

Om Prakash and ors. Vs. State of Rajasthan and ors.

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Court : Rajasthan

Decided On : May-15-1986

Reported in : 1987(2)WLN661

Judge : Mahendra Bhushan Sharma, J.

Appeal No. : S.B. Cr. Misc. Petition No. 244 of 1986

Appellant : Om Prakash and ors.

Respondent : State of Rajasthan and ors.

Advocate for Def. : Mr. Bhandari

Disposition : Petition allowed

Judgement :

Mahendra Bhushan Sharma, J.

1. This Misc. Petition under Section 482 Cr. P.C. arises in the following circumstances.

2. The dispute relates to shop No. 50 situated at Gangori Bazar, Jaipur. Besides shop in dispute there is another shop No. 48 also situated in the same market. Rather these two shops are on either side of the main gate of the house. Late Shri Ratanlal and Gokulchand Jaipuria, were the real brothers. Though Murarilal,

respondent No. 6, contests that shop number 50 did go in partition to Ratanlal & shop No. 48 went to Gokulchand but this fact is not contested by the other parties to this petition. In other words, except Murarilal, one of the sons of Gokulchand, who contests that Late Shri Ratan Lal and Gokulchand were the owners of shop No. 50 and 48 respectively and a partition took place in between them, the other parties do not contest it.

3. In shop No. 48, business in partnership in the name of M/s Sat. Vyavharik and Company was going on of which the both late brothers were the partners. The case of the petitioners is that so far as shop No. 50 is concerned, they alone were in possession of it and were carrying on business in it in the name of M/s Sat Vyavharik Cloth House and three other names namely Om Prakash Jaipuria and Co., Arun Stores and Anup Distributing Centre. The case of Hansraj, and others sons of late Shri Gokulchand is that shop No. 50 was being used as a godown for keeping the goods of M/s Sat Vyavharik and Co. and the partnership concerned, M/s Sat Vyavharik and Co. was in possession of it also. It appears that Lal Imli is a product of Kanpur Woolen Mills, a Government of India undertaking and it appointed Om Prakash and Arun Kumar as organisers for their products for Rajasthan and inauguration in shop number 50 of that business was to take place.

4. Non-petitioners No. 2 to 9 filed an application on 18th October, 1985, under Section 145/146 Cr. P.C. wherein a case was set-up that there was an apprehension of the breach of the peace in respect of possession of shop number 50 and prayed that the same may be attached. The application addressed to the City Magistrate, was sent to the police station concerned for enquiry and police station, Kotwali, submitted its report on January 2, 1986. The learned City Magistrate made a preliminary order under Sub-section (1) of Section 145 Cr. P.C. and called upon the parties to produce their respective evidence regarding possession of shop No. 50. There has been no attachment of the subject of dispute (shop No. 50) yet under Sub-section (1) of Section 146 Cr. P.C.

5. In this petition the order under Sub-section (1) of Section 145, Cr. P.C. made by the learned City Magistrate on March 10, 1986 has been challenged.

6. A preliminary objection has been raised by Mr. Bhandari, learned Counsel for the non-petitioners No. 2 to 9, about the maintainability of this petitioner under Section 482 Cr. P.C. His contention is. that the inherent powers conferred on this court under Section 482 Cr. P.C. can and should only be exercised in case a revision does not lie. According to him a revision lies against an order made under Sub-section (1) of Section 145 Cr. P.C. and therefore, this petition is not maintainable. It is also contended by him that this petition cannot and should not be treated as a revision petition under Section 397, Cr. P.C. because the jurisdiction of this court under that Section is concurrent with that of Sessions Judge and therefore, the petitioner should have first filed a revision petition before the learned Sessions Judge, Jaipur City, Jaipur.

