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Court : Jammu and Kashmir

Decided On : Sep-02-1977

Reported in : 1978CriLJ299

Judge : G.M. Mir, J.

Appellant : Ghulam Mohammad

Respondent : Hari Chand

Judgement :
ORDER

G.M. Mir, J.

1. This revision petition Under Section 439 read with Section 561-A of the Cr.PC arises out of the following facts:

An application Under Section. 145 Cr.PC was instituted in the court of Addl. District Magistrate (Asstt. Commissioner) Rajouri. The applicant, Shri Harichand, submitted that the land bearing Khasra No: 60 situate in village Rahan was in his pos- session since 1971 as a tenant, and that the non-applicant was interfering in his possession. He prayed that the property in dispute be attached. A preliminary order was drawn up by the court on 31-8-19-74. The non-applicant therein appeared and submitted his objections, filed some documentary evidence and also produced affidavits affirmed by a number of persons. The applicant therein

likewise produced a copy of the Girda-wari 1974 and also submitted a number of affidavits in support of his contention. The Patwari's statement appears to have been recorded Under Section. 540-A Cr.PC The learned Addl. District Magistrate vide his order datel 7-9-1976 allowed the application and held that the land is dispute bearing Khasra No. 60 situate in village Badhiara was in possession of the applicant and, therefore, directed that he should continue to remain in possession of the same without any disturbance from the non-applicant. Aggrieved by this order the matter was taken up to the Sessions Judge, Poonch, Camp Rajouri, in revision by the petitioner herein. The learned Sessions Judge vide his order dated 25-3-1977 found no illegality or impropriety in the order of the trial Magistrate, and, therefore, confirmed the same. This revision petition has been directed against this order of the learned Sessions Judge.

2. The petitioner herein has submitted that the order of the Addl. District Magistrate, Rajouri, was illegal, and was based on evidence which was legally not admissible and that the learned Sessions Judge has also failed to apply his mind to the facts of the case and dispose of the matter in accordance with law.

3. His first contention was that the affidavits submitted by the petitioner herein were refused to be considered by the trial Magistrate as evidence and were rejected on the ground that the same were attested and sworn before a Notary. His submission was that the trial Magistrate should not have rejected such important pieces of evidence as the same according to him, could not have been done under law. He admitted that in Chhotan Prasad Singh v. Hari Dusadh, reported in : 1977 CriLJ249 affidavits sworn before a Magistrate other than that who was trying the application Under Section. 145 Cr.PC have been held not to be admissible in evidence yet his learned counsel submitted that the facts appearing in the instant case were distinguishable from those appear- ing in the Supreme Court case (supra) and therefore, contended that the reliance placed on the said judgment by the trial court was misplaced which has consequently led the Magistrate to entirely wrong conclusions. His submission was that in the instant case the affidavits submitted by the petitioner herein were not attested and had not been sworn before a Magistrate but before a Notary appointed under law for the purpose. He therefore, submitted that the rejection of the affidavits produced by

the petitioner herein in the court below was improper and illegal. I am, however, afraid that this contention of the learned counsel could not be entertained. The point for consideration in appeals by special leave before the Supreme Court was whether affidavits sworn or affirmed before Magistrates who were not seized of the case Under Section. 154 Cr.PC could be read in evidence in that case. The High Court had held that such affidavits were inadmissible in evidence after discussing the law on the point. Their Lordships of the Supreme Court agreeing with the High Court were pleased to say as follows in Para 8 of the judgment:

As the High Court has rightly held in the two impugned judgments that the affidavits were inadmissible in evidence as they were sworn before Magistrates who were never in seisin of the case, we find no force in these appeals and they are hereby dismissed.

Their Lordship of the Supreme Court after discussing the implications of Sub-section (3) of Section 3 of the General Clauses Act and also relevant provisions of the Oaths Act 1873 as well as Oaths Act of 1969 were further pleased to observe as follows (at p. 251 of 1977 Cri. LJ):

It is therefore, clear that all courts and persons having by law or consent of parties authority to receive evidence are authorisd to administer oaths and affirmations, but they can do so only where they are otherwise acting 'in the discharge of the duties, or in exercise of the powers imposed or conferred upon them respectively by law. So the Court or person mentioned in Clause (a) of Section 4 of the Oaths Act can administer oath or affirmation to the deponent in an affidavit only if the court or person is acting in the 'discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law.

