

Dharmendra Rajput Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Oct-08-2010

Judge : S.C. Agarwal, J.

Appeal No. : Criminal Misc. Writ Petition No.12303 of 2010

Appellant : Dharmendra Rajput

Respondent : State of U.P. and Others

Advocate for Def. : Sri. Sudhir Shandilya

Advocate for Pet/Ap. : Sri. S. Niranjana

Judgement :

1. This writ petition under article 226 / 227 of the Constitution of India has been filed with a prayer to quash the order dated 1.7.2010 (annexure 13 to the writ petition) and order dated 19.6.2010 (annexure 10 to the writ petition) passed by Sessions Judge, Jhansi and criminal revision no.171 of 2010 and criminal revision no. nil of 2010 respectively and also to quash preliminary order dated 7.6.2010 under section 145 (1) Cr.P.C. (annexure 4 to the writ petition) and order dated 10.6.2010 under section 146 (1) Cr.P.C. (annexure 5 to the writ petition) passed by Additional City Magistrate, Jhansi and other consequential prayers for direction to the Magistrate to lift the attachment of the shop in dispute and dropping the proceedings under section 145 Cr.P.C.

2. The facts are that the petitioner and respondent no.2 are closely related and are cousins. Respondent no.3 is wife of respondent no.2. The dispute revolves around a shop situated in Sipri Bazar, Jhansi wherein a business in the name of 'Janaks Sweets & Cold Drinks' was being run. On 21.4.2010, an application under section 145 Cr.P.C. was moved by respondents no.2 & 3 before Additional City Magistrate, Jhansi stating therein that they are the co-owners of shops no.79/1 to 79/7, Sipri Bazar, Jhansi whereupon they and other co-owners are running business in the name of 'Janaks Sweets & Cold Drinks'. Earlier the business was being done in the name of 'Ras Bahar'. On 23.7.1975, a partition of the joint properties took place between their ancestor Late Sri Ghasi Lal and his four sons namely Kashi Ram, Bhagwati Prasad, Narayan Das and Kamta Prasad. Respondent no.2 is the son of Kamta Prasad and the petitioner is the son of Bhagwati Prasad. No share was given to Bhagwati Prasad in the partition, but Bhagwati Prasad was given a share in shop no.78 and Bhagwati Prasad had no share in the disputed shop. Late Ghasi Lal, having 1/4th share in the shop, executed a registered Will on 24.9.1977 bequeathing his share to respondents no.2 and three other grandsons. By the virtue of the aforesaid Will, the respondent no.2 became owner of 1/16th share in the disputed shop. His wife respondent no.3 purchased 1/4th share of the shop from Kashi Ram. It was claimed in the application that the petitioner Dharmendra Rajput has no share in the shop, but being a member of the family, he was running joint business in the shop, but had started claiming himself to be the owner of the business and is preventing the respondents no.2 & 3 from entering the shop. On 18.4.2010 at 5:00 p.m., respondent no.2 and his son went to the shop, but the petitioner asked them to go out of shop and was prepared to fight and, therefore, there was apprehension of breach of peace.

3. A report was also submitted by Sub Inspector K.N. Singh of P.S. Sipri Bazar to the Additional City Magistrate, Jhansi on 29.4.2010 wherein it was mentioned that Late Ghasi Lal had executed a registered Will in favour of the petitioner, respondent no.2, Shailendra Rajput and Narendra Rajput and both the parties were running business on the shop, but opposite party (petitioner) was preventing respondent no.2 from coming to the shop. By a subsequent report dated 7.6.2010, police requested the Magistrate to attach the shop.

4. On 7.7.2010, learned Magistrate passed preliminary order under section 145 (1) Cr.P.C. on the ground that there was apprehension of breach of peace due to dispute between the parties on account of possession of the shop and directed the parties to appear before him on 14.6.2010. Just after 3 days, on 10.4.2010, learned Magistrate passed another order under section 146 (1) Cr.P.C. directing attachment of the shop in dispute. Consequently, shop in dispute was attached on 12.6.2010 by the police and was sealed. It was mentioned in the attachment report submitted by the police that at the time of attachment, the petitioner Dharmendra Rajput was present on the shop and he removed perishable goods from the shop earlier and a copy of the attachment memo was furnished to the Sanchalak of the shop Dharmendra Rajput (petitioner).

