
(1970) 04 AHC CK 0004
In the Allahabad High Court

Abdul Wahid and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 02-04-1970

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 147, 561.A

Citation : (1970) 40 AWR 465 : (1970) CriLJ 1285

Hon'ble Judges : S.D. Khare, J;J.M.L. Sinha, J

Bench : Division Bench

Judgement

J.M.L. Sinha, J.—This is an application u/s 561.A, Criminal P. C,

2. The facts leading to this application can briefly be stated as under:

On the basis of a report submitted by Station Officer, P. S. Dilari of district Moradabad. proceedings u/s 147, Criminal P. C. were instituted before the S. D. M. The learned S. D. M. found himself unable to arrive at a definite conclusion as to which party had the right of user over the land in dispute. Therefore, by his order dated 1st November, 1968, he made a reference to the Sessions Judge of Moradabad for sending the file to a civil court of competent jurisdiction for deciding as to which party had the right to use the land.

3. Against this order, the present applicants went up in revision before the Sessions Judge of Moradabad. The Sessions Judge by his order dated 7th January, 1969, rejected the revision. The reference made to the Civil Court has also since been disposed of by the Munsif, Moradabad, through his finding dated 25th May, 1969. The Munaif sent back the file to the Magistrate along with his finding and directed the parties to appear before the S. D. M. on 81st May, 1969.

4. On 18th August, 1969, the applicants moved the present application in this Court for the proceedings pending before the Magistrate being quashed u/s 561-A, Criminal P.C.

5. The principal ground on which the prayer for the proceedings being quashed is

based is that Section 146, Criminal P. C. is not applicable to proceedings u/s 147, Criminal P. C. and, consequently, not only the order of the S. D. M, making reference to the Civil Court was illegal but that the finding given by the learned Magistrate is also inapplicable to the case and cannot be made use of by the learned Magistrate.

6. According to Section 146 (11B), Criminal P. C. after the finding of the Civil Court is received by a Magistrate, he has no option but to proceed to dispose of the proceedings in conformity with the decision of the Civil Court. The necessity of moving the present application has arisen because the Magistrate shall have no option except to pass an order in conformity with the finding of the learned Munsif.

7. The application first came up before a learned Single Judge of this Court. He found that though the grievance of the applicants, namely, that no reference u/s 146, Criminal P. C. could be made to a civil court in proceedings u/s 147, Criminal P. C. carried substance, there appeared to exist an obstacle in the way of the applicants in getting the reference order quashed : The applicants had filed a revision before the Sessions Judge assailing the order of the S. D. M. making a reference to the civil court. The revision was dismissed by the learned Sessions Judge. The applicants did not come up in revision before this Court to assail the orders passed by the Sessions Judge and that of the S. D. M, It was, therefore, argued on the one hand before the learned Single Judge that the order of the Magistrate had become final between the parties. On the other side, it was argued that the order did not have the effect of res judicata and that if the court is convinced that the order of the Magistrate making reference to the civil court is illegal, it can act u/s 561-A, Criminal P. C. to quash that order. The learned Single Judge felt it constituted a question of law of considerable importance and he, therefore, directed that since the matter involved a question of law of considerable importance, the papers may be placed before the Hon'ble the Chief Justice so that the matter may be decided by a larger Bench. It is thus that it has come before us.

8. Three questions arise for consideration in this case:

(1) Whether Section 146, Criminal P. C. is applicable to proceedings u/s 147, Criminal P. C.?

(2) Whether because of the applicants not having filed a revision against the order of the Sessions Judge dated 7th January, 1969, the order of the Sessions Judge has become final and resort cannot be had to Section 561A, Criminal P. C, to grant any relief to the applicants ?

(3) Whether this is a fit case in which this Court should exercise its discretion to grant relief to the applicants under 6. 561.A, Criminal P. C.?

9. - Taking up the first point, a perusal of Section 147, Criminal P. C. would show that all that it permits is that in the matter of making an enquiry in the

respective claims of the parties regarding the exercise of the impugned rights, the Magistrate can resort to the provisions of Section 145, Criminal P.C. so far as they may be applicable in the case of such enquiry. There is no reference of Section 146, Criminal P. C. anywhere in Section 147, Criminal P. C. A reference to Section 145, Criminal P. C. would show that it also contains no provision for a reference being made to the civil Court. It is in Section 146, Criminal P.C. that the Magistrate making an enquiry into a dispute u/s 145, Criminal P. C. is given the option to refer the matter to the civil Court if he is not able to arrive at a conclusion himself. If the Legislature had intended that in proceedings u/s 147, Criminal P. C. also, it should remain open to the Magistrate to make a reference to the civil Court if he is not able to decide as to whether the claimants before him had the right to exercise the impugned right, reference of Section 146, Criminal P.C. could be explicitly made in Section 147, Criminal P. C. as well.

