

(1983) 12 AHC CK 0042

In the Allahabad High Court

Case No : Criminal Miscellaneous Case No. 1510 of 1983

Bam Bahadur Singh and Others

APPELLANT

Vs

Moti Singh and Others

RESPONDENT

Date of Decision : 22-12-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 142, 145, 145(1)

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 142, 145, 145(1)

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133(1), 142, 145, 145(1)

Citation : (1982) 8 ACR 394

Hon'ble Judges : Kamleshwar Nath, J

Bench : Single Bench

Advocate : L.P. Shukla, for the Appellant; S.M. Nasir, for the Respondent

Final Decision : Allowed

Judgement

Kamleshwar Nath, J.—The dispute relates to a house situate in the city of Balrampur. It originally belonged to Hardwari Prasad and Ravi Chand who were the sons of the original owner and since these persons normally resided out of Balrampur, they transferred it by a sale on 13-7-1982 to the Petitioners Bum Bahadur Singh and others. Sometime in April, 1983 a dispute appears to have arisen between them and opposite parties Moti Singh and others who claimed themselves to be old tenants of the property. On 26-4-1983 the police submitted a report for proceedings u/s 145 Code of Criminal Procedure. On 27-4-1983 the Magistrate concerned passed a preliminary order u/s 145(1) Code of Criminal Procedure calling upon both the parties to file their written statements. On 12-5-1983, both the parties filed their written statements.

2. In the meantime the Petitioners had filed a regular civil suit in the civil court and on 30-4-1983 an interim order was passed between the parties to maintain status quo. While that order was still in force, the opposite parties made an application u/s 145(8) Code of Criminal Procedure on 18-5-1983 with the allegation that the Petitioners wanted to make alterations in the structure of the

building and, therefore, local inspection of the property may be made and for its preservation the house may be given in the Supardigi of some person. The application was objected to by the Petitioners. On 6-6-1983 the Magistrate made local inspection and placed his inspection memo on record. The material content on which the Magistrate relied was that the house was in a dilapidated condition especially the first floor which was not fit for human habitation. Another report dated 15-6-1983 was also submitted by the police which suggested that there was apprehension of breach of peace on the ground that there was high tension between the parties in respect of possession over the property which could cause use of force by either party. On the basis of this report, the learned Magistrate, while refusing to act u/s 145(8) Code of Criminal Procedure, passed the impugned order u/s 146(1) Code of Criminal Procedure directing the house to be attached. The learned Magistrate while passing the impugned order noticed that the opposite parties had contended that the Petitioners had forcibly entered into the house and wanted to make alterations therein whereas the Petitioners stated that on account of the interim order passed by the civil court, there was no question of making any alterations in the house. The Magistrate then went on to record two contingencies which in his opinion justified the order in question. Firstly, according to him there was high tension between both the parties and secondly, the house was so dilapidated that it would be improper and unsafe for any one to live in it. On this basis the Magistrate directed that it was necessary to take action u/s 148 Code of Criminal Procedure and that the house be kept under attachment.

3. Learned Counsel for the Petitioners contended that the Magistrate, having acted on the motion of the opposite parties in a petition u/s 145(8) Code of Criminal Procedure was not competent to pass order u/s 146 Code of Criminal Procedure. There is no substance in this contention. If the facts establishing emergency are made out, even though the proceedings are on a motion u/s 145(8) Code of Criminal Procedure, there is nothing to prevent the Magistrate to take action u/s 146 Code of Criminal Procedure. In the case of Nathuni Ram v. State of U.P., 1983 AWC 489 it has been observed that if action u/s 145(8) Code of Criminal Procedure is not effective, the Magistrate may attach the property u/s 146 Code of Criminal Procedure.

4. Learned Counsel for the Petitioners then urged that the impugned order has been passed on irrelevant and extraneous considerations inasmuch as it takes into account the so-called dilapidated condition of the house. It is pointed out that action u/s 146(1) Code of Criminal Procedure could be taken only if the Magistrate considers the case to be one of emergency; the other contingency set forth in that Sub-section being not applicable. If the Magistrate thought that the building was so dilapidated that it was improper and unsafe for any one to live in it, perhaps he had the jurisdiction to act u/s 133(1)(d) Code of Criminal Procedure and pass conditional order containing directions provided for in Clause (iv) of that: Sub-section. This contention is correct and to it one may add that in those circumstances the Magistrate was also competent to pass suitable

injunction u/s 142 Code of Criminal Procedure, against the Petitioners to prevent danger or injury to any person pending final orders in the proceedings u/s 133 Code of Criminal Procedure.

