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Ashok Kumar. Vs. State of Uttarakhand and ors.

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Court : Supreme Court of India

Decided On : Dec-13-2012

Judge : K.S. Radhakrishnan; Dipak Misra, JJ.

Acts : Code Of Criminal Procedure (CrPC), 1973 - Sections 146(1), 145, 145(1); Code Of Civil Procedure (CPC) - Order 39 Rule 1, Order 39 Rule 2, Section 151

Appeal No. : CRIMINAL APPEAL NO. 2038 OF 2012 @ Special Leave Petition (Crl.) No. 3932 of 2012

Appellant : Ashok Kumar.

Respondent : State of Uttarakhand and ors.

Judgement :

K.S. Radhakrishnan, J.

1. Leave granted.

2. We are, in this case, concerned with the validity of an Order of attachment passed under Section 146(1) of the Code of Criminal Procedure by Sub Divisional Magistrate (SDM), Haridwar on 25.11.2009 attaching property situated in khasra No. 181 admeasuring 0.400 hectares situated at Gram Subhash Garh, Pargana Jawala Pur, Tehsil and District Haridwar. The above- mentioned order was affirmed by the High Court of Uttarakhand at Nainital in Criminal Misc. Application

(C482) No. 1029 of 2010 dated 27.03.2012.

3. Mona Sharma, the second respondent herein, mother of minor children, preferred O.S. No. 168 of 2009 before the Court of Civil Judge (J.D.) Haridwar with the appellant and third respondent as defendants praying for a decree of temporary injunction restraining them from interfering with their peaceful enjoyment and possession of the above-mentioned and few other items of properties. The suit was instituted on 02.09.2009. An application was also preferred under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure for an order of interim injunction. The Civil Court did not grant any interim injunction, but only ordered notice to the respondents on 14.9.2009.

4. Mona Sharma later filed an application under Section 145, Cr.P.C. on 19.9.2009 in respect of the disputed property before SDM for an order of attachment of the property in question. An enquiry was conducted through the Pathri P.S., District Haridwar and Sub-Inspector of Police who submitted the report dated 01.10.2009 before the SDM, Haridwar. It was indicated in the report that house of Ashok Kumar is situated in the land in dispute where he has undertaken some construction. Further, it was also opined that the possibility of breach of peace in the locality could also be not ruled out. Meanwhile, in the civil suit, after conducting a local inspection, a report was submitted by the Amin on 21.11.2009 stating that the plaintiff is in possession of the property and the construction is going on. After referring to the report of the Sub-Inspector dated 01.10.2009, SDM Haridwar passed the impugned order dated 25.11.2009 attaching the property under Section 146(1), Cr.P.C., the validity of which is under challenge in these proceedings.

5. Shri Ambrish Kumar, learned counsel appearing for the appellant, submitted that the SDM has committed a grave error in passing an order under Section 146(1), Cr.P.C. attaching the property in question since possession of the property by the appellant was not disputed by the respondent while the civil suit was filed, so also when an application under Section 145 was preferred. Learned counsel submitted that the SDM has exceeded its jurisdiction in passing an order dated 25.11.2009, when the same issue is pending consideration in a civil court. Learned

counsel also pointed out that the respondent could not get an order of injunction from the civil court, hence he invoked the jurisdiction of the SDM under Section 146(1), Cr.P.C. and got an order of attachment of the property. Learned counsel submitted that the SDM has committed a gross illegality in passing the order, when possession of the property by the appellant has not been disputed.

6. Shri Vivek Gupta, learned counsel appearing for the respondents, on the other hand, submitted that there is no illegality in the order passed by the SDM attaching the property under Section 146(1), Cr.P.C., since there is dispute regarding the possession of the property in question and tension is existing and peace can be breached at any time. Learned counsel submitted that there is no error in the order passed by the High Court, confirming the order of the SDM.

