

Ahad Dar Vs. Maqbool Dar and ors.

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Court : Jammu and Kashmir

Decided On : Feb-20-2001

Reported in : 2003(2)JKJ590

Judge : O.P. Sharma, J.

Acts : Jammu and Kashmir Code of Criminal Procedure (CrPC) (J&KCrPC), Svt. 1989 - Section 145

Appeal No. : Petition No. 43/2000

Appellant : Ahad Dar

Respondent : Maqbool Dar and ors.

Advocate for Def. : P.S. Ahmad, Adv.

Advocate for Pet/Ap. : M.H. Attar, Adv.

Disposition : Revision allowed

Judgement :

O.P. Sharma, J.

1. The inherent jurisdiction of this Court is sought to be invoked for quashing the order dated 21.9.2000 passed by Tehsildar, Executive Magistrate Anantrnag (Annexure 'D'), 2. Order dated 29.4.2000 passed by the Session Judge Anantrnag

(Annexure 'E'), 3. Order dated 11th July, 2000 passed by Session Judge Anantnag (Annexure 'G'), 4. Order dated 5.8.2000 passed by the District Magistrate Anantnag, (Annexure 'H') and recalling of the order dated 29.5.2000 passed by this Court in Cr. Ref. No. 04/2000 inter alia on the ground that this amounts to abuse of the process of court.

2. The facts of the case relevant for appreciating the controversy are that petitioner Ahad Dar has instituted a suit for declaration that adoption deed dated 28.7.1984 executed by father of petitioner in favour of respondent No. 2 was nullity. This suit is pending disposal in the Court of Munsiff, Judicial Magistrate Anantnag. While rejecting the application for interim relief prayed by the plaintiff, the Munsiff Anantnag vide order dated 31.12.1998 directed the parties to maintain status-quo with regard to the suit property. By the same order the trial court declined to stay the execution of adoption deed dated 12.8.1984 though this document was already registered but it appears that its effect was not given in the revenue records because of the stay order. However, the plaint does not describe the property in respect of which status-quo order was passed. Subsequently, on the application of the petitioner, the Tehsildar Executive Magistrate passed order dated 28.6.1999 initiating proceeding Under Section 141 and also attached the land described therein. These proceedings were dropped by the Tehsildar vide order dated 21.9.1999 passed on the application of the second party in the proceedings. The petitioner sought review of the order dated 21.9.1999 and the Tehsildar vide order dated 29.9.1999 sought permission of the District Magistrate to review his order dated 21.9.1999. This order was challenged by the second party before the Session Judge Anantnag, who allowed the revision vide order dated 29.4.2000 and made a reference to this Court for quashing the order passed by the Tehsildar on 29.9.1999. The reference was accepted by this Court vide order dated 29.4.2000.

3. After the reference was allowed, respondent Maqbool Dar & Ors. approached the Session Judge Anantnag for direction to S.H.O. Anantnag for providing them police protection to facilitate planting of sampling of paddy in the disputed land. This application was disposed of on 11.7.2000. In the meanwhile Ahad Dar had challenged the order dated 21.9.1999 passed in revision before District Magistrate

Anantnag, which was dismissed on 5.8.2000.

4. The contention of Mr. Attar is that the proceedings were dropped by the Executive Magistrate on the assumption that a civil suit in respect of the same property is pending disposal in a court of competent jurisdiction and interim injunction was subsisting, which according to the Ld. Counsel is not a fact because there was no interim injunction in respect of the disputed property because the suit was not in respect of the possession of the disputed land but only with respect to the validity of the adoption deed made by his father. This aspect of the case, it is argued was lost sight by the Executive Magistrate, as this is not the correct approach. Moreover, status-quo order without determining the factum of possession and that too with regard to the property which is not specified, argued the Ld. Counsel could not be a ground to drop the proceeding because such an order in facts gives rise to a dispute between the parties when both starts claiming possession. In such circumstances proceedings Under Section 144 Cr.P.C is the only course which can come in the aid of the civil court. The fact that non-petitioners were out of possession according to the Ld. counsel find support from the application, they made to the Session Judge seeking police assistance to enable them to plant paddy. It further supports the initial conclusion of the Executive Magistrate, that there was a likelihood of breach of piece in respect of the land between the parties to justify drawing of preliminary order.

