

(1982) 03 BOM CK 0057

In the Bombay High Court

Case No : Criminal Application No. 2018 of 1981

Cadglin A. D'Souza and Another

APPELLANT

Vs

Harichandrai Vanjumul Sangtani and Another

RESPONDENT

Date of Decision : 31-03-1982

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(3)
Evidence Act, 1872 — Section 40, 41, 42, 43

Citation : (1983) 1 BomCR 313

Hon'ble Judges : S.J. Deshpande, J

Bench : Single Bench

Advocate : M.R. Suryavanshi, P.P., Shekar Naphade, for S.B. Amrute, for the Appellant; A.K. Thjani, for the Respondent

Judgement

S.J. Deshpande, J.—This is a petition filed by the petitioners who were originally the opposite parties in proceedings u/s 145 of the Criminal Procedure Code. Respondent No. 1 to this petition was the first party who commenced the proceedings u/s 145 of the Criminal Procedure Code on 6-6-1981 before the Executive Magistrate, Greater Bombay, Court No. 1, Old Customs House. On 13-6-1975, the Executive Magistrate passed a preliminary order as required by section 145 and proceeded with the enquiry. The petitioner was joined as opposite party to that proceedings. The enquiry was completed by the Executive Magistrate and he passed the final order on June 22, 1981. The Executive Magistrate held that the respondent No. 1 was in possession of the disputed premises as mentioned in his order.

2. This order was challenged by the petitioners before the Sessions Court, Greater Bombay in revision. The learned Additional Sessions Judge, Greater Bombay rejected the revision application after recording his reasons by his order dated November 19, 1981.

3. It is the revisional order of the learned Additional Sessions Judge, which was

been challenged by the petitioner by way of invoking the powers of this Court under Article 227 of the Constitution of India. I have heard the learned advocates of the parties and also of Public Prosecutor. The learned Advocate for the petitioner contended that the orders of the Court below are vitiated by an error apparent on the face of record and, therefore, this Court should interfere and examine the record. It was pointed out that a criminal prosecution was filed at the instance of respondent No. 1 in regard to certain offences which are described under sections 380, 341 and 454 of the Indian Penal Code. The offences relate to house-breaking and commission of theft from the complainant's premises. The complainant in the criminal case is the original first party before the Magistrate. This Criminal Case was numbered as 2698/P/1975. This was initiated earlier in the sense that the complainant alleged that between the period of 18-5-1975 to 20-5-1975 respondent No. 1 petitioner herein and three others committed various acts which are covered by sections 454, 380, 341, r/w 114 of the Indian Penal Code. On the basis of this complaint a police case was filed and the prosecution ended in acquittal of the petitioners, by the judgment and order passed by the Additional Magistrate Chief Metropolitan, 9th Court, Bandra, Bombay on November 21, 1978.

4. It was contended by the learned Advocate for the petitioner that in view of the finding recorded in this judgment at para 13 that the possession of the premises in question is not proved, by any reliable and acceptable evidence, there is no question of the accused or any one else for that matter committing burglary or house-breaking into the said premises. There is also no question of the complainant having any right to enter the said premises of which he is supposed to have been deprived. The charges of house-breaking and wrongful restrain must, therefore, fail. The same holds about the charge of theft from the alleged shop premises. Relying on this observation and the findings of judgment, it was contended by the learned Advocate for the petitioners that the Magistrate before whom this judgment was cited casually referred to it and did not even give any weight to it. The learned Advocate further contended that the findings recorded in this case related to the same premises which are in dispute before the Magistrate and if the complainant's possession was disproved in the said prosecution the Magistrate had no jurisdiction to proceed with the enquiry u/s 145 of the Criminal Procedure Code, 1973 or having proceeded with the enquiry he had no jurisdiction to record the finding recorded by the learned Magistrate. 9th Court in the said criminal prosecution. In short, the contention of the learned Advocate was that the finding recorded by the criminal courts in the above case should have been accepted by the Magistrate on the principle of natural justice. The contention of the petitioner was that the findings recorded by the Competent Court in relation to the question of possession of the premises must prevail and the jurisdiction of the Magistrate to that extent is curtailed.

