
(1985) 02 RAJ CK 0026
In the Rajasthan High Court

Asgarali Shabab and Others	Vs	APPELLANT
State of Rajasthan and Another		RESPONDENT

Date of Decision : 27-02-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146

Citation : (1985) CriLJ 1982 : (1985) RLW 571 : (1985) 1 WLN 230

Hon'ble Judges : V.S. Dave, J;K.S. Sidhu, J

Bench : Division Bench

Judgement

V.S. Dave, J.—This is a reference made to us by the Hon"ble Chief Justice for answering the question referred to Division Bench by the learned single Judge, Hon"ble Sharma J. The question referred is : whether a composite order of attachment of disputed property u/s 146 Cr. P.C. can be passed by the Magistrate while passing the preliminary order u/s 145(1) Cr. P.C.

2. The aforesaid question arose in a revision petition filed against the order passed by the Sessions Judge, Jhunjhunu, whereby he had partly quashed the order of the Sub-Divisional Magistrate, Jhunjhunu, dt. Dec. 20, 1982 so far as the attachment of the property and appointment of receiver was made. The learned Sub-Divisional Magistrate had passed one composite order which was in two parts. In first part he had drawn a preliminary order as required by Section 145(1) Cr. P.C. and in the second part he had passed an order of attachment and appointed a receiver to manage the property. The learned Sessions Judge while reversing the order of the Sub-Divisional Magistrate to the extent of it being one u/s 146(1) Cr. P.C. placed reliance on a decision of this Court reported in Kishan Bihari Birla v. Prem Kumari Bhati 1984 Raj Cri C161. A revision was filed before this Court which come up for hearing before Hon"ble Sharma J. His attention was drawn to the decision of Hon"ble Byas J. in Ram Prasad v. State of Rajasthan 1983 R LR 751 : 1984 Cri LJ 130 and of Hon"ble Kasliwal, J. in Girwar Dan Vs. Ram Prasad, Hon"ble Sharma J. had, already, in an earlier case cited above taken the view that a composite order under Sections 145(1) and 146(1) Cr. P.C.

is illegal and it was this judgment which was relied on by the Sessions Judge. Since Hon"ble Byas J. had taken the view that simultaneous order of attachment can be passed and there is no illegality in it so as to call for interference in revision petition and Hon"ble Kasliwal J. had taken the view that a composite order may validly be passed though it is appropriate if the Magistrate passes two separate orders and also that order u/s 145(1) Cr. P.C. must precede order u/s 146(1) Cr. P.C. and further it must be clearly borne out from composite order that the Magistrate was satisfied separately with regard to existence of conditions for drawing orders under the two sections, therefore, Hon"ble Sharma J. in the instant case made a reference to the Larger Bench. This is how this reference has come up before us for answering.

3. Learned Counsel for the petitioner Shri Jagdeep Dhankhar, while supporting the view taken by Hon"ble Byas J. and Hon"ble Kasliwal J. submitted that there is no bar in passing simultaneous or composite order and the only requirement of law is that the Magistrate should apply his mind twice and it should be apparent from the order. He placed reliance on the decision of Allahabad High Court in Syed Ahmad and Others Vs. Rais Ahmed and Others, He also placed reliance on Surendranath Samantaray Vs. State of Orissa, a judgment from the Orissa High Court. He also placed reliance on the observations of their Lordships of the Supreme Court in Mathuralal Vs. Bhanwarlal and Another,

4. On the strength of the aforesaid observations of their Lordships of the Supreme Court he submitted that there being no substantial change even after separately enacting Section 146(1) Cr. P.C. the position of law remains the same and there is no legal bar if the Magistrate passes a composite order.