10. There are other reasons too which lend support to the conclusion that Section 146, Criminal P. C. has no correlation with Section 147, Criminal P. C. According to Section 146, Criminal P. C. reference can be made to the civil Court if the Magistrate is unable to decide as to which of the rival claimants was in possession of the immovable property. Again, when the reference is received by the civil Court, all that it can enquire into is as to which of the parties was in possession of the subject of dispute on the date of the preliminary order. A perusal of Section 147, Criminal P. C. would show that it does not relate to a dispute regarding possession of an immovable property. It relates to a dispute regarding exercise of a right. The exercise of a right is not always dependent on the possession of the property. A person may not be in physical possession of a property and yet he may have a right of some sort over that property, such as an easementary right. There is a specific mention of the easementary right in Section 147, Criminal P.C. The question that then arises, is if Section 146, Criminal P.C. is applicable to proceedings u/s 147, Criminal P.C. what shall be the terms of reference to be made by a Magistrate and what shall be the scope of an enquiry before the civil Court. Obviously, in view of the language contained in Section 147, Criminal P. G. the Magistrate seized of the proceedings under that section cannot make a reference to the Munsif to make an enquiry on the point or possession of immovable property nor can the civil Court make an enquiry into that point for, such an enquiry is neither warranted by Section 147 nor can it be relevant to the point in issue in the proceedings u/s 147, Criminal P. C.

11. Again, a perusal of Section 145, Criminal P. C. would show that under that section, a Magistrate can call for the parties to file documents and to adduce, by putting in affidavits, the evidence of such persons as may be relied upon by them in support of the respective claims. The Magistrate acting u/s 145, Criminal P. C. has to act only on those documents and those affidavits. He can, in the alternative, call for and examine only such of the persons who may have filed affidavits. Persons other than those who have filed affidavits are not to be generally examined in proceedings u/s 145, Criminal P. C. The jurisdiction of a Magistrate u/s 147, Criminal P. C. is, however, wider as would appear on a

perusal of Sub-section (1A) of Section 147, Criminal P. C. Under that provision of law, the Magistrate can peruse the statements put in, can receive all such evidence as may be produced by the parties and can take such further " evidence as he may consider necessary. In other words, in proceedings u/s 147, Criminal P. C. it is open to the claimants to adduce oral evidence before the Magistrate by examining the witnesses, and it is open to the Magistrate to take such further evidence as he may consider necessary. Obviously, this wider jurisdiction has been conferred on a Magistrate u/s 147, Criminal P. C. because in proceedings under the said section, he does not have the advantage to refer the matter to a civil Court for adjudication.

12. There is yet another reason in support of the view that Section 146, Cr. P. C., is not applicable to the proceedings u/s 147, Cr. P. C. In Sub-section (1E) of Section 146, Cr. P. C., it is said that an order under this section shall be subject to any subsequent decision of a Court of competent jurisdiction. No analogous provision is contained in Section 145, Cr. P. C. In Section 147 (4), Cr. P. C., however, an express provision has been incorporated to say that an order passed by a Magistrate under that section shall be subject to a subsequent decision of a civil court of competent jurisdiction. If Section 148, Cr. P. C., was applicable to proceedings u/s 147, Cr. P. C., it was not necessary to incorporate Sub-section (4) in Section 147, Cr. P. C.

13. Therefore, on a bare perusal of Sections 145, 146 and 147, Cr. P. C., we are of the opinion that Section 146, Cr. P. C., does not apply to proceedings u/s 147, Cr. P. C. Learned Counsel for the opposite "party has tot Been able to produce before us a single decision in which a contrary view may have been expressed. On the contrary, learned Counsel for the applicants has referred us to the case Chandra Ballabh and Another Vs. Emperor, . It was observed in this case:

I am inclined to accept his view that the way Section 146 is worded it is probably not applicable to a dispute relating to : a right of user of immovable property, but I do not see why, the learned Magistrate could not pass a suitable order under Sub-section (3) of Section 147.

14. Reference has also been made on behalf of the applicants to the case Ram Lal and Another Vs. Chuni Lal, , to the case Thounaojam Ningol Indrani Devi v. Gurumayum Ningol Mainu Devi AIR 1959 Gua 29 as also to the cage Rameshwar Rai v. Raghu Kahar AIR 1961 Pat 869. In all the three cases, it has been observed that Section 146, Cr. P. C. does not relate to proceedings u/s 147, Cr. P. C.

15. Much stress was laid on behalf of the opposite party on the words "if possible" , occurring in Sub-section (1A) of Section 147, Cr. P. C., Learned Counsel for the opposite parties con-tended that these words indicate that in cases in which it is not possible for a Magistrate to come to a conclusion himself, he can refer the matter to the Civil Court. It was contended by the learned Counsel that proceedings u/s 147, Cr. P. C., are initiated when there is an

apprehension of breach of peace and, consequently, the matter cannot be left at that stage by the Magistrate but that he has to give a decision.

16. Having given our careful thought to this contention, we do not find much force in it. There can be three different situations in proceedings u/s 147, Cr. P. C., namely;-

(1) where the Magistrate, on enquiry comes to the conclusion that the applicant before him is entitled to exercise the impugned right,

(2) where the Magistrate finds that no such right, as claimed, exists; and,

(3) where the Magistrate is not able to conclude as to whether any right as claimed by the applicant does or does not exist.