5. The order of this Court dated 29.5.2000 according to Mr. Attar is a nullity in view of the law laid down by Full Bench of this Court in Prem Singh v. State and Anr., 1982 KLJ 55. The order of the District Magistrate in dismissing the revision petition argued Mr. Attar is bad because he has relied on some observation made by the Session Judge in an ancillary application not germane to the issues raised before him. He thus failed to exercise jurisdiction vested in him under law.

6. Mr. P.S. Ahmad appearing for the respondents however argued that the Civil suit is not a suit for declaration or cancellation of the document simplicitor but also includes the relief of injunction insofar as the possession of the land is concerned. It is further argued that there was another proceeding pending before the Collector, which is evident from the order dated 21.9.1999 dropping the

proceedings. Since this factual position cannot be disputed, it is submitted that the law laid down by the Supreme Court in AIR 1985 SC 472 is applicable and the proceedings were rightly dropped. His further contention is that the adoption deed was given effect by the revenue officers by attesting Mutation No. 527 in favour of the adopted son. Even this mutation argued the Ld. Counsel was challenged by the petitioner and the appeal is still pending before the Collector Anantnag. It was only after considering all these facts that the proceedings were dropped by the Magistrate because the matter involved complicated question of law and fact which can be best decided by the civil court and the parties were already before the civil court.

Following facts are not disputed :

Munawar Dar has two sons, namely, the petitioner Ahad Dar and Respondent No. 1 Maqbool Dar. He adopted the son of Maqbool Dar respondent No. 2. During his life-time, he was the sole proprietor of the land. But in the adoption deed, the property was to be shared by the two sons equally. It is not disputed that the property is joint and not partitioned so far. While the petitioner claimed 1/2 share in the property of his father. According to the respondents he is entitled to 1/3rd only in view of the adoption of respondent No. 2

7. The whole controversy revolves round the actual physical possession of the property. In case Ahad Dar at whose instance, the Executive Magistrate initiated proceedings Under Section 145 of Cr.P.C was found in possession of the disputed land within two months from the date the preliminary order was passed. The application would have to be allowed and the second party restrained from interfering with his possession. In case the parties were found to be in joint possession of the land, the proceedings may have to be dropped. However, neither of this course was followed by the Magistrate while dropping the proceedings. How the order dropping the proceedings came to be passed on 21.9.1999 is revealing the operative portion of the order, which reads as under:

'..... Heard the counsel of non-applicants at length Mr. Alla-uddin advocate who was present alongwith applicant refused to argue the case alleging that the case has been fixed by Addl. Dy. Commissioner Anantnag on 28.9.1999 before A.C.R.

Anantnag while as the A.C.R. without hearing him passed an order dated 20.9.1999 directing the parties to appear before the Tehsildar Ex. Magistrate Anantnag for further necessary action.

After pursuing the record available on the file & keeping the ruling of Supreme Court AIR 1985 SC 472 into consideration. I am of the opinion that the applicant Ahad Dar wants to prolong the case and thereby wasting the time of the court without any legal justification. Therefore, the proceedings under Section 145 Cr.P.C are not warranted under law. Hence, the proceedings are hereby dropped and the attachment order passed on 12.6.1999 by Tehsildar Agrarian Anantnag stands vacated. The GQ will go on spot and restore the possession prior to the party who was in possession prior to the attachment order after collecting the cultivating charges. File shall go to records after due completion.'

8. This order is bad for two reasons firstly, the Magistrate has not decided whether the case was transferred from his file to A.C.R. and if so, how he exercised the jurisdiction without referring the matter to the Dy. Commissioner. Secondly reference to the Supreme Court is mis-placed, because the civil court had only passed a status-quo order which is not the same as an order restraining the other side from interfering in the possession of the disputed land. This was not the proper course to be followed by the Tehsildar.

9. Since the order dated 29.5.2000 has been passed without notice to the first party in the proceedings Under Section 145 of Cr.P.C. therefore, it is a nullity and as such the same is set-aside.