The learned counsel for the petitioner herein further submitted that the above mentioned judgment of the Supreme Court was mainly based on the interore-tation of Section 4 of the Oaths Act, 1969 but as the Oaths Act was not applicable to the State of Jammu & Kashmir the facts appearing in and the law applicable to the case before the Supreme Court were obviously different from those appearing in the instant case, and therefore, the principle of law enunciated therein was not applicable to the case at hand. This contention of the learned counsel for the

petitioner herein is also without any force, as admittedly the Oaths Act though not applicable to the State of Jammu & Kashmir but the State of Jammu & Kashmir has framed Rules namely, the Judicial Oath Rules, 1950, which are almost an exact copy of the provisions of the Oaths Act in force in the rest of the country. Rules 3 and 4 of the Judicial Oaths Rules of the State are in particular the exact copy of Sections 3 and 4 of the Oaths Act, 1969, and as Sections 3 and 4 of the Oaths Act have been considered in regard to this matter in : 1977 CriLJ249 case the reasoning given therein is ipso facto applicable for the interpretation of the Rules 3 and 4 of the Judicial Oaths Rules of the State. The distinction tried to be drawn by the learned counsel for the petitioner herein between the Act in force outside the State and the Rules prevalent in the State is misconceived as there appears to be no justification for making such a distinction.

4. The further contention raised by the learned counsel for the petitioner herein that the affidavits sworn in the instant case deserved to be differently treated than those affirmed under Oaths Act as the same were administered and affirmed under the Notary Act, is also without any force. No doubt the Notary Under Section 8 of the Notary Act was empowered 'to administer oath and take affidavits' but that would not mean that the affidavit sworn or affirmed before him would necessarily be received and considered as evidence, if he is not acting in the discharge of his duties or in exercise of' the powers imposed or conferred upon him by law to receive such affidavits in evidence. Obviously, the Notary who had attested the affidavits in question was not dealing with the dispute Under Section. 145 Cr.PC between the parties and as such the affidavits affirmed and sworn before him would not constitute evidence for the purpose of Section 145 Cr.PC In this view of the matter there was, therefore, no difference between an affidavit affirmed and sworn before a Judicial Magistrate or an Executive Magistrate and an affidavit sworn and affirmed before an Oath Commissioner or a Notary, as the case may be, as long as these persons were not in seisin of the case Under Section. 145 Cr.PC and were not empowered to receive such affidavits as evidence in the case. The contention of the learned counsel for the petitioner that the ratio decidendi laid down in the : 1977 CriLJ249 was not applicable to the facts of the instant case could not therefore, be entertained and is as such rejected.

5. Next, the learned counsel for the petitioner herein drew the attention of the court to the preliminary order drawn on 31-8-1974 by the trial Magistrate and severely criticised the same inasmuch as the order in question did not specifically mention or convey the satisfaction of the Magistrate with regard to the existence of the dispute on spot and likelihood of the breach of peace thereon. His contention was that failure on the part of the Magistrate to record his satisfaction with regard to these two important aspects of the case was fatal and has vitiated the entire proceedings. A perusal of the preliminary order would obviously show that the same was defective in several respects including the one mentioned by the learned counsel that the Magistrate has failed to record in so many words his satisfaction with regard to the existence of a dispute and because of it the likelihood of the breach of peace on the spot. The order is couched in words rather strange in which after reproducing the allegations of the applicant that he was in fear of likelihood of breach of peace on the spot because of the dispute, the learned Magistrate was pleased to record only 'that the court is satisfied'. The Magistrate should have stated with regard to what he was satisfied. In plain words the requirement of law was that he should have clearly stated that he was satisfied with regard to the existence of the dispute on the spot and also that there was likelihood of the breach of peace. Unfortunately, however, the Magistrate has failed to comply with the requirement of law in full but admitting that this infirmity did exist in the order it would not ipso facto lead to the quashing of the proceedings on this ground alone in the absence of proof of any prejudice having been resulted as a consequence thereof to the petitioner herein. No injustice or prejudice appears to have; been caused to the petitioner herein as he has taken part in the proceedings after the passing of the preliminary order, submitted his objections and also produced evidence in the form of affidavits and other documents. The petitioner herein, has all along been aware of the nature of the case and has taken part in the proceedings in full knowledge of it. The fact that an irregularity has been committed in the matter of procedure unaccompanied by any suggestion of any probable failure of justice having been occasioned thereby is not sufficient to invalidate the proceedings (See AIR 1947 PC 44). It is now settled law that the preliminary order though not complete and legal in all respects would not be sufficient to vitiate the proceedings unless there is proof of any prejudice having

