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Sahdeo and Others Vs. Sumanlata

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Court : Chhattisgarh

Decided On : Sep-05-2011

Judge : Manindra Mohan Shrivastava

Appeal No. : CrMP No 252 of 2011

Appellant : Sahdeo and Others

Respondent : Sumanlata

Judgement :

Oral- Order

(Petition u/S 482 of the Cr.P.C)

1. Heard.

2. This petition under Section 482 of the Cr.P.C., has been filed by the petitioners assailing the correctness and validity of order dated 31st March, 2011 passed by the revisional Court, whereby the order dated 26.8.2010 passed by the Sub Divisional Magistrate, directing attachment, has been affirmed.

3. The sole ground of challenge to the impugned orders passed by the Magistrate and the Court below is that unless a preliminary order in terms of Section 145 (1) of the Cr.P.C. is passed by the Magistrate, power of attachment under Section 146 (1) of the Cr.P.C. could not be invoked.

4. Learned counsel for the petitioner submits that in the present case, the Magistrate has passed the impugned order dated 26.8.2008, which does not fulfill the statutory requirement of passing preliminary order in terms of Section 145 (1) of Cr.P.C. He submits that the order nowhere records in writing the grounds of satisfaction that a dispute is likely to cause a breach of peace exists concerning the property in dispute. In support of his submissions, learned counsel for the petitioner relied upon the decision of the High Court of Madhya Pradesh in the case of Rama Vs. Pyarji and the judgments passed by the High Court of Madras in the case of Janaki Ramchandran and Ors. Vs. The State and in the case of Peria Mannadha Gounder Vs. Marappa Gounder. In his submission, the impugned order passed by the Magistrate is clearly in excess of jurisdiction conferred on him under the law and is therefore liable to be set aside. Learned counsel for the petitioner also submits that as the entire proceedings have been drawn without passing any preliminary order as required under Section 145 of the Cr.P.C., the proceedings itself be quashed as the same is abuse of the process of law.

5. On the other hand, learned counsel for the respondent submits that a perusal of the order dated 26.8.2010 shows that the Magistrate himself had inspected the spot and therefore such inspection, followed by an order of attachment, substantially complies with the requirement of passing a preliminary order in terms of provision contained in Section 145 (1) of the Cr.P.C. Next submission of learned counsel for the respondent is that the petitioner has only challenged the order dated 26.8.2010, but the subsequent order, by which, the attachment was continued till the final adjudication of the case has not been subjected to challenge either before the revisional Court or before this Court and, therefore, the present petition is not maintainable. Learned counsel for the respondent then submitted that since the order has been passed way back on 26.8.2010, instead of interfering with the order of attachment, considering the nature of dispute between the parties, the Magistrate may be directed to finally dispose of the matter, within a time frame.

6. Power of attachment has been conferred on the magistrate under Section 146 of the Cr.P.C. A bare reading of the provision would show that if the Magistrate, at any time after making the order under sub-section(1) of Section 145 of the Cr.P.C.,

considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof. A perusal of the aforesaid provision clearly shows that power of attachment had been made subject to an important rider and a pre-condition for exercise of such power and that is - after making the order under sub-section (1) of Section 145. Under the statutory scheme engrafted under Section 145(1) of the Cr.P.C., an Executive Magistrate is required to make an order in writing, stating the grounds of his being satisfied from a report of a police officer or upon other information that a dispute likely to cause breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction. He may then require the parties concerned in the dispute to attend his Court and put in written statements in their respective claims as respects the fact of actual possession of the subject of dispute. Therefore, the Magistrate is under an obligation to make an order in writing as required under Section 145 (1) of the Cr.P.C., thereby passing a preliminary order before embarking upon an inquiry under Section 145 of Cr.P.C. The pre-condition of passing an order under Section 145 (1) of the Cr.P.C. is a sine-qua-non for exercise of power of attachment conferred under Section 146 (1) of the Cr.P.C.. Power of attachment of unmovable property is a drastic power conferred on Executive Magistrate. The legislative scheme of putting a pre-condition for exercise of such power is therefore, necessarily, a mandatory condition and cannot be termed to be a directory provision. The effect of the order of attachment is that a party, who may be in possession, is deprived of the possession and enjoyment of property till the matter is finally decided by the Magistrate under proceedings of Section 145 of the Cr.P.C. Therefore, looking to the scheme of provision contained in Section 146 of the Cr.P.C., the pre-condition, that the power of attachment is exercisable only after making an order under Section 145 (1) of the Cr.P.C., is mandatory, non-compliance of which would render an order of attachment illegal, being in excess of jurisdiction.

7. Next issue which arises for consideration is as to whether the aforesaid pre-condition for exercise of power of attachment has been complied with or not by the Magistrate before passing an order of attachment. The order of attachment dated 26.8.2010 shows that the Magistrate had gone on the spot and made an inspection. All that has been written in the order is that "LANGUAGE". The order says - preliminary order be passed and order of attachment be issued. It is beyond all comprehension as to how such order could be passed by the Magistrate. The preliminary order is required to be passed by the Magistrate. The order of the Magistrate that preliminary order be passed, clearly shows that at the time of passing the order of attachment, the Magistrate was completely oblivious of the requirement of passing of preliminary order as required under Section 145 (1) of the Cr.P.C.. The order nowhere records any ground of satisfaction that there exists a dispute which likely to cause breach of peace concerning any land or water or the boundaries thereof. The order, to say the least, is most cryptic and hardly fulfils the statutory requirement of making an order in writing, stating the grounds of satisfaction required under the law. The order of attachment, therefore, is apparently in excess of jurisdiction.

8. The submission of learned counsel for the respondent that the petitioner has not challenged subsequent order dated 28.8.2010, deserves rejection, because the subsequent order has been passed on the basis of and in continuation of order dated 26.8.2010, which itself has been found by this Court to be in excess of jurisdiction and illegal.

9. The last submission of learned counsel for the respondent that instead of interfering with the order of attachment, the proceedings itself may be directed to be disposed of, deserves to be rejected, though in part. Having found that the order of attachment is grossly illegal and in excess of power conferred under the law amounting to the abuse of the process of law, this Court would be failing in its duty if the order is not interfered with. Therefore, the order is required to be set aside by declaring it to be illegal.

10. Consequently, the impugned orders dated 26.8.2010 passed by the Magistrate and order dated 31st March, 2011 passed by the Court below in revision, directing

attachment of the property are declared illegal and hereby set aside.

11. I find that without there being any preliminary order, as required under Section 145 of the Cr.P.C., the Magistrate has proceeded to pass order and the proceedings are also pending. All proceedings before the Magistrate subsequent to 26.8.2010 are therefore declared illegal. It would be open for the Magistrate to consider the circumstances of the case, report or other information and pass preliminary order as required under Section 145 (1) of the Cr.P.C. and proceed with the matter.

12. The submission of learned counsel for the respondent that the proceedings be directed to be decided expeditiously is reasonable.

13. Accordingly, it is directed that the Magistrate shall complete the entire proceedings as expeditiously as possible and within a period of 6 months from the date of receipt of copy of this order.

14. The petition is accordingly allowed.

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