10. Moreover, while dropping the proceedings, he directed the Girdawar Qanungo to go on spot and restore the possession to the party which was in possession prior to the attachment. This order clothes the girdawar Qanungo to determine possession, which is not permissible under law. Since the property was under attachment, the Magistrate had himself to determine as to who was in possession of the same and from whose possession, it was taken over. It is admitted case of the parties that two persons, namely, Azad Dar and Kabir Dar were appointed as Superdars of the disputed land. Both of them have sworn an affidavit that they are still in possession of the same, whether it is a fact or not has to be decided by the

Magistrate who passed the order of attachment. The Magistrate has in fact wrongly applied the judgment of the Supreme Court while dropping the proceedings because a mere pendency of a civil suit is not a bar to the proceedings Under Section 145 of Cr.P.C as held in Ishar Dass v. Guari Lal, SLJ 1982 J&K; 451 which reads as under:

'....4. The *raison detre* of Section 145 is to prevent breach of peace that, owes its genesis to dispute between the parties relating to possession of 'land or water boundary thereof It is the existence of breach of peace that confers jurisdiction upon the Magistrate to deal with the rival claims of the parties concerned regarding possession of such land, which in its absence would be the exclusive domain of a civil court. The final order that may be passed in a proceeding Under Section 145 is therefore, always subject to the decision of a competent civil court, which alone is the final arbiter in the matter. It necessarily follows that the civil court's decision, whether it determines the conflicting rights of the parties in regard to possession of the land before or after the commencement of proceedings Under Section 145, has to be respected by the Magistrate and the apprehension of breach of peace prevented by him by upholding its decision as a civil court alone can determine the rights of the litigating parties. Mere pendency of a civil suit will of course not be enough to disentitle the Magistrate from arriving at his own independent finding as to who out of the contesting parties in actual possession of land on the date of the preliminary order as by not doing so he would be indeed failing in his duty to prevent the breach of peace for which alone Section 145 has been enacted. But where the civil court has already decided the question of possession, the Magistrate must uphold such finding unless there has been a sufficient time gap between that finding and the commencement of proceedings Under Section 145 and new rights appear to have come into existence during the intervening period....'

11. So a mere order of status quo was not enough to prevent the Magistrate from continuing the proceedings.

12. Regarding the status-quo order, the High Court of Punjab and Haryana has in Mohinder Singh v. Dilbagh Rai, 1977 Cr.LJ 1029 laid down the following

parameters to determine the maintainability of the proceedings Under Section 145 Cr.P.C.

'...11.... The third type of cases, that is, maintenance of status quo during the pendency of the civil suit is a situation in which a civil court does not prima facie feel satisfied about any party being in possession of the subject-matter of the suit. In such cases when both parties claim possession, dangerous situation can develop with the anxiety of both or any one of them to get into actual possession. If the situation deteriorates then the police or the Magistrate cannot act as silent spectators to witness the breach of peace. If they act in such circumstances and the Magistrate attaches the subject-matter of the dispute under Section 145, Criminal Procedure Code then he would be acting to defend the maintenance of the status quo as ordered by the civil court.

12. Such situation are not purely hypothetical or conjectural but do occasionally arise in the courts. The position, that the Magistrate under Section 145, Criminal Procedure Code, cannot continue with the proceedings when the civil court is seized of the case or passes injunction orders referred to above, if accepted, can lead not only to breach of peace but also to dis-respect to the orders and the process of the Civil Court. M.R. Sharma J, sitting singly, giving a dissenting view to the above referred to case, in Criminal Misc. No. 728-M of 1975, *Bir Singh v. State of Haryana*, decided on 15.7.1976 on similar facts referring to Teja Singh's case (*Supra*) observed :

'There is no quarrel with the aforementioned proposition of law but in matter like this no hard and fast rule can be laid down. Sometimes during the pendency of a Civil Suit and during the continuance of an order of injunction passed by the Civil Court the parties do violate the peace and try to take forcible possession of the land from one another. In such a situation the police or the weaker party would not be absolutely debarred from initiating proceedings under Section 145 of the Code of Criminal Procedure...' A Magistrate acting under Section 145 Cr.P.C. is called upon to decide a question of possession, the nature and period of which is limited by this section. The Magisterial authority is quicker and has more effective sanction behind the orders, passed Under Section 145 Cr.P.C for avoiding the

