1) of Section 145 is of the Magistrate. The question whether on the materials before him, he should initiate proceedings or not is, therefore, in his discretion which, no doubt has to be exercised in accordance with the well recognised rules of law in that behalf. No hard and fast rule can, therefore, be laid down as to the sufficiency of material for his satisfaction. The language of the sub-section is clear and unambiguous that he

can arrive at his satisfaction both from the police report or 'from other information' which must include an application by the party dispossessed. The High Court in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate.

In this connection it will be pertinent to refer to Sections 145(1), 146(1) & (2) and Section 482, Cr. P.C, which read as under:-

145(1) Whenever an Executive Magistrate is 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 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 his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

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 himself 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.

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908.

482. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

9. It was further contended by the learned counsel for the petitioners that Section 482, Cr. P.C. saves inherent powers of the High Court to interfere, in any case, if it is necessary to prevent abuse of the process of Court or to secure ends of justice e.g. where the impugned order is a nullity. It was further contended by the learned counsel that this is not the case of the abuse of the powers by the learned Magistrate in directing the attachment of the property in question and also appointing the receiver as the same was necessary on the subjective satisfaction of the learned Magistrate on receipt of a report from the police that a dispute likely to cause breach of peace exists within his local jurisdiction and if such order is not passed, it will result not only in breach of peace but will also result in bloodshed of the innocent people. Hence the stay order directing the attachment of the property in question on the ground of emergency cannot be said to be an order either passed in excess of jurisdiction or a nullity. However the order was passed by the learned Magistrate at the preliminary stage and in any event the stay order was liable to be vacated at any later stage in view of the changed circumstances under Section 146(1), Cr. P.C. if at any subsequent stage the learned Magistrate would be satisfied that there is no longer any likelihood of the breach of peace with regard to the subject of dispute, hence no finality can be said to be attached to such an order.

10. The aforesaid contentions advanced by the learned Counsel for the petitioners have been controverted at the Bar by the learned Counsel for the respondent No. 2 on the ground that the learned Magistrate was not competent to pass an order of attachment of the property in question under Section 145, Cr. P.C. and the impugned order dated 18-7-95 passed by the learned Magistrate suffers from excess of jurisdiction and is a nullity in the eyes of law. It was further contended by the learned Counsel for the respondent No. 2 that the learned Addl. Sessions Judge (revisional court) was thus perfectly justified in staying the operation of the impugned order passed by the learned Magistrate. In support of his contentions

advanced at the Bar reliance was placed by the learned Counsel for respondent No. 2 on the following judgments:-

1. Malam Singh v. State of Rajasthan, 1976 Cr LR601 (Raj.);
2. Ram Avtar v. Dhan Raj, 1977 (2) RCC 184;
3. Nathi v. Patori, 1981 Cr LR 697 (Raj.);.
4. Johari v. Kirori, 1985 RCC 54 : (1985 Cri LJ 1108).

11. In the matter of Malam Singh v. State, 1976 Cri LR 601 (Raj) (supra), the question which had arisen for consideration before this Court was regarding interpretation of Sections 397 and 482, Cr. P. C. It was held that the revisional jurisdiction and inherent jurisdiction are separate and distinct. Court exercises revisional jurisdiction under Section 397, Cr. P.C. but it prevents injustice under Section 482, Cr. P.C. I am of the view tha this case is not one of injustice nor it is a case of inherent lack of jurisdiction on the part of the learned Executive Magistrate in passing an order of attachment under Section 145(1), Cr. P.C. since the same was within full competence and powers of the learned Executive Magistrate.

12. In the matter of Ram Avtar v. Dhan Raj, 1977 (2) RCC 184 (supra), the question which had arisen for consideration of this Court was regarding interpretation of Section 145(1) and Section 397, Cr. P.C. In this context the question which had arisen for determination was as to whether the final order passed by the Sub-Divisional Magistrate in conformity with the decision of the Civil Court can be said to be initiated on the ground that the possession of party No. 1 was not determined as on the date of the preliminary order but was determined as on the date of the attachment of the land. It was held by this Court that it was the duty of the Sub-Divisional Magistrate, at the first instance to find out on materials on record as to which party was in actual possession of the disputed land and on the date of the preliminary order. If, however, a party found in possession of the property on the date of preliminary order had forcibly and wrongfully dispossessed the other party within 2 months next before the date of preliminary order the Sub-Divisional Magistrate could treat the party so dispossessed as if he

had been in possession on the date of preliminary order. If for some reason or other, the Sub-Divisional Magistrate was of the opinion that none of the party was in actual possession of the disputed land at the relevant time or if he was unable to decide as to which of them was in actual possession he could make a reference to the Civil Court of competent jurisdiction to decide the said question. In my opinion since in the present case the learned Executive Magistrate, before passing the preliminary order of attachment of the property in question under Section 145(1), Cr. P.C, had arrived at his subjective satisfaction on the basis of the preliminary enquiry as well as on the basis of the police report regarding the possession of the petitioners over the disputed land the question of making any reference to the Civil Court for obtaining its opinion regarding which party was in actual possession of the disputed land would not arise in this case. Hence the aforesaid decision does not help in advancing the case of the respondents in any manner.

13. In the matter of *Nathi v. Patori*, 1981 Cri LR 697 (Raj) (supra) on interpretation of Sections 145 and 146, Cr. P.C, it was held by this Court that where the learned Magistrate has not recorded instance of the emergency conditions for attachment of the property in dispute, the learned Sessions Court was justified in setting aside the attachment order. In my opinion this decision is also not applicable to the instant case since the learned Executive Magistrate had recorded the emergency conditions which justify the passing of the attachment order of the disputed land under Section 145(1), Cr. P.C on the basis of his subjective satisfaction.

14. In the matter of *Johari v. Kirori*, 1985 Cri LJ 1108 (supra), it was held by this Court that an order under Sections 145 and 146(1), Cr. P.C. is not an interlocutory order and revision was maintainable. In my opinion the question here is not regarding the maintainability of the revision but is regarding the relevancy of the passing of the attachment order under Section 145(1), Cr. P.C. and since the learned Magistrate had passed the said order on the basis of his subjective satisfaction after having made a proper inquiry, the question of maintainability of the revision petition either before the Sessions Court under Section 397 or before this Court under Section 482, Cr. P.C. in exercise of its inherent powers, with a view to prevent abuse of process of law, does not arise since in my considered opinion, the respondents failed to spell out any reason justifying exercise of

inherent powers by this Court under Section 482, Cr. P.C. for quashing the. order dated 20th July, 1995 passed by the learned Addl. District and Sessions Judge, Raigarh, District Alwar, by which he had stayed the order of the learned Executive Magistrate, Kathumar.

15. The Misc. Petition is consequently allowed. The impugned order dated 20-7-95 passed by the learned Addl. District and Sessions Judge, Raigarh, District Alwar, by which he stayed operation of the order dated 18-7-95 passed by the learned Executive Magistrate, Kathumar, is quashed and set aside and the order of the learned Executive Magistrate dated 18-7-95 is maintained.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com