Moti and ors. Vs. State and ors.

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Court : Himachal Pradesh

Decided On : Mar-10-1976

Reported in : 1976CriLJ1956

Judge : Chet Ram Thakur, J.

Appellant : Moti and ors.

Respondent : State and ors.

Judgement :
ORDER

Chet Ram Thakur, J.

1. This criminal reference has been made by the Sessions Judge, Dharamsala, for quashing the order, dated 12-7-1973 passed by the Sub-Divisional Magistrate, Chamba. in proceedings under Section 145 of the Code of Criminal Procedure, 1898 declaring the possession of the disputed land in favour of Smt. Dhiko, Smt Bhutto and Hoshiara, and restraining Moti, Birbal, etc. from disturbing the possession of the respondents, Smt. Dhiko alleged that she along with her daughters was the owner of the land 5 bighas 19 biswas in village Karian in District Chamba. Smt. Dhiko on 26-5-1972 made a complaint before the Sub-Divisional Magistrate, Chamba complaining therein apprehension of breach of peace at the hands of Moti and eleven others in respect of the possession of the aforesaid land. This application purported to be one under Section 145 of the

Code of Criminal Procedure. The Sub-Divisional Magistrate sent the complaint to the police, who after enquiry reported that there existed danger of breach of peace and that action may accordingly be taken against Birbal and others. The Magistrate by his impugned order found himself satisfied that Smt. Dhiko, Smt. Bhutto and Hoshiara, party No, 1, were in possession and that they should remain in possession of the land in dispute till the case was decided by the Civil Court. The opposite party was restrained from interfering with the possession of Smt. Dhiko, party No. 1.

2. Against this order Moti and others went in revision before the learned Sessions Judge who has recommended that the order passed by the learned Sub-Divisional Magistrate should be quashed. The grounds are that there was no evidence on the record to show that there was likelihood of breach of peace on account of dispute between the parties over the land. The affidavits which were put in by party No. 1 in support of their being in possession of the land were not properly attested as required under the law and as such they could not be taken into consideration and the learned Magistrate was, therefore, wrong in basing reliance on the same for his satisfaction. The second ground is that the learned Magistrate had not discussed the contents of the affidavits and that the order was quite sketchy. The third ground was that Smt. Dhiko had gifted away the entire land in favour of her daughter Bhutto on 10-4-1972 and as such she had no locus standi to file the application being not in possession. The further ground in support of the recommendation is that there was nothing on the record to indicate if there was any danger of the breach of peace on the date when the preliminary order was passed and also on the date of the passing of the final order. The last ground mentioned was that the Magistrate failed to dispose of the case within two months of the date of appearance of the parties before him as is contemplated under Section 145 (4).

3. I have heard the learned Counsel for the petitioners and Shri H. K. Paul, Assistant to the Advocate General, and I find that there is force in this recommendation.

4. The first ground is that the affidavit had not been properly and legally attested and as such they could not be taken into consideration. Before the Amendment Act No. 26 of 1955 the parties were required to put in written statements of their respective claims and they were entitled to examine such witnesses as they deemed fit and it was thereafter that the Magistrate was to make up his mind as to the party who was in possession after taking into consideration the written 'statement and the evidence produced by the parties. Since this was a dilatory method, therefore, under the Act 26 of 1955 it was provided that the parties could put in such documents or to adduce, by putting in affidavits, the evidence of such persons as they relied upon in support of such claims. Therefore, it is after this amendment that affidavit evidence was permitted to be adduced. Now in order to make the affidavit evidence admissible it is necessary that it must be attested in accordance with law. The affidavits filed show that the Magistrate attested the affidavits only by writing:

Attested. Signed Magistrate 2nd Class Chamba (H.P.).

From this it cannot be inferred if the deponents who appeared before the attesting officer were known to him or were identified by somebody and declared that the statements made in the affidavits were their own. The instructions as contained in paras. 11 to 15, Part B, Chapter 12, Volume IV of the Punjab High Court as applicable to Himachal Pradesh prescribe the mode of attestation and the learned Magistrate has observed the rules more in the breach rather than in the observance and this is not only an irregularity but it is an illegality which vitiates the proceedings in the sense that there is no legal evidence on the record to enable the Magistrate to satisfy himself with regard to the apprehension of the breach of peace in respect of the possession of the land at the hands of the petitioners.

5. The second ground that the evidence has not been discussed is also quite true. I have perused the record and I find that the learned Magistrate has made a sketchy order without referring to the evidence which enabled him to satisfy himself. Therefore, this order is 'really not a speaking order.

6. The third ground was that Smt. Dhiko had no locus standi because she had parted with the possession of the land in the month of April, whereas the complaint was made by her only in the month of June 1972. In this respect, however, I do not find myself in agreement with the recommendation of the learned Sessions Judge, because Sub-section (1) of Section 145 says that the

District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class whenever he; is satisfied from a police report or 'other information' that dispute is likely to cause breach of the peace exists concerning the land or water ..... he shall make an order in writing stating the grounds of being so satisfied and requiring parties concerned in such dispute to attend his Court in person or. by pleader within a time, to be fixed by such Magistrate.....

Therefore, these words 'other information' are wide enough to include the knowledge derived from any source whatever. It is not necessary that any person should have actually informed the Magistrate. Therefore, there is no question of locus standi.

7. The fourth ground is that there was not an iota of evidence on the record to indicate that there was likelihood of the breach of the peace when the impugned order was passed. In other words, there was nothing on the record to show that there was danger of the breach of peace on the date when the preliminary order was passed and also on the date of the passing of the final order. I have been taken through the affidavit evidence which as a matter of fact is inadmissible. In the absence of any evidence it cannot be said that the Magistrate had sufficient material to satisfy himself about the existence of a dispute likely to cause breach of the peace which is a condition; precedent necessary to give the Magistrate; jurisdiction to initiate proceedings under this section. Therefore, it cannot be said that at the time of the passing of the impugned order there existed any dispute likely to cause a breach of the peace much less could there be any dispute likely to cause breach of peace at the time of making the final order. Therefore, in my opinion, the learned Sessions Judge is right in his observations that the danger of the breach of peace must exist on the date of the preliminary order as also on the date of the passing of the final order. If there is no danger of the breach of peace

at the time of the final order then, the Magistrate has no option but to cancel the preliminary order passed by him. In the instant case there is no evidence and the affidavits which were relied upon by the learned Magistrate are not of any legal value, as already stated above.

8. The last ground of recommendation was that the Magistrate failed to dispose of the proceedings within two months of the date of appearance of the parties before him and that he protracted the proceedings for over a year or so and as such the order was not sustainable. This view of the learned Sessions Judge does not appear to be correct. The learned Counsel appearing on behalf of the petitioners also does not subscribe to that view. Sub-section (4) of Section 145 reads as:

The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject.

From the words, 'as far as may be practicable' it would appear that this is not mandatory that the proceedings must be concluded within a period of two months rather it is directory. Therefore, if the proceedings were not concluded within the period of two months it cannot be said that the same were vitiated by non-compliance with the directory provisions of this sub-section.

9. In view of the fact that there was no evidence before the Magistrate to satisfy himself with regard to the dispute likely to cause a breach of peace over the land between the parties and further there being no speaking order, I am of the view that this order is liable to be quashed, and I, therefore, accepting the recommendations quash the order and the proceedings.