breach of peace or recurrence of such breaches, as compared with the powers of the Civil Court under Order XXXIX, Rule 2(3) Civil P.C. The finding recorded or the decision returned by a Magistrate in such cases is, of course, subject to the decision of the Civil Court, as the right of the parties to possession are not decided in proceedings under Section 145 Cr.P.C. The mere pendency of the Civil Suit about the same subject-matter between the same parties or the order of the civil court of the type discussed above do not restrain the Criminal Court from exercising jurisdiction Under Section 145, Criminal Procedure Code. Their Lordship of the Supreme Court in *R.H. Bhutani v. Miss Mani J. Desai*, AIR 1968 SC 1444 : (1969 Cri LJ 13); approving the decision of the Bombay High Court in *Jiba v. Chandulal*, AIR 1926 Bombay 91 : (27 Cri LJ 661) observed (para 14). 'In AIR 1926 Bom 91 (Supra) the High Court of Bombay held that it would be unfair to allow the other party the advantages of his forcible and wrongful possession and the fact that time has elapsed since such dispossession and that the dispossessor has since then been in possession or has filed a suit for a declaration of title and for injunction restraining disturbance of his possession is no ground for the Magistrate to refuse to pass an order for restoration of possession once he is satisfied that the dispossessed party was in actual or deemed possession under the second proviso.'

13. It is thus clear that status quo order is no bar. With respect, I agree with the proposition and held that a status-quo order passed by a civil court cannot be a ground to drop the proceedings Under Section 145 Cr.P.C. Moreover, the facts in case *Ram Sumer Puri Mohant v. State of U.P.*, AIR 1985 SC 472 were altogether different. In that case his title suit for possession and injunction in respect of certain property was instituted before the civil court. The suit was dismissed and the matter was taken up in appeal. When the appeal was pending for disposal proceedings Under Section 145 Cr.P.C were initiated with regard to the same property. The Magistrate passed the preliminary order and also attached the property. This order was challenged by the aggrieved party. It was on these facts that the court held that multiplicity of litigation is not in the interest of the parties. Referring to this judgment, their Lordships in *Jhunamal v. State of M.P.* AIR 1988 S.C. 1973 held as under:

'7.....The ratio of the said decision is that a party should not be permitted to litigate before the Criminal court when the civil suit is pending in respect of the same subject-matter. That does not mean that a concluded order under Section 145 Cr.P.C made by the Magistrate of competent jurisdiction should be set at naught merely because the unsuccessful party has approached the civil court. An order made under Section 145, Cr.P.C deals only with the factum of possession of the party as on a particular day. It confer no title to remain in possession of the disputed property. The order is subject to decision of the civil court. The unsuccessful party therefore must get relief only in the civil court. He may move the civil court with properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil court has jurisdiction to give a finding different from that which the Magistrate has reached.'

14. As noticed above, the civil court has passed an order of status-quo. The civil court has declined to grant injunction. However, vide order dated 31.12.1999 had directed the parties to maintain status-quo with regard to the suit property. The suit property admittedly is not described in the plaint. Assuming that it is known to the parties, the order is only to maintain status-quo. It appears that the dispute about possession arose only after passing of the status-quo order and this forced the petitioner to approach the Executive Magistrate Under Section 145 Cr.P.C. Since status-quo order did not determine the possession of either side, the assertion of the second party about its possession is itself proof of the fact that there was danger of breach of peace. The Executive Magistrate therefore rightly initiated the proceedings. However, it acted illegally and without jurisdiction while dropping the proceedings. Since the order dropping proceedings is bad in law. This revision is allowed and the order is quashed. The proceedings shall revive and the Magistrate shall decide them after giving the parties opportunity to produce evidence as required Under Section 145 Cr.P.C. Since the Executive Magistrate had no power to review his order dated 21.9.1999 therefore the order of the District Magistrate or the recommendation made by the Session Judge for quashing the same is inconsequential. So the order was rightly quashed by this Court on 29.5.2000. While accepting the reference made by the Session Judge. However, the Ld. Session Judge by his order dated 29.4.2000 has unwittingly made a reference to the order dated 21.9.1999 passed by the Magistrate and this indicates his approval.

However, order dated 21.9.1999 was not under challenge before him but was challenged before him was the order dated 29.9.1999 seeking permission to review the order dropping the proceedings. So any observation made by the Session Judge insofar as the validity of the order dated 21.9.1999 is concerned, it is without jurisdiction and non-est. However, this court while accepting the reference order dated 29.5.2000 has only quashed the order dated 29.9.1999 without referring to the legality of the order dated 29.9.1999. So the order dated 29.5.2000 does not come in the way of this Court to decide the revision with regard to the maintainability of the revision against the order dated 21.9.1999. Thus, viewed the order of Tehsildar dated 21.9.1999 is illegal besides being without jurisdiction. The revision therefore is allowed and the order is quashed. The Tehsildar Executive Magistrate is directed to restore the file to its original number and pass final order after hearing the parties in accordance with the mandate of Section 145, Cr.P.C.