been caused. The preliminary order in this case of course was not in strict compliance with the provisions of Clause 1 of Section 145 Cr.PC but this fact alone would not be sufficient to vitiate the entire proceedings in the case. This is however not to say that in a given case the finding of the Magistrate with regard to his satisfaction about the existence of a dispute and likelihood of the breach of peace on the spot should not be unambiguous and clear, but as has been stated above on the facts of the instant case it appears that no injustice has been caused on account of the failure of the Magistrate to record his satisfaction in clear and unambiguous terms. A few other defects have been found in the preliminary order but none of these goes to the root of the case and no injustice has occasioned thereby. The contention of the learned counsel for the petitioner herein that because of the defective preliminary order the entire proceedings have been vitiated cannot on the facts of the case be entertained and is therefore, rejected.

6. Now let me take up the various affidavits produced by the parties for consideration. The trial Magistrate as has been noticed above was right in rejecting the affidavits of the petitioner herein on the ground that the same were not properly sworn before the Magistrate having jurisdiction in the case. Strangely however he has failed to apply his mind to the affidavits submitted in the case by the other party and has not as required of him critically examined the same. In the impugned order he has merely mentioned that the applicant before him had produced so many affidavits in support of his case. He has failed to discuss the affidavits one by one and consequently his findings are not based on such discuss-sions. Under Sub-section (4) of Section 145 Cr.P.C. a duty has been cast on the Magistrate to 'peruse1 the documents, affidavits, and the statements of the parties produced before him with regard to the right to possess the subject matter of dispute. After a perusal of such affidavits and documents the Magistrate is required to decide, if possible, the question whether any and which of the parties was on the date of the order in such possession of the subject matter of the dispute. This is a mandatory provision and failure to comply with it and failure to peruse the affidavits and the documents etc. would vitiate the findings of the Magistrate and consequently vitiate the entire proceedings. The word 'peruse' used in Sub-section (4) of Section 145 Cr.PC means 'to go through critically' i.e. 'to read attentively and examine critically in detail the documents and affidavits one

by one'. See : AIR1962 Pat253 . It is incumbent upon the Magistrate that he should peruse the documents and affidavits filed by the parties and also other statements recorded in the case, It is imperative that the order of the Magistrate must show that he has considered the affidavits i.e. he has applied his judicial mind to the assertions contained therein. (See : AIR1965 Pat104 . In 1967 All Cri. Rule 100 and in AIR 1967 Manipur 23 : 1967 Cri LJ 1342 it has been held that the failure to consider the affidavits is an illegality which vitiates the order of the Magistrate. The same view has been expressed in AIR 1965 Tripura 43 : (1965) 2 Cri, LJ 811.

7. That being the law, on the facts of the instant case it can safely be stated that the Magistrate has failed to peruse the affidavits produced before him by the applicant therein. Besides referring to these affidavits cursorily and casually he has done nothing to perform the function of perusing them. He as such has failed to comply with a mandatory provision of law. Had he taken the trouble of going through the affidavits, he would have certainly found that the contents of the various affidavits filed by the applicant before him were almost the same, word by word. All the affidavits appear to have been written by one and the same person at one and the same time in English, the language presumably not known to the deponents. All the af- fidavits contain one and the same contention i.e. that the land in dispute was in possession/owned by the applicant therein and that the only remedy to maintain peace on the spot was to attach the same. In all these affidavits nothing appears to distinguish one from the other in contents, in sequence of contents and the words and terms used therein. The affidavits thus do not appear to have been sworn by the deponents shown therein but for the mechanical and parrot like repetition appearing in all the affidavits it may safely be presumed that' these were affidavits not of the deponents thereof but that of the scribe. In this view of the matter the only conclusion that can be drawn under the circumstances was that the various affidavits submitted in support of the contention of the respondent herein were neither properly nor legally sworn and affirmed. No reliance could and should have been placed on such so-called affidavits. The learned Magistrate has thus erred in not perusing and critically examining the affidavits produced before him by the applicant before him, and as stated above the failure; to do so was sufficient to vitiate the en-tire proceedings

for the reason that the Magistrate has failed to comply with a mandatory provision of law.

