

Mohammad Ali Vs. Safiqul and ors.

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Court : Kolkata

Decided On : May-05-1995

Reported in : (1995)2CALLT402(HC)

Judge : Nripendra Kumar Bhattcharyya, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 144, 145, 145(4), 146, 146(1) and 401

Appeal No. : Crl. Rev. No. 2540 of 1994

Appellant : Mohammad Ali

Respondent : Safiqul and ors.

Advocate for Def. : None

Advocate for Pet/Ap. : Sudipto Moitra, ;M.J. Abdin and ;Md. Zubair Alam, Advs.

Disposition : Application dismissed

Judgement :

Nripendra Kumar Bhattcharyya, J.

1. The petitioner by this revision has challenged the order dated July 15, 1994 passed by the learned Executive Magistrate, Islampur, District Uttar Dinajpur, in Case No. 74-MR of 1994. By the order impugned the learned. Magistrate

converted the proceeding under Section 144 to a proceeding under Section 145 of the Code of Criminal Procedure and attached the land in dispute under Section 146 of the Code of Criminal Procedure and directed the parties to file written statement by 10th August, 1994. He also appointed the Officer-in-Charge, Karandighi Police Station, a custodian of the land in dispute.

2. The short background of the case is that upon the petition of the petitioner, who is the first party in Case No. 74-MR of 1994 under Section 144 of the Code of Criminal Procedure, the learned Magistrate by his order dated 19th May, 1994 drew up a proceeding ex parte upon the assertion of the said first party that he was in possession of the land in question. The Officer-in- Charge, Karandighi Police Station, was directed to maintain law and order and the Block Land and Land Reforms Officer, Karandighi, was directed to submit a detailed report on his enquiry by the date fixed. The learned Magistrate fixed 8th June, 1994 for submission of show-cause and he also restrained the opposite party members from entering the case land. It will be apposite to mention here that the parties to the said proceeding under Section 144 of the Code of Criminal Procedure are brothers. It further appears from the order dated 30th May, 1994 that the second parties filed a petition for vacating the interim order before the learned Magistrate, asserting that they were in possession of the land in question. That petition of objection was tagged with the proceeding and treated as show-cause. Both the petitions were directed to be heard together on 1st June, 1994. On that date the learned Advocate for the opposite party members prayed for time. It appeared further from the order dated 15.6.94 that the opposite party members by filing a petition cited the mother of both the parties as witness. On 22nd June, 1994 both the parties appeared through their learned Advocates and both the parties were heard on 13th July, 1994 as it appears from the order of that date. On 15th July, 1994 the mother appeared in Court in person and affirmed an affidavit wherein she alleged that she is the owner of the property and she has not executed any deed of sale in favour of anybody, not to speak of the petitioner, but she entrusted the opposite parties Nos. 2 and 3 to look after the disputed property on her behalf because of her old age. According to the petitioner, the land belonged originally to the mother but she sold the land in his favour. It further appears from the order dated 15th July, 1994 that the petitioner herein moved this Court in its writ

jurisdiction against recording of the name of the opposite party members in the land revenue records and the High Court directed maintenance of status quo in respect of the said land. As there was dispute regarding possession of the land, the learned Magistrate in consideration of the affidavit filed by the mother of both parties, the petition, the objection of which was treated and the submissions as made by both the parties, opined that in the absence of the evidence it cannot be decided who is actually in possession of the property and for that he converted the proceeding under Section 144 of Cr. P.C. to one under Section 145 Cr. P.C. and attached the disputed property in exercise of his power under Section 146 of the Code of Criminal Procedure and appointed the Officer-in-Charge, Karandighi P.S. as custodian of the property in dispute.

3. Appearing for the petitioner, Mr. Sudipto Moitra, learned Advocate, contended that the learned Magistrate, without considering the show-cause as it was not filed and without any evidence on record, converted the proceeding under Section 144 Cr. P.C. to a proceeding under Section 145 Cr. P.C. and also attached the property under Section 146 Cr. P.C. and appointed the Officer-in-Charge, Karandighi Police Station, as custodian of the property.

4. In support of his submission Mr. Moitra relied on three decisions to wit, Daulat Ali Molla (Mondal) v. Hedait Mollia and Anr. reported in 32 CWN 843, wherein it was held that as the order of attachment was passed without giving the parties an opportunity of being heard and without recording any evidence the order is without any jurisdiction. He also referred to a Rajasthan decision in the case of Tikuda and Ors. v. State reported in , wherein it has been held, inter alia, that it is clear from subsection (4) of Section 145 that after the Magistrate has passed preliminary order, it is his bounden duty to perused the written statement of both the parties and also the affidavit and other evidence which has come on the record. He cannot proceed under Section 146(1) of the Code of Criminal Procedure unless he is of the 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 to dispute 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. The third

decision that has been referred to and relied on by Mr. Moitra is in the case of Mathuralal v. Banwarlal and Anr. reported in 1980 CrL LJ 1, wherein it has been held that in a case of emergency a Magistrate may attach the property at any time after making 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 is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145, Sub-section (4) is against any 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.

5. From the fact it appears that the learned Magistrate considered the affidavit affirmed by the mother. It is the admitted case of both the parties that the mother was the original owner of the land in dispute and according to the first party the land was sold to him. By filing an affidavit the mother denied the same. There was a dispute regarding the possession of the land which the learned Magistrate has recorded. As he found emergency in the matter the learned Magistrate further opined that in the absence of the evidence the question of possession cannot be decided. Accordingly, he converted the proceeding from Section 144 to a proceeding under Section 145 of the Code of Criminal Procedure. As there was emergency and dispute between the parties he attached the land in question under Section 146 of the Code of Criminal Procedure and appointed the Officer-in-Charge as the custodian of the property.

6. Having heard the learned Advocate for the petitioner and considering the materials on record, I find no illegality, incorrectness or perversity in the order impugned. This is a vexatious proceeding.

As I do not find any merit in this revisional application the same is accordingly dismissed with cost of 200 G.M.