5. On 15.6.2010, the petitioner moved an application before the Magistrate for setting aside the order under section 146 (1) Cr.P.C. on the ground that he was running the sweets business in the shop in dispute in the name of 'Janaks Sweets & Cold Drinks' and by attachment, prepared goods shall be ruined and it would cause irreparable loss to the petitioner.

6. The petitioner also filed reply to the notice under section 145 (1) Cr.P.C. stating therein that Late Ghasi Lal distributed his properties through registered partition deed dated 23.7.1975 amongst Kashi Ram, Bhagwati Prasad, Narayan Das and Kamta Prasad and separate shares were allotted to each of them. The disputed shop bearing no.79 and 79/1 to 79/7 and 78 were not given exclusively to any co-sharer, but was common for all. First party (respondents no.2 & 3) had no share in the business run in the disputed shop and the business of 'Janaks Sweets & Cold Drinks' is being done by petitioner only. Another application dated 17.6.2010 was moved by the petitioner before the Magistrate for recalling attachment order on the ground that the business on the shop was being run exclusively by him. The petitioner filed criminal revisions against the orders dated 7.6.2010 and 10.6.2010, which were rejected by learned Sessions Judge, Jhansi vide judgment and orders dated 19.6.2010 and 1.7.2010. Hence, this petition.

7. Supplementary affidavit, counter affidavit and rejoinder affidavit have been exchanged between the parties.

8. Heard Sri Dharampal Singh, senior advocate assisted by Sri S. Niranjana, learned counsel for the petitioner, learned A.G.A. for the State and Sri Sudhir Shandilya, learned counsel for the respondents no.2 & 3 and perused the material available on record.

9. Learned counsel for the petitioner submitted that disputed shop is a joint property of the petitioner, respondents no.2 & 3 and other co-sharers and the same was in joint possession of all the co-owners and proceedings under section 145 Cr.P.C. cannot be initiated in respect of joint property and the orders dated 7.6.2010 under sections 145 (1) Cr.P.C. and dated 10.6.2010 under section 146 (1) Cr.P.C. are void ab initio and learned Sessions Judge should not have rejected the revisions on the ground that these orders are interlocutory orders. It was further submitted that the petitioner was running the business in the shop in dispute in the name and style of 'Janaks Sweets & Cold Drinks' and was in possession of the shop in dispute, as is evident from various documents filed along with the writ petition and supplementary affidavit. Even the police report indicates the petitioner to be the shop Sanchalak and thereby indicating that it was the petitioner who was running the business in the disputed shop and proceedings under section 145 (1) Cr.P.C. and under section 146 (1) Cr.P.C. cannot be used at the instance of a co-owner to ruin the running business of another co-sharer and the remedy lies only in the Civil Court by filing a Suit for partition of the joint properties.

10. Per contra, learned counsel for the respondents no.2 & 3 contended that shop in dispute was rightly attached by the Magistrate, as there was apprehension of breach of peace regarding possession of the shop between the parties and the petitioner can raise all the aforesaid pleas before the Magistrate and it was for the Magistrate to decide as to whether the petitioner was in possession over the shop in question and it is for the Civil Court to decide whether the petitioner is the co-sharer of the shop in question or not. In the counter affidavit, it has specifically been denied that petitioner had any share in the shop in question.

