
(1995) 04 J&K CK 0015
In the Jammu And Kashmir High Court
Case No : Criminal Rev. No. 20 of 1994

Girdhari Lal

APPELLANT

Vs

Remi Bairagi and Others

RESPONDENT

Date of Decision : 07-04-1995

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 145, 145(1), 145(4), 146

Citation : (1995) CriLJ 3311

Hon'ble Judges : B.A. Khan, J

Bench : Single Bench

Advocate : O.P. Thakur, for the Appellant; J.P. Singh, for the Respondent

Final Decision : Dismissed

Judgement

B.A. Khan, J.—This is the second revision filed by the petitioner challenging the rejection of his application u/s 145 Cr. PC. His application

was dismissed by the Magistrate on finding that he had failed to prove the possession of the subject of dispute. The learned Sessions Judge

concurred rejecting his first revision petition by an elaborate order though on a different reasoning. The matter has in the process thrown up an

interesting question for determination viz: Whether the trial magistrate can assume jurisdiction' u/s 145 Cr.P.C. on the application of a party who is

not in ""actual possession"" of the subject of dispute ?

2. Petitioner's case was that his uncle, Lachhman Singh, happened to be the tenant of a shop owned by Mandir Satyanarayan Ji at Panjtirthi,

Jammu and let out to him by Mahant Ram Rattan, the manager of the diety. Lachhman Singh, a bachelor, died on 17-12-1993 and though he was

to carry on the business in the shop, he could not do so on account of the death

of two sisters of his father. In the meanwhile respondents broke

open into the shop on 19-4-1993 and took forcible possession of the goods lying therein with the help of goondas.

3. The Magistrate after framing preliminary order and perusal of the evidence led by the parties concluded that the petitioner had failed to prove his

possession of the shop and dismissed his application. The Sessions Judge upheld the rejection but went a step further ruling that since he was not in

actual possession"" of the shop and was only agitating his right of possession, the Magistrate had no jurisdiction to proceed with his application.

4. Mr. Thakur, learned counsel for the petitioner assailed the orders passed by the courts below primarily on two counts. According to him, even

when the petitioner was not found in actual possession of the subject of dispute, he should have been deemed to be in its constructive possession

by reason of his being the legal heir and successor. of his uncle, Lachhman Singh. Alternatively, he urged that when Lachhman Singh's surrender of

the shop to the respondents, two years before his death, remained, unestablished, the Magistrate instead of rejecting the petitioner's application

should have referred the matter to the civil court of competent jurisdiction u/s 146 Cr.P.C. He sought support from Sita Devi Thapa Vs. The

Commandant, 6th Battalion Assam Rifles, and Others, and Padmaraju Subba Raju and Others Vs. Padmaraju Koneti Raju and Another, .

5. Mr. J.P. Singh, learned counsel for the respondents, on the other hand, submitted that the Magistrate could assume jurisdiction u/s 145 Cr.P.C.

only where the dispute related to ""actual possession"" of the property mentioned therein. Since the petitioner had failed to claim actual possession of

the shop and based his case on his right of possession being the legal heir of tenant Lachhman Singh, he could not invoke the jurisdiction of the

Magistrate u/s 145 Cr.P.C. His remedy was for recovery of possession of the shop before a civil court only. He relied upon 1986 Cr LJ 1110.

6. I have examined the orders passed by the courts below and I find that the first revisional court has dealt with all the contentions raised by the

petitioner in this petition. However, I am still called upon to undertake a repeat exercise and all that remains to be seen in essence is whether the

petitioner's application was rightly rejected and whether his case before the Magistrate reflected his claim to right of possession of the shop or its

actual possession.

7. It is well settled by now that Section 145 contemplates only the "actual possession" of the subject of dispute and the Magistrate is concerned

only with determining such possession of the parties without reference to and irrespective of their right of possession. The expression "actual

possession" suffers from no ambiguity and connotes that a person must have effective control and command over the subject of dispute. It may not

be also actual physical possession or a lawful possession in all cases and may include even the possession of a trespasser or for that matter,

constructive possession, but it cannot certainly include a right to possession. The right to possess stands poles apart. It is a half-baked right which

may or may not culminate in actual possession. As such it cannot be equated with actual Possession conceptually or otherwise. A person may seek

determination of his right to possess a property in which he may succeed or fail. If he fails it would not result in his possession on a simple logic.

8. The right to possess is also not synonymous with the constructive possession as is mistakeably believed by Mr. Thakur. The constructive

possession stands at higher pedestal and postulates a power and intent to control a property. A person must be in a position to exercise dominion

or control over the property to claim constructive possession. It has all the attributes of a possession short of actual physical possession. It may be

true that the Magistrate is competent to investigate into the constructive possession of a party, but such an occasion did not arise in this case.

9. No precedent is required to be dug up to show that a Magistrate assumes jurisdiction u/s 145 Cr.P.C. only in a case where the dispute likely to

cause breach of peace relates to the actual possession of the subject because the terms of the possession are so plain and clear. Sub-section (1)

carries the expression "as respects the fact of actual possession of the subject of dispute." Similarly, Sub-section (4) empowers a Magistrate to

peruse the statements, documents and affidavits filed by the parties and to decide the question as to which of the parties was in such possession on

the date of preliminary order without reference to the merits of their claims relating to right to possess the subject of dispute.

9A. Viewed thus, it does not now require any research to be conducted to discover that the petitioner, on his own showing,, had failed to assert

actual possession"" of the shop in question in this application or in his evidence. His case was based on his claim to possess the shop on the death

of the original tenant. He could also not be credited with the constructive possession of the shop because he had never claimed at any stage that he

was exercising any control or dominion over it. Therefore, the Magistrate was justified in rejecting his application in this setting.

10. Mr. Thakur's other submission also proceeds on misconstruction of the terms of Section 146 Cr.P.C. This provision deals with the power of

the Magistrate to attach the subject of the dispute and to refer the case to a civil court of competent jurisdiction where he forms an opinion that

none of the parties was in possession or where he is unable to decide which of the parties was then in possession. Such a situation did not obtain in

the present case. The Magistrate, therefore, was not obliged to attach the shop and forward the record of the proceedings to the civil court for

determination of possession of the parties.

11. This petition must resultantly fail and is dismissed.