5. Shri M.M. Ranjan appearing on behalf of the non-petitioner submitted that the view taken by Hon"ble Sharma J. is a correct view and further that the words "at any time after, making the order under Sub-section (1) of S". 145 Cr. P.C." will become redundant in case any other interpretation is given. He placed reliance on a decision of the Patna High Court reported in Mahendra Tiwary Vs. Mt. Lal Pari Devi and Others, He also relied on Kottarathil Mavunni and Another Vs. State of Kerala and Another, wherein the Kerala High Court relied on one of its own earlier judgment in Lilly Franklin v. Wilson 1977 K LT 871, delivered by Janki Amma J. It is thus submitted by Shri Ranjan that order passed u/s 145 Cr. P.C. should be separately signed and it is only thereafter that the Magistrate should apply his mind for the second time and pass a separate order u/s 145(1), 146(1) Cr. P.C.-If he has not signed the earlier order, it is submitted, then the order cannot be said to be an order in the eye of law and the Magistrate has no jurisdiction to pass an order u/s 146(1) Cr. P.C. The words "at any time after making the order" have no ambiguity and it is submitted that on a plain reading also intention of the legislature is apparent that two orders should be separately passed.

6. We have given our thoughtful consideration to the rival contentions and have carefully perused the decisions cited before us.

Section 146(1) Cr. P.C. reads as under:

Section 146(1). If the Magistrate at any time after making the order under Sub-section (1) of Section 145 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:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

7. This provision had been newly added in the Cr. P.C., 1973 and in fact is a corollary to Section 145 Cr. P.C. It is Section 145(1), Cr. P.C. wherefrom the Magistrate gets the jurisdiction to proceed with the case i.e. drawing of a preliminary order is the basis of proceedings wherein a dispute likely to cause a breach of peace arises and it is this assumption of jurisdiction which further empowers the Magistrate u/s 146(1) Cr. P.C. to pass an order regarding attachment of the property and appointment of receiver. If there is no dispute concerning the immovable property, there would be no jurisdiction in the Magistrate to proceed under Sections 145 & 146 Cr. P.C. The legality of order u/s 146(1) Cr. P.C. depends on its having been preceded by lawful proceedings u/s 145(1), Cr. P.C. and, therefore, it can be said that Section 146 Cr. P.C. is in continuation of Section 145 Cr. P.C. and passing a preliminary order u/s 145(1), Cr. P.C. is prior in point of time to an order u/s 146(1) Cr. P.C. To this extent there is no controversy in either of the decisions cited by learned Counsel for both the parties. The only dispute raised and which has been referred is whether a composite order can be passed. Hon"ble Sharma, J. while taking the view that a composite order under Sections 145(1) and 146(1), Cr. P.C. is without jurisdiction and against the spirit of Section 146(1), Cr. P.C. placed reliance on the decision in Kottarathil Mavunni's case 1982 Cri LJ 468 (supra). Kerala High Court observed as under:

A composite order under Sub-section (1) of Section 145 and under Sub-section (1) of Section 146 cannot be passed as an order of attachment under Sub-section (1) of Section 146 can be passed only after the preliminary order under Sub-section (1) of Section 145 had already been passed by the Magistrate.

Where the Magistrate made a preliminary order u/s 145 and stated that he was satisfied that there were sufficient grounds for taking proceedings as there exists serious likelihood of breach of peace concerning the disputed property and further by the later part of the decree he placed the disputed property under attachment u/s 146(1), his order regarding later part would be without jurisdiction.

Justice Menon while taking the above view relied on the observations of Janki

Amma, J. in Lily Franklin's case 1977 Ker LT 871 wherein it was observed as under:

The learned Additional Sessions Judge has held that in the instant case, the order of attachment does not conform to the requirements of Section 146(1) of the Code of Criminal Procedure. The conclusion seems to be well-founded. The order of the Magistrate extracted above shows that it is a composite order initiating proceedings u/s 145(1) and at the same time attaching the subject of dispute on the ground that there is an emergency. In other words, the initiation of proceedings u/s 145(1) and the attachment of property are seen effected by the same order. This is not warranted by the provisions of Section 146(1). Section 146(1) begins with the words:

If the Magistrate at any time after making the order under Sub-section (1) of Section 145...