11. According to learned counsel for the respondents no.2 & 3 and the application under section 145 Cr.P.C., the case of the respondents no. 2 & 3 was that the

petitioner had no share in the disputed shop, but in paragraph 24 of the counter affidavit, the respondents no.2 & 3 have admitted that as per the Will of Late Ghasi Lal dated 24.9.1977, the petitioner had 1/16th share in the shop in question. Therefore, it cannot be said that the petitioner is not the co-owner of the shop. However, there is a dispute between the parties regarding extent of share of the petitioner and respondents no.2 & 3 in the disputed shop. It is thus an admitted fact that the petitioner and the respondents no.2 & 3 are co-sharers of the shop in question. Regarding possession, in the application under section 145 Cr.P.C., respondents no.2 & 3 have clearly stated that the petitioner was doing business in the disputed shop jointly with other co-owners. Therefore, impliedly respondents no.2 & 3 admitted joint possession of the petitioner. It was claimed that the petitioner was preventing respondents no.2 & 3 from entering the shop. This admission clearly indicates possession of the petitioner. Respondents no.2 & 3 claimed title through registered partition deed dated 23.7.1975 and registered Will of Late Ghasi Lal dated 24.9.1977, but the respondents no. 2 & 3 have not dared to file the copies of the partition deed and the registered Will of Late Ghasi Lal in Court.

12. On the other hand, the petitioner has filed copy of the registered partition deed dated 23.7.1975 as Annexure SA-1 and has also filed the copy of the registered Will of Late Ghasi Lal dated 24.9.1977 registered on 9.5.1980 as Annexure SA-2. Bhagwati Prasad, father of the petitioner was also given a share in the joint properties through partition deed and through Will, Late Ghasi Lal bequeathed his share in the property of his grandsons Dharmendra Rajput (petitioner), Mahendra Rajput (respondent no.2), Narendra Rajput and Shailendra Rajput. It is thus apparent that the petitioner also has a share in the disputed shop and he is not a stranger.

13. Parties i.e. petitioner and respondents no.2 & 3 belong to the same family. Father of petitioner and father of respondents no.2 were real brothers and sons of Late Ghasi Lal. The petitioner has also filed a copy of license issued by Nagar Palika Parishad, Jhansi in the year 2001-2002 as Annexure SA-4, which shows that license was granted to the petitioner for running restaurant business at 'Janaks Sweets & Cold Drinks', Sipri Bazar, Jhansi. Trade tax was also deposited

by the petitioner, as is evident from Annexure SA-6.

14. On the other hand, respondents no.2 & 3 have not filed any document to show that they were also running business on the shop in dispute.

15. The respondents no.2 & 3, in their application under section 145 Cr.P.C., admitted the joint possession of the petitioner. The attachment memo prepared by the police at the time of attachment of the shop (Annexure no.6 to the writ petition) also indicates that at the time of attachment, petitioner Dharmendra Rajput was present on the shop. Copy of attachment order was given to shop Sanchalak Dharmendra Rajput (petitioner), who removed all the perishable goods from the shop and a copy of attachment memo was also given to the shop Sanchalak Dharmendra Rajput (petitioner). This memo itself indicates that the shop in dispute was attached from the possession of the petitioner.

16. In *Ramdhani Pandey Versus Raghunath Pandey & another*, 2007 (1) JIC 17 (All), this Court has held that if the parties are real brothers and there was no partition between the parties and all were co-sharers, no member of a joint family can claim any part of the joint family property exclusively for himself and Sub-Divisional Magistrate was justified in dropping the proceedings under section 145 Cr.P.C.

17. In *Ram Subhag Pandey Versus State of U.P. & others* 2001 (42) ACC 768, this Court has held that if the dispute was regarding joint holding or property jointly possessed and partition suit was pending, then use of provisions of section 145 Cr.P.C. is an abuse of process of the Court and orders under sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C. were quashed.

18. In *Vijay Singh Versus First Addl. Sessions Judge, Saharanpur & others* 1991 (28) ACC 99, it was held that if the property was found to be in joint possession of parties, resort to proceedings under section 145 (6) Cr.P.C. cannot be taken.

19. In *Gopal & others Versus State of U.P. & others* 2001 (2) JIC 459 (All), it was held that where the parties were jointly recorded co-tenure holders, the Magistrate had no power or jurisdiction to put parties in possession as per their shares in the

disputed property and no proceedings under section 145 Cr.P.C. could be legally initiated. There was lack of jurisdiction in passing preliminary and order of attachment.