17. In the first situation, the Magistrate will act under Sub-section (2) of Section 147, Cr. P. C., and there can be no difficulty about it. In the second situation, the Magistrate can pass an order under Sub-section (3) of Section 147, Cr. P. C. In the third situation, all that the Magistrate has to do is to dismiss the application on the ground that the applicants are not able to substantiate that they are entitled to exercise the impugned right. If the Magistrate feels that any apprehension of breach of peace is likely, he can have resort to the proceedings u/s 107, Cr. P.C. Therefore merely for the reason that the words "if possible" occurred in Section 147 (1A), Cr. P. C., we cannot lead ourselves to the conclusion that Section 146, Cr. P. C., is applicable to proceedings u/s 147, Cr. P. C,

18. Our answer on the first point therefore is that Section 146, Cr. P. C., is not applicable to! proceedings u/s 147, Or. P. C.

19. This takes us to the second point formulated earlier in this judgment. The contention that has been raised on behalf of the opposite party is that the applicants filed a revision application in the Court of Sessions Judge assailing the order of the Magistrate making a reference to the civil Court which revision was dismissed by the Sessions Judge, and, thereafter, the applicants did not file any revision in this Court with the result that the order of the Sessions Judge has become final and it is no more open to the applicants to invoke the aid of Section 561-A, Cr. P. C., for getting the proceedings before the Magistrate quashed,

20. The simple point which is, therefore, to be considered in this connection is whether finality attaches to the order passed by the Sessions Judge in exercise of his revisional jurisdiction. For this reference is necessary to Section 480, Cr. P. C., which reads as follows:

430. Judgments and orders passed by an Appellate Court upon appeal shall be final except in the cases provided for in Section 417 and Chapter XXXII.

21. Provisions relating to reference and re. visions are contained in Chapter XXXII, Criminal P.C. Section 480, Criminal P. C. therefore, leads to this that no finality attaches to orders passed in revisional jurisdiction. There are a number of

decisions on this point, but it would suffice to make a reference to the case *Raj Narain v. State* AIR 1959 All 815. Almost the entire law has been examined in this case and the Full bench held that finality does not attach to orders passed in revision and that this Court has power to revoke, review, recall or alter its decision passed in a criminal revision and can re-hear the same.

22. In view of the above, we have no difficulty in concluding that the decision of the Sessions Judge in the instant case does not prevent the applicant from invoking the aid of Section 561-A, Criminal P. C. nor does it prevent us to exercise our discretion under the said provision of law.

23. The last point for consideration is whether this is a fit case in which jurisdiction should be exercised u/s 561-A, Criminal P. C, to grant any relief to the present applicants. Section 561-A, Criminal P. C. reads as follows:

561-A, Nothing in, this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

24. A perusal of the above would show that jurisdiction can be exercised u/s 561-A, Criminal P. C, in either of the following three situations:

- (1) When it is necessary to give effect to any order under this Code.
- (2) When it is necessary to prevent abuse of the process of any Court.
- (8) When it is otherwise necessary to secure the ends of justice.

25. We have already concluded earlier that Section 146, Criminal P. C. is not applicable to proceedings u/s 147, Criminal P. C. It would mean that the reference made by the S. D. M. to the civil court and the decision of the Civil court on that reference are without jurisdiction. If no relief is granted to the applicants in the present proceedings, it will lead to this that the Magistrate shall have to pass an order in conformity with the decision of the civil court which shall again be an illegality. Therefore, if in the instant case, we exercise jurisdiction u/s 561-A, Criminal P. C, we shall be doing so in order to give effect to the provisions contained in the Criminal Procedure Code and to prevent abuse of the process of the Court.

26. Learned Counsel for the opposite parties contended before us that Section 561-A, Criminal P. C. confers extraordinary jurisdiction on this Court and it should not be resorted to if the party coming before this Court has any other remedy available to it. Even accepting this contention, we find that no remedy under the ordinary law is available to the applicants to prevent the Magistrate from passing the final order in proceedings u/s 147, Criminal P. C. which, in the absence of any intervention by us, will be in conformity with the decision of the civil court. It may be possible for the applicants to file a civil suit for adjudication of rights with regard to the right of user but no such suit can be filed to prevent

the Magistrate from passing the order. We do not, therefore, think that any remedy is open to the applicants to prevent the Magistrate from passing the order.

27. Once it has come to our notice in the present proceedings that if we do not interfere, an illegal order is likely to be passed by the Magistrate who is seized of the proceedings u/s 147, Criminal P. C, we think it desirable that we should interfere.

28. In the above view of the matter, the present application is allowed. The order of the S. D. M. dated 1st November, 1968, by which he referred the matter to the civil court, and the finding of the Munsif dated 31st May, 1969, are quashed. It will be open to the Magistrate to proceed in accordance with law, as contained in Section 147, Criminal P. C. and in the light of the observations contained in the body of the judgment.