5. The only contention submitted by the opposite parties in this connection is that if emergency was found established by the Magistrate, then the mere inclusion of the further irrelevant or extraneous ground of the building being in a dilapidated condition would not vitiate the order, because it cannot be said that the Magistrate would not have ordered the attachment of the property if he had not taken the dilapidated condition of the house into consideration. It is not possible to accept this contention because in clear terms the Magistrate set forth both these elements as the basis of his order for attachment. It is not possible to separate one from the other, and it is not possible to surmise that if he did not feel that the property was not in a dilapidated condition he might still have maintained the attachment order u/s 146(1) Code of Criminal Procedure. It is well settled that irrelevant and extraneous matter vitiates an order.

6. Learned Counsel for the opposite parties submitted that this petition u/s 482 Code of Criminal Procedure is not maintainable because an order u/s 146(1) Code of Criminal Procedure is an inter-locutory order. He referred to the decision in the case of *Inder Deo Pandey v. Smt. Bhagwati Devi* 1981 AWC 314. But this decision does not support the contention in as broad a language as learned Counsel for the opposite parties seeks to apply. The ultimate view taken in the case, in para 15 of the report, is as follows:

In the instant case the power can be exercised in favour of the applicant only if this Court comes to the conclusion that there is going to be abuse of the process of any court or otherwise it is necessary to secure the ends of justice. The learned Magistrate has found that there is imminent apprehension of breach of peace between the parties. The proceedings u/s 145 of the Code are still going on. In these circumstances it was necessary for him to have the property attached so that breach of peace may be prevented and he may be able to conclude the proceeding u/s 145 of the Code. The satisfaction recorded by the Magistrate in this regard does not appear to be mala fide or motivated. In these circumstances there is hardly any scope for saying that any process of the court is being abused by any party.

7. It will be seen that the High Court is not barred totally to interfere u/s 482 Code of Criminal Procedure in matters of attachment of property u/s 146(1) Code of Criminal Procedure, but is competent to do so if it is found that there is going to be abuse of process of the court or that otherwise it is necessary to secure the ends of justice. The order is also liable to be interfered with if it appears to be mala fide or motivated. In this connection it is noticeable that on the opposite parties own showing it is the Petitioners who are in possession of the property which has given them the occasion for making alterations in the house. The result of the order of attachment would be to throw the Petitioners out of possession of the property and if such an order is based on irrelevant and

extraneous considerations, it may well be said to be vitiated by mala fides in law as distinguished from mala fides in fact. It will be noticed that the Supreme Court has held in State of Punjab and Another Vs. Gurdial Singh and Others, that:

If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power vitiates the acquisition or other official act.

8. Learned Counsel for the opposite parties has also referred to the case of Nathuni Ram v. State of U.P., 1983 AWC 489 to show that order u/s 146(1) Code of Criminal Procedure is an inter locutory order and, therefore, a revision u/s 197 Code of Criminal Procedure does not lie. The contention is answered by the last sentence in paragraph No. 7 of the report which reads as follows:

...I may also mention if the Court does not find any abuse of process of law it would refrain from exercising powers u/s 482 Code of Criminal Procedure while exercising such powers the Court does not function as Court of appeal or revision.

9. The provision u/s 397(2) Code of Criminal Procedure does not operate as a bar to the power u/s 482 Code of Criminal Procedure. It, of course, goes without saying that the power u/s 482, Code of Criminal Procedure has to be exercised subject to those conditions as are set forth in the Division Bench case of Indra Deo Pandey v. Smt. Bhagwati Devi, (supra). I find that the requisite conditions for interference by this Court u/s 482 Code of Criminal Procedure are made out and the order cannot be sustained.

10. The revision is allowed and the impugned order dated 16-6-1983, contained in Annexure No. 4 to the petition is quashed. The Magistrate will do well to conclude the proceedings u/s 145 Code of Criminal Procedure as early as possible.