7. A look at Sub-section (5) of Section 145 Cr. P.C. will show that subject to cancellation of order made under Sub-section (1) of Section 145, Cr. P.C. as provided therein, the order of the learned Magistrate, shall be final. Under Sub-section (5) of Section 145 Cr. P.C. nothing in Section 145 shall preclude, any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate, shall cancel his said order, and all further proceedings there on shall be stayed but if a party does not take any action under subsection (5) of Section 145 Cr. P.C. the order of the Magistrate, made under Sub-section (1) of Section 145 Cr. P.C. shall be final. Therefore, not with standing the fact that after having made an order under Sub-section (1) of Section 145 Cr. P.C. the Magistrate is required to decide whether any and which of the parties was at the date of the order made by him under Sub-section (1) in possession of the subject of dispute in my opinion, an order Sub-section (1) of Section 145 Cr. P.C. is not an interlocutory order within the meaning of Section 397(2) Cr. P.C. and a revision petition shall lie against an order made under Sub-section (1) of Section 145 Cr. P.C. In a Full Bench decision of Jammu and Kashmir High Court in the case of Brij Lal Chakoo etc. v. Abdul Ahmed Nishati and Ors. etc. AIR 1980 NOC (J & K), it has been held that a preliminary order made under Sub-section (1) of Section 145 Cr. P.C. and attachment order are not interlocutory order and a revision petition will lie. I am, therefore, of the opinion that a revision petition lies against an order made under Sub-section (1) of Section 145, Cr. P.C.

8. There cannot be a dispute that inherent powers of this court under Section 482, Cr. P.C. can and should only be invoked in case an appeal or revision does not lie to this court, and this proposition of law is so well established that it needs no reference to any decided case.

9. The question is as to whether this Misc. Petition be treated as revision petition or not. I have already referred to the preliminary objection raised by Mr. Bhandari, learned Counsel for the respondent that the jurisdiction of this Court as well as the Court of Sessions is concurrent and, therefore, the revision should first be filed to that court. In my opinion, this objection has no force. There is the basic difference in the powers of revision under Section 435 Cr. P.C. 1898 and under Section 397 of the Cr. P.C. 1973. For the sake of brevity the earlier one shall be referred to as the old Code and the later as the New Code. Under Section 435 CPC. of the Old Code the jurisdiction of the Sessions Judge and the High Court was no doubt, concurrent but there was no bar that if a revision petition has been filed before the Sessions Judge or the District Magistrate, and has been disallowed a further revision to High Court will lie. In other words, there was no bar to a second revision to the High Court by a unsuccessful party in the court of Sessions Judge or the District Magistrate. The only bar under Sub-section (4) of Section 435 Cr. P.C. (old Code) was that if an application under Section 435 Cr. P.C. has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them. Under Section 397 Cr. P.C. (New Code) the High Court or any Sessions Judge, has been conferred to powers of revision and it may call for and examine the record of any proceeding before any inferior criminal court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceeding of such inferior Court, and may, when calling for such record direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his bound pending the examination of the record. There is a clear bar contained in Sub-section (3) of Section 397 of the new Code which provides that 'if any application under Sub-section (1) of Section 397 has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.' It can

therefore, be said that the use of the words 'has been made by any of the person either to the High Court or to the Sessions Judge', in Sub-section (3) of Section 397 of the New Code, leaves no doubt that an option has been given to a party either to file an application for revision under Section 397(1) of the new Code, to the High Court or to the Sessions Judge. If a revision petition is filed before the High Court it cannot be dismissed or the court cannot refuse to entertain it on the ground that the parties must first file a revision petition to the Sessions Judge. The rulings on Section 435 Cr. P.C. (Old Code), have no relevancy to the provisions of Sub-section (3) of Section 397 of the Cr. P.C. (New Code). There is no substance in the arguments of Mr. Bhandari, learned Counsel for the respondents No. 2 to 9 that a right of revision is denied to him to the High Court in case, the revision is directly entertained by this Court and is allowed. We have to go by provisions of law and as stated earlier the option lies with the parties either to file a revision petition to the Sessions Judge or to this Court and if party chooses to file a revision to this court, the court cannot refuse to entertain it.