5. The learned Advocate invited my attention to a judgment of the Supreme Court, in support of his contention, reported in *Manipur Administration Vs. Thokchom, Bira Singh*, Relying on the observation of this case, the learned

Advocate for the petitioner contended that the Magistrate is precluded from reversing any evidence or disturbing the finding of fact when in the earlier case the petitioners accused were acquitted on the basis of that finding. In my opinion, the principle relied on by the learned Advocate is in dispute. The Supreme Court has rightly pointed out that if the trial of offence is repeated on the same facts which were earlier in dispute and the finding of the Competent Court is recorded then such finding does bar the other Court for proceeding with the trial or recording any finding adverse to the previous finding already recorded between the same parties. In the present case in which the orders on the criminal courts are invoked are quite different. Proceedings u/s 145 are not in the nature of trial. There is no determination of any criminal liability in the proceedings. While the judgment in the criminal case which was relied on by the learned Advocate for the petitioner related to certain offences i.e. illegal acts committed by the petitioners in respect of certain premises. Therefore, the common factor i.e. subject of determination on between two proceedings being quite different, it is difficult to hold that the finding recorded in criminal case seems to be accepted by the Magistrate in making order u/s 145 of the Criminal Procedure Code. I may here refer to a judgment of the Supreme Court reported in *Kharkan and Others Vs. The State of Uttar Pradesh*, wherein the Supreme Court has observed under :---

"The earlier judgment could be admissible only if it fulfilled the conditions laid down in sections 40 to 43 of the Evidence Act. The earlier judgment was admissible to show the parties and the decision but it was not admissible for the purpose of relying upon the appreciation of evidence."

In view of this observation, I do not think that it would be justified to adopt the judgment and give it such weight as to debar the Magistrate from determining the subject matter of dispute before him.

6. There is another aspect which is very important. The proceedings u/s 145 are not for determination of any right. The proceedings are started on the special grounds. The intention of jurisdiction to initiate the proceedings is based on the existence of the breach of itself. It is speedy remedy provided by the legislative to maintain the possession of the party which is found in possession. The jurisdiction does not cover the decision of the title at all. The proceedings are quasi administration and the object of these proceedings is to maintain peace and avoid the breach of peace. It is a speedy remedy and the purpose and the object of this remedy is to prevent the breach of peace by preventing parties before the Court to ascertain who of them are in actual possession and, thereafter maintain status quo, until their rights are decided by the Competent Court. The conditions which are laid down in section 145 are well-settled. The Magistrate is to satisfy firstly that the dispute in relation to the immovable property exists and secondly such a dispute is likely to cause breach of peace. Once these two conditions are satisfied the jurisdiction of the Magistrate to pass the preliminary order and to conclude the proceedings remains unlimited and he

can proceed with the enquiry and pass the final orders.

7. The orders passed by the Magistrate in such proceedings are only temporary orders and subject to the final decision of the Competent Civil Court. The Magistrate has to option once the proceedings are started. He has to proceed with the enquiry and the order which the passed u/s 145 is in the nature of declaration of the possession of a particular party.

8. Having regard to the nature of the order passed by the Magistrate, I do not think that any order passed by any Criminal Court in any proceedings can bar the enquiry of the Magistrate.

9. There is another aspect which should not be forgotten while appreciating the true effect of the order u/s 146. The parties with whom the Magistrate has to deal with are not merely the actual parties but all those persons who were concerned with the dispute. The object being to prevent the breach of peace, therefore, the order which is passed by the Magistrate u/s 145 binds all those who have a notice of these proceedings and it is borne out by sub-section (3) of section 145 that the preliminary order must be affixed to some conspicuous place at or near the subject of dispute. Therefore, the persons found or the parties are of those who have noticed this publication. The intention of the legislature is that the order passed by the Magistrate should have a reference to the subject-matter of the dispute, not to the persons who are included therein i.e., to see whether the declaration has been made as regards the possession of the subject-matter of the dispute. It is without prejudice, binding on all persons interested therein and consequently it is for these persons who dispute the possession whether he was party to the possession or not to approach the Civil Court.

10. I would not dispose of thus matter on the preliminary point itself bearing in mind the above observations which I have made that the petitioner had an adequate remedy of civil suit and the petition under Article 227 of the Constitution of India is not a proper remedy in the circumstances of this case. But as I have heard the learned Advocate for the petitioners who raised a point of law, I have chosen to decide that point. Otherwise in my opinion, when the Executive Magistrate had passed an order and it has been confirmed by the Additional Sessions Judge, the jurisdiction of this Court under Article 227 of the Constitution of India cannot be invoked, because the petitioners in such cases had got adequate remedy and that remedy being of filing civil suit and get right or title decided once, he is bound by the order passed u/s 145. In my opinion, there is no substance in the contention raised by the petitioner as stated above and the order passed had not suffered any defect of law much less any error apparent on the face of record as was pointed out by the learned Advocate for the respondent. Therefore, the rule is discharged. Petition fails. The learned Advocate for the petitioner has requested that he may be given time to file suit or take proper remedy and till then the order of the Magistrate cannot be executed. I grant him time upto 21-4-1982 within which he must obtain any proper order from the Competent Court, otherwise the order of the Magistrate

will be executed forthwith.