The expression "after making the order" makes it clear that proceedings u/s 145(1) should precede the order attaching the property, Section 146(1) does not contemplate a simultaneous exercise of jurisdiction under Sections 145(1) and Section 146(1). The order u/s 145(1) becomes complete only when the Magistrate puts his signature therein. It is only thereafter that he is expected to consider whether it is a case of emergency requiring attachment of property. Since the order attaching property in the instant case did not satisfy the above requirements, it was rightly set aside by the Additional Sessions Judge. Now that the preliminary order u/s 145(1) has been confirmed by the Additional Sessions Judge, it is open to the Magistrate to consider whether a case of emergency exists and whether the property should be attached and if he is so satisfied it is up to him to issue fresh order of attachment followed by appointment of receiver.

8. Thus Janki Amma, J. has laid emphasis on the Magistrate's putting signatures on the order u/s 145(1), Cr. P.C. In our opinion this is reading the provisions of Section 146, Cr. P.C. in between lines. We are in respectful disagreement with the view taken in this case inasmuch as we do not find any restriction in any law that the order u/s 145(1), Cr. P.C. is complete only when the Magistrate puts his signature therein and it is only thereafter that he is expected to consider whether it is a case of emergency requiring attachment of the property. While interpreting the provisions of Sections 145(1) and 146(1), Cr. P.C. one has to look into the substance rather than the form and rules of technicality need not negative the intention of the legislature. The Magistrate, while passing the order u/s 146(1), Cr. P.C. has to do so in three cases viz. (1) if it is a case of emergency or (ii) if none of the parties was in possession, or (iii) if in no position it is possible to ascertain as to which party is in possession. Such an order if necessary can only follow preliminary order u/s 145(1), Cr. P.C. The words "at any time after making the order under Sub-section (1) of Section 145, Cr. P.C. in our opinion have been added so that the Magistrate without mixing up the two may draw the preliminary order first in terms of the Section 145(1), Cr. P.C. and having fixed the date and place of hearing, thereafter consider the question of attachment

and appointment of receiver. Therefore, only requirement is that order u/s 145(1), Cr. P.C. must precede the order u/s 146(1), Cr. P.C. It is not the requirement of law that order u/s 146(1), Cr. P.C. should be passed only after notice to either side.

9. The words "at any time" in our considered opinion mean that the order u/s 146(1), Cr. P.C. can be passed immediately after passing the order u/s 145(1), Cr. P.C., it can be passed at a later hour on the same day, or on any date thereafter, may be after notice to the other side, or otherwise and cannot be restrained to mean that order should be separately drawn and signed twice. If such a restrictive meaning is given then the words "at any time" would become redundant. The plain meaning of the words "at any time" after making the order u/s 145(1), Cr. P.C. only requires the precedence of order u/s 145(1), Cr. P.C. over order u/s 146(1), Cr. P.C. It need not be signed at two places. The putting of the separate signature is merely an idle formality and cannot negative the intention of the legislature. It may at best be an irregularity.

10. In Mahendra Tiwary Vs. Mt. Lal Pari Devi and Others, the Division Bench of Patna High Court observed as under:

From discussion of the above cases this much is clear that an order of attachment cannot be passed simultaneously in the sense that a Magistrate while initiating a proceeding u/s 145 of the Code cannot, at the same time also make an order of attachment. An order of attachment has got to be made subsequent to the initiation of the proceedings in the circumstances mentioned in Section 146(1) of the Code.

In the aforesaid case reliance has been placed on the following observations of their Lordships of the Supreme Court:

Now, in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145, Sub-section (4) is against any such implication. Suppose a Magistrate draws up a preliminary order u/s 145(1) and immediately follows it up with an attachment u/s 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under %. Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely

to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

The provisions of Sections 145 and 146 of the 1973 Code are substantially the same as the corresponding provisions before the 1955 amendment. The only noticeable change is that the second proviso to Section 145(4) (as it stood before the 1955 amendment) has now been transposed to Section 146 but without the words "pending his decision under this Section" and with the words "at any time after making the order u/s 145(1)" super-added. The change, clearly, is in the interests of convenient draftsmanship. All situations in which an attachment may be made are now mentioned together in Section 146. The words "pending his decision under this section" have apparently been omitted as unnecessary since Section 145 provides how the proceeding initiated by a preliminary order must proceed and end and therefore, an attachment made "at any time after making the order u/s 145(1)" can only continue until the termination of the proceeding. At the termination of the proceeding, if he finds one of the parties was in possession as stipulated, the Magistrate must make an order as provided in Section 145(6) and withdraw the attachment as provided in Section 146(1) since there can be no dispute likely to cause a breach of the peace once an order in terms of Section 145(6) is made.

In *Mathuralal Vs. Bhanwarlal and Another*, their Lordships of the Supreme Court after considering *Chandu Naik and Others Vs. Sitaram B. Naik and Another*, held as under:

There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145, Sub-section (4) is against any such implication. The only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

Their Lordships of the Supreme Court neither considered the question whether a simultaneous order or a composite order can be passed or not. Their Lordships only considered the Magistrate's jurisdiction u/s 146, Cr. P.C.. On a careful reading of this decision of the Supreme Court we are unable to come to the conclusion which has been arrived at by Patna High Court. In Patna High Court's case there is no mention as to on which observations of their Lordships of the Supreme Court they had reached the conclusion that simultaneous orders under Sections 145 and 146, Cr. P.C. cannot be passed. We are in respectful disagreement with the view expressed by the Hon'ble Judges of the Patna High Court.

11. We will now consider the cases cited by Shri Dhankhar. In *Surendranath Samantaray Vs. State of Orissa*, Orissa High Court has observed as under:

A Magistrate who wants to pass an order u/s 146(1), has at first to pass an order u/s 145(1) in order to assume jurisdiction to attach the property u/s 146(1). There is nothing in the said two sections or in the Cr. P.C. to prevent a Magistrate to pass the said two orders in the same strain and in the same sitting, the order u/s 146(1) just following the order u/s 145(1) of the Code.

We do not get any assistance from this decision as neither the facts are mentioned nor there is discussion of law. However, we are in agreement with the conclusions arrived at for the reasons which we have mentioned in this judgment. Hon"ble Byas, J. in *Ram Prasad's case* 1984 Cri LJ 130 (Raj) relying upon the observations made in *Ramavtar v. Dhanraj* 1977 R LW 47 held that passing of the orders simultaneously both under Sections 145 and 146, Cr. P.C. is not illegal. In our opinion the word "simultaneously" may not be proper phraseology which ought to have been used while deciding the scope as in our opinion the order u/s 145(1) must precede order u/s 146(1), Cr. P.C. and the two orders are separate one after another though they have been signed at the bottom and there is no illegality in doing so. Hon"ble Kasliwal, J. in *Girwar Dan Vs. Ram Prasad*, discussed several cases except the judgment of Hon"ble Byas, J. and that of Sharma, J. But after detailed discussions of the various decisions on either side held that composite order may validly be passed. He however held that it is appropriate if the Magistrate passes two separate orders.

12. We are thus in agreement with the view taken by Hon"ble Kasliwal, J. in *Girwardan's case* that a composite order signed at one place can be passed and the only requirements are that order u/s 145(1), Cr. P.C. must be separate than the one u/s 146(1), Cr. P.C. The order u/s 145(1) must precede the order u/s 146(1), Cr. P.C. Both the orders must satisfy the conditions for drawing the orders under the two sections and if this is all done, then the order is a valid order.

13. We, therefore, conclude that the Magistrate can pass a composite order of attachment on disputed property u/s 146(1) while passing the preliminary order u/s 145(1), Cr. P.C. But such an order is only valid in the following circumstances:

(a) The order u/s 145(1) should be separately drawn than the order u/s 146(1), Cr. P.C.

(b) That the order u/s 145(1) must precede order u/s 146(1), Cr. P.C.

(c) It must be borne out from both the orders that they satisfy separately the existence of the conditions for drawing such orders under the two sections. The reference is answered accordingly.