10. I have held above that an order made under Sub-section (1) of Section 145 Cr. P.C. is not an interlocutory order within the meaning of Sub-section (2) of Section 397 Cr. P.C. and as such revision lies to this court. The petition is, therefore, treated as revision petition.

11. Coming to the merits of the revision petitions the main challenge to the order under Sub-section (1) of Section 145 Cr. P.C. made by the learned City Magistrate, is that a civil litigation in between the parties in respect of shop No. 50 is already pending in the court of learned Additional District Judge, No. 2, Jaipur City, Jaipur and any of the parties, including the non-petitioners at whose complaint proceedings under Section 145 Cr. P.C. have been initiated could secure any order from the civil Court including the order of injunction or appointing of a receiver. In support of his contentions that parallel proceedings civil and criminal under Section 145 Cr. P.C. should not be allowed to continue and in case, civil litigation in between the parties is going on the Executive Magistrate, should refuse to take action under Section 145 Cr. P.C. Learned Counsel for the petitioner has placed reliance on *Ram Sumer Puri Mahant v. The State of U.P. and Ors.* : AIR 1985 SC472 , *Shyam Sunder and Ors. v. State of Rajasthan and*

Ors. 1985 RLR 1036 and Sudhakar Shastri v. The State of Rajasthan and Ors. 1986 RLR 28 wherein placing reliance on the case of Ram Sumerpuri Mahant v. The State of U.P. and Ors. (supra) it was held that parallel proceedings should not be allowed to continue. Mr. Bhandari, learned Counsel for the non-petitioners, has contended that the purpose of proceedings under Section 145 Cr. P.C. is to prevent a breach of peace and the orders made under that section are orders co-terminus, with the passing of a decree of a civil court. According to Mr. Bhandari, learned Counsel for the non-petitioner Nos. 2 to 9, under Section 145 Cr. P.C. the claim of the parties to a right to possess the subject of dispute is not to be decided and the enquiry is limited as to who was in actual possession of the subject of dispute on the date of the preliminary order or whether a party was dispossessed within two months before the date of the report of the Police Officer, or other information received by the learned Magistrate. According to him the decision of Mahant Ram Sumerpuri v. The State of U.P. and Ors. (supra) is the decision of the two Judges where as decision in the case of Bhinka and Ors. v. Charan Singh : 1959 CriLJ1223 is as of a 3 Judges Bench. So also the case of Sajjan Singh v. Sajjan Singh (1969 WLN 75) is of three Judges Bench. Therefore, according to Mr. Bhandari, learned Counsel for the non-petitioners Nos. 2 to 9 in view of the two judgments of the Hon'ble Supreme Court, of larger bench they still hold the field and the case of Ram Sumerpuri Mahant v. The State of U.P. (supra) firstly, according to him will not apply to this case, because the rights of the parties have not yet been decided by the civil court and secondly, the proceedings under Section 145 Cr. P.C. have to be initiated in case the Magistrate, is of the opinion that there is such a dispute in respect of the property within his jurisdiction which is likely to cause breach of peace. In case of Bhinka and Ors. v. Charan Singh (supra) it has been held that 'the foundation of the jurisdiction of the Magistrate under Section 145 Cr. P.C. is an apprehension of the breach of the peace and, with that object he makes a temporary order irrespective of the rights of the parties which will have to be decided and disposed of in the manner provided by the law. It was also held that the life of the said order is co-terminus with the passing of a decree by a civil court and the moment a civil court makes an order of eviction, it displaces the order of the criminal court. The orders under Section 145 Cr. P.C. are merely police orders made to prevent breaches of the peace and decide no