7. We are of the view that the SDM has not properly appreciated the scope of Sections 145 and 146(1), Cr.P.C. The object of Section 145, Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.

8. We may notice, in the instant case, the application was preferred by the respondent under Section 145, Cr.P.C. and on that application, a report was called for and the Sub-Inspector of Police submitted its report before the SDM on 01.10.2009. It is stated in the enquiry report that the Sub-Inspector of the village went to Subhashgarh and noticed that even though the landed property stood in the name of Mona Sharma yet it was found that Ashok Kumar, appellant herein was in possession of the land in question in khasra No. 181. The relevant portion of the report reads as follows:

"It is submission of applicant Mona Sharma that above both Ashok Kumar and Narendra Kumar have taken possession over her land and above both have stated that they have purchased land from Bal Krishan husband of Mona Sharma whereas, this land comes in the category of 10(Ka), which cannot be sold/purchased.....In land there is situated under constructed house of

Ashok Kumar in present time and eucalyptus and mangoes trees of Narendra Kumar s/o Jairam, r/o Subhashgarh are standing."

9. Further, it is relevant to note that even in the SDM order dated 25.11.2009, the possession of the property by the appellant - Ashok Kumar has been noticed. The operative portion of the impugned order dated 25.11.2009 reads as follows:

"Applicant wants to take possession over the property in question, but opp. Party Ashok in forcible manner does not leave possession and there is full tense of spot taking possession, the peace can break at any time, therefore, the property in question should be attached. The property in question was given to father in law of the applicant on lease by State Government."

10. The order also records the statement of learned counsel of the appellant, which reads as follows:

"The applicant has no possession over the property in question. Applicant accepts the possession of opposite party Ashok on property in question, there is not any dispute regarding possession."

11. The SDM then stated as follows:

"In view of report of Sub Inspector P.S. Pathri also there is dispute in parties regarding possession of property in question on spot and the tension is existing and peace can breach at any time hence, it appears just and proper to attach the property in question during hearing and to give any (sic) anyone for maintaining peace law and order situation on spot."

The operative portion of the order, further, reads as follows:

"Hence, property in question khasra No. 181, rakba 0.400 hectares situated in mauja Subhashgarh stands attached u/s 146(1) Cr.P.C. S.O. Pathri is directed that he may go on spot and by taking the property in question in his possession ensure giving the same in (sic) of anyone and sent (sic) in this court at any time before fixed date 30.12.2009. Put up on 30.12.2009 for written statement of first party."

12. The above order would indicate that the SDM has, in our view, wrongly invoked the powers under Section 146(1),Cr.P.C. Under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145, Cr.P.C. It can only be read in the context of Section 145, Cr.P.C. If after the enquiry under Section 145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

13. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

14. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant - Ashok Kumar, whether it is legal or

not, is not for the SDM to decide.

15. We also notice that the respondent herein has filed a civil suit for injunction before Civil Judge (J.D.) Haridwar on 02.09.2009 and an application for interim injunction is also pending, on which the civil court has issued only a notice. An Amin report was called for and Amin submitted its report on 21.11.2009. Civil suit was filed prior in point of time, it is for the civil court to decide as to who was in possession on the date of the filing of the suit. In any view, there is nothing to show that there was an emergency so as to invoke the powers under Section 146(1) to attach the property, specially, when the civil court is seized of the matter. Under such circumstances, we are inclined to set aside the order passed by the SDM dated 25.11.2009 and the order of the High court dated 27.03.2012.

16. Learned counsel appearing for the appellant submitted that he will not change the character of the property or create third party rights in respect of the property in question till the civil court passes final orders on the application filed by the respondent for temporary injunction. The submission of the learned counsel is recorded and we direct the civil court to pass final orders on the interim application filed by the respondent for injunction. We make it clear that we have also not expressed any final opinion on the contentions raised by the learned counsel. We have however found that no ground exists to attach the property under Section 146, Cr.P.C.

17. The appeal is disposed of, as above.

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