20. In *Uma Nath & another Versus State of U.P. & others* 2001 (2) A.Cr.R. 1585, it was held that the proceedings under section 145 Cr.P.C. cannot be initiated in respect of joint property or joint holding or joint possession and in such a case, orders under sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C. are without jurisdiction and, therefore, cannot be said to be interlocutory orders and Sessions Judge has jurisdiction to entertain the revision.

30. In *Jayanti Prasad & others Versus Kamal Narain & others* 1998 (36) ACC 392, it was held that if there was a dispute between the co-sharers and mutual partition was not established, proceedings under section 145 Cr.P.C. cannot be initiated.

31. Learned counsel for respondents no.2 & 3 has cited certain decisions to show that revisions before learned Additional Sessions Judge were not maintainable, as orders passed under sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C. are interlocutory orders, but these decisions did not support the respondents, as the orders passed by the Magistrate are void ab initio, as in the case of joint property and joint possession, the proceedings under sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C. cannot be resorted to to dispossess the co-sharer.

32. The respondents no.2 & 3 have clearly admitted in their application under section 145 Cr.P.C. that the petitioner and other co-sharers including respondents no.2 & 3 were running joint business on the disputed shop. In the counter affidavit, respondents no. 2 & 3 admitted at least 1/16th share of the petitioner in the disputed shop. Admittedly, according to respondents no.2 & 3, the petitioner was in joint possession of the shop, though the petitioner is claiming exclusive business in the shop in dispute, but the factum of joint possession is not denied to petitioner also. In the case of joint ownership and joint possession, learned Magistrate had no jurisdiction to initiate proceedings under section 145 Cr.P.C. The documents filed with the supplementary affidavit as well as the attachment memo prepared by the police at the time of attachment of the shop clearly show that business in the disputed shop was being conducted by the petitioner only.

33. Respondents no.2 & 3 have not been able to show any documentary evidence that they had any share in the business run in the shop in dispute. In these circumstances, the remedy available to the respondent no.2 & 3 was to file a Suit for partition and exclusive possession, but in the garb of proceedings under sections 145 (1) Cr.P.C. and 146 (1) Cr.P.C., a person running a business cannot be deprived of his right to run the business and he cannot be dispossessed through attachment. If a running business by a co-sharer is permitted to be destroyed by means of attachment, it would amount to grave miscarriage of justice. When there was specific admission of respondents no.2 & 3 in the application under section 145 Cr.P.C. that there was a joint business being run on the shop, the Magistrate had no jurisdiction to initiate proceedings under section 145 Cr.P.C. and, therefore, preliminary order under section 145 (1) Cr.P.C. and attachment order under section 146 (1) Cr.P.C. could not have been passed by the Magistrate.

34. In these circumstances, the orders passed by learned Magistrate, being void ab initio and also being without jurisdiction, are liable to be quashed and petition deserves to be allowed. It was always open and still open to the respondents no. 2 & 3 to seek partition of the disputed shop and other joint properties through Civil Court. Since the order passed by the Magistrate being ab initio, learned Sessions Judge had the jurisdiction to entertain the revision and learned Sessions Judge failed to exercise the jurisdiction vested in him. Therefore, the orders passed by learned Sessions Judge are also liable to be quashed.

35. The writ petition is allowed.

36. Impugned order dated 7.6.2010 under section 145 (1) Cr.P.C. and order dated 10.6.2010 under 146 (1) Cr.P.C. passed by Additional City Magistrate, Jhansi in Case No.8 of 2010 (Mahendra Rajput and another Versus Dharmendra Rajput) are quashed. Judgment and orders dated 1.7.2010 and 19.6.2010 passed by Sessions Judge, Jhansi are also quashed.

37. Learned Magistrate is directed to hand over the possession of the shop to the person from whose possession the shop was attached, as is evident from the attachment memo.