question of title.' It may be stated that the context in which the said observations were made is that the question to be decided was as to whether the provisional order of a Magistrate, in regard to possession under Section 145 Cr. P.C. irrespective of the rights of the parties can enable a person to resist the suit under Section 180 of the U.P. Tenancy Act. It was held that such an order cannot enable a person to resist a suit under Section 180 of the Act, and such a suit can only be resisted by a person who can claim possession with title. In *Sajjan Singh v. Sajjan Singh* (supra) it appears that by the time the case went to the Supreme Court the suit itself had been compromised and in that case an application under Section 145 Cr. P.C. was filed before the S.D.M. a preliminary order was made on October 28, 1967. Thereafter a suit for permanent injunction was filed and in that suit a temporary injunction restraining Sajjan Singh was obtained. On the strength of that temporary injunction order an application was filed before the learned S.D.M. that the proceedings under Section 145 Cr. P.C. be stayed. That application was dismissed and the Tehsildar, Bilara, was ordered to take possession of the house as receiver. A revision was filed in the court of Sessions. The learned Sessions Judge, made a reference to the High Court recommending that the appointment of the receiver be set aside. The High Court dealt with the matter in two aspects (1) the effect of the temporary injunction granted by the civil court upon the proceedings under Section 145 Cr. P.C. and (2) the appointment of the receiver. The High Court held that both, the order of attachment of the house and the appointment of receiver were valid and that the Civil Court's temporary injunction had no effect upon the proceedings before the S.D.M. The order of the High Court was questioned before the Supreme Court and the Supreme Court while sending the case back to the S.D.M. for decision of the proceedings before him made the observations that in the mean-time we do not see any reason to order the setting-aside the order of the High Court. 'It may be stated that the case of *Sajjan Singh v. Sajjan Singh* (supra) is also a case decided by a bench of two Judges of Hon'ble Supreme Court and not three, as stated by Mr. Bhandari, learned Counsel for the non-petitioner Nos. 2 to 9. The question does not appear to have been either agitated or decided as whether two parallel proceedings one civil and the other criminal should be allowed to be continued in between the same parties in respect of the same property. In the case of *Ram Sumerpuri Mahant v. The State of U.P.*

(supra) their Lordships have observed as under:

When a Civil litigation is pending for the property where in the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceedings under Section 145, Cr. P.C. There is no scope to doubt or dispute the position that the decree of the civil court is, binding on the criminal court in a matter like the one before us.

According to Mr. Bhandari, learned Counsel for the non-petitioners Section 2 to 9 from the above quoted observations their Lordships of the Supreme Court only in such of the cases, where the question of possession is involved and had been adjudicated, there may not be any justification for initiating a parallel criminal proceedings under Section 145 Cr. P.C. of the new Code but where the rights of the parties or the question of possession have not been adjudicated in a civil court, there is no bar of initiating of criminal proceedings which according to him serve a different purpose and are only temporary orders and their life is coterminous with the decree of a civil court. In the case of Ram Sumerpuri Mahant v. The State of U.P. (supra) it has further been held as under:

Counsel for respondent No. 2 to 5 was not in a position to challenge the proposition that parallel proceedings should not be permitted to continue and in the event of a decree of the civil court, the criminal could should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation.

From the above quoted observations of their Lordships of Supreme Court it can be said that it has laid down the law that when the possession is being examined by the civil court from which court interim order like injunction/ appointment of receiver for adequate protection of the property can be obtained it would not be in the interest of justice to continue criminal proceedings under Section 145 Cr. P.C. (new). Parallel proceedings one civil and the other criminal under Section 145 Cr.