8. The learned Magistrate has put much reliance on a copy of the Girda-wari produced by the applicant before him in which he has been shown in possession in Rabi 1974. Copy of the Girda-wari, it appears has been issued to the applicant therein on 19-6-1974. In his deposition in the trial court, the Patwari has confirmed about the correctness of this copy of the Girdawari. The copy of the Girdawari may of course be of some assistance in considering the question of possession during a particular period of time but it all depends on the circumstances appearing in a particular case. The date of filing the application Under Section 145 Cr.PC in the instant case was 27-8-74. The possession of the land in question is to be shown to be with the applicant on the date of the passing of the preliminary order Under Section 145 Cr.PC or two months prior to the drawing up of that order, The applicant had not claimed dispossession within two months next before the date of application, or the preliminary order. The copy of the Girdawari produced by him could if relied upon prove this, much only that the applicant therein was in possession of the subject mat- ter of dispute in Kharif 1974 and particularly on 19-6-1974, when the copy of the Girdawari was issued to him. In absence of the claim of dispossession it would be hard to presume that the applicant was in possession of the land in question on 27-8-1974 also. In cases Under Section 145 of Cr.PC possession of the subject matter of dispute on the relevant date is to be established. Under the provisions of the section and for the limited purpose mentioned therein even a trespasser's possession may be upheld as against a real owner or tenant. Moreover, the Patwari in his deposition has categorically stated that the subject matter of dispute was in fact in possession of the petitioner herein. The learned trial Magistrate has rejected the deposition of the Patwari in a very cursory manner without giving proper thought to its implications. The petitioner herein has also submitted a copy of the Girdawari in which he has been shown in possession in 1975. This copy of the Girdawari however, could not be taken into consideration with regard to the possession on the relevant date which was 27-8-1974. The trial Magistrate was right in refusing to rely on this copy of the Girdawari. Both the Girdawaries, therefore, are irrelevant with regard to the actual possession on the relevant date. No reliance should have been placed on either of

them. The Girdawaries or for that matter any other revenue record recording the possession of the subject-matter of dispute in favour of a particular party was not by itself sufficient to conclusively establish such possession on the relevant date for the purposes of Section 145 Cr.PC in absence of other reliable oral or documentary evidence.

9. In the application itself the applicant had prayed for the attachment of the subject matter of dispute. The witnesses who had sworn affidavits on his behalf had also prayed for the attachment of the property. Would it be too much to conclude, under the circumstances, that had he been in possession of the property in question on the relevant date, he would have been the last person to ask for the attachment of the property? This conclusion may draw further strength from the assertion of the applicant in his application Under Section 145 Cr.PC itself to the effect that the non-applicant therein was threatening to kill him in case he enters' upon the disputed land. The words 'if enters' are significant and unmistakably point out that the applicant before the trial Magistrate may not have been infact in possession of the disputed property on the relevant date.

10. Proceedings Under Section 145 of the Cr.PC are purely of a summary nature and it is only very rarely that the High Court interferes with the orders made under the said section unless the orders on the face of it appear to have been passed by the Magistrate not in conformity with the provisions laid therein. If gross irregularity in the proceedings is shown to have been committed by the Magistrate, the High Court will certainly interfere and set aside the order passed by the trial Magistrate. There are not only a number of irregularities of procedure committed by the trial court in the instant case but the illegality in not perusing the documents and affidavits before passing the final order is a serious defect in the proceedings as it overlooks the mandatory provisions of law. I have no hesitation in holding, therefore, that the entire trial has been vitiated by this serious lapse of the trial Magistrate. The power Under Section 145 Cr.PC appears to have been exercised by the Magistrate in an arbitrary and capricious manner.

11. It is surprising to find that the learned Sessions Judge, Poonch, (Camp Rajouri) has also failed to apply his judicial mind to the facts of the case and has

like a rubber stamp signed and confirmed the order of the' trial Magistrate. The Sessions Judge ought to have applied his mind to the facts appearing in the case, discussed the evidence in the light of the affidavits and other documents produced in the case and then should have come to some to conclusion. The order of the learned Sessions Judge appears to have been passed in a slipshod manner without the application of his judicial mind.

12. In view of the above discussion, the revision petition is allowed, and the orders both of the learned trial Magistrate and that of the learned Sessions Judge, Poonch (Rajouri) are quashed. The courts below exercising powers Under Section 145 of the Cr.PC appear to have failed to do justice in the case, and, therefore, if so advised, the aggrieved party would do well to approach a civil court of competent jurisdiction for redress of his grievances.

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