P.C. (New Code) should not be continued. 'Thus, it is not only when the rights of the parties have been decided or the question of possession has been adjudicated by the civil court 'But also when they are being examined by the civil court that the parties must be left to obtain any interim relief from the civil court and though the court has jurisdiction under Section 145, Cr. P.C. to initiate the proceedings but must take note of the aforesaid situation of pendency of civil proceedings as aforesaid and refuse to take any action under Section 145 Cr. P.C. The above case of Mahant Ram Sumerpuri v. The State of U.P. (Supra) came up for consideration before this court before different benches on different occasions. In Sham Sunder v. The State of Rajasthan (supra), a suit for injunction was pending since 1982 in the court of Additional Munsif and Judicial Magistrate, No. 2, Jodhpur and in respect of same property proceedings under Section 145 Cr. P.C. (New Code) were initiated on April 17, 1983. The rights of the parties to the properties or in respect of the possession of the property had not yet been decided by the civil court. Placing reliance on Mahant Ram Sumerpuri v. The State of U.P. and Ors. (supra) the order of the learned Sessions Judge quashing the proceedings under Section 145, Cr. P.C. was upheld. In case of Sudhakar Shastri v. The State of Rajasthan (supra) in which another Judge of this court sitting singly also took a similar view Other Benches of this court have also taken a similar view and even in those cases where the civil suits are pending and where the rights of the parties in respect of the immovable property or in respect of his possession have not yet been decided proceedings under Section 145 Cr. P.C. (New Code) have been quashed on the ground that it will amount to abuse of the process of the court. So far as rulings of this court before the case of Mahant Ram Sumerpuri v. The State of U.P. and Ors. (supra) came to be decided by the Hon'ble Supreme Court are concerned, Mr. Bhandari, learned Counsel for the respondents Nos. 2 to 9, has placed reliance on them, but in view of the latest authority of their Lordships of the Supreme Court, it is not necessary to discuss any of them. This court placing reliance on the case. of Mahant Ram Sumerpuri v. The State of U.P. and Ors. also took note of the earlier authorities of this court but still has taken a view after the case of Mahant Ram Sumerpuri v. The State of U.P. and Ors. (supra), that parallel civil and criminal proceedings should not be allowed to be continued and if civil proceedings are pending in respect of the possession of the certain

dispute interim orders in respect of the adequate safety of the property can be secured from the civil court. Parallel proceedings under Section 145 Cr. P.C. should not be allowed to be continued. Mr. Bhandari, learned Counsel for the non-petitioners No. 2 to 9 contended that a revision petition has been admitted by a Judge of this court but in my opinion, admission is not adjudication and several benches of this court as stated earlier have decided this controversy.

12. A look at the facts of this case, will show that even as per the case of the non-petitioners in shop No. 50 the godown of partnership business of the company was kept. The shop No. 50, according to non-petitioners, was being used a godown to keep the goods of the partnership business of the company which was being carried on shop No. 48. Shop No. 48 is also said to have been attached but it is not the subject matter of dispute in present revision. Thus, even as per the case of the non-petitioners, the shop was in joint possession of the partners. As stated earlier the petitioners do assert that they were in exclusive possession of shop No. 50. This court has taken a consistent view that in case of joint possession proceedings under Section 145, Cr. P.C. cannot be initiated. There appears to be no dispute that before an application under Section 145/146 Cr. P.C. of the new code was filed on October 18, 1985 by the non-petitioners before the learned Civil Magistrate, a suit in respect of shop No. 50 had been filed on 31st August, 1985 by the petitioners in the court of District Judge, Jaipur City, Jaipur which is now pending in the court of Addl. District Judge No. 2, Jaipur City, Jaipur. On 3rd December, 1985 a suit has also been filed by the non-petitioners except Murari Lal in the court of learned District Judge, Jaipur City, Jaipur in respect of shops No. 48 & 50 and the relief claimed in their suit is also that the plaintiffs alone are to sue the shops No. 48 and 50 and are the proprietor of M/s Sat Vyaharic and Company. That suit was pending when the order under Sub-section (1) of Section 145 Cr. P.C. was made by the learned City Magistrate on 3rd March, 1986. It can therefore, be said that when a preliminary order under Sub-section (1) of Section 145 Cr. P.C. was made by the learned City Magistrate, two suits were pending in between the parties in the Civil Court where the question of possession of shop No. 50 was also involved. Any of the parties could have secured any interim relief for the safe custody of the property. They could have prayed for injunction/appointment of receiver. In my opinion, in the facts and circumstances of

the case, the learned City Magistrate should not have made an order under Sub-section (1) of Section 145 Cr. P.C.

13. Consequently, I allow this revision petition and set aside the order dated 10th March, 1986 under Sub-section (1) of Section 145, Cr. P.C.

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