
(2011) 11 UK CK 0075

In the Uttarakhand High Court

Case No : Criminal Miscellaneous Application No. 251 of 2007

Girish Prasad and another

APPELLANT

Vs

State of Uttarakhand and another

RESPONDENT

Date of Decision : 30-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116, 145, 146, 146(1)

Citation : (2011) 11 UK CK 0075

Hon'ble Judges : Servesh Kumar Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Servesh Kumar Gupta, J.—By way of this petition filed u/s 482 Cr.P.C., a prayer has been made to quash the order dated 06.02.2006 passed by Sub Divisional Magistrate, Bhatwari, District Uttarkashi whereby the property in question was attached. It has also been prayed to quash the order dated 17.03.2007 passed by learned Sessions Judge, Uttarkashi in criminal revision No. 6 of 2006. Learned Sessions Judge dismissed the revision and affirmed the impugned order of Sub Divisional Magistrate.

2. Having heard learned counsel for the parties, it transpires that Ganga Prasad and Badri Prasad were two real brothers and residents of village Phold Baman Gaon, Patti Dhanari, Tehsil Dunda, District Uttarkashi. Applicants are sons of Badri Prasad and thus, nephew of Ganga Prasad. Both the parties resided in different rooms, which are located in the same precinct. In front of the rooms occupied by the parties, there is a spacious yard, which was in joint use of Ganga Prasad, applicants and two other brothers namely Hirdey Prasad and Jagdish Prasad, who were also having their rooms between the rooms of Ganga Prasad and applicants, so they had also a right to use this empty yard equally.

3. The dispute arose when Girish Prasad and Vikas Prasad raised a double storeyed construction in the vacant place of yard, which was located in front of

Hirdey Prasad's room. Their averment was that shares of Hirdey Prasad and Jagdish Prasad have been purchased by them. By raising the construction, they impeded the enjoyment of open space of open yard, approach of sunshine, shade and air to the detriment of Ganga Prasad and his family members. Some time in the month of April to June, 2004 Ganga Prasad was on his priestial work in the plane area. When applicants started to raise constructions, he was informed by his daughter-in-law, he soon came back to his house sometime in the last week of June, 2004. Ganga Prasad moved an application on dated 03.08.2004 to the concerned Executive Magistrate, who asked Patwari of area to submit his report.

4. Patwari submitted his report on dated 28.08.2004 to the Sub Divisional Magistrate concerned. He reported that by raising construction sunshine, shade and air has been adversely affected to Ganga Prasad and his family members, which resulted in the apprehension of breach of peace. Learned Magistrate registered case No. 14 of 2004 and invited the objections from Girish Prasad and Vikas Prasad. They also kept their version before the Magistrate but the learned Magistrate was of the view that Girish Prasad and Vikas Prasad since could not produce any evidence regarding purchase of shares from Hirdey Prasad and Jagdish Prasad, so finding a prima facie case in view of Sub Divisional Magistrate that newly raised construction erected in the share of Hirdey Prasad in front of Ganga Prasad was attached being disputed one u/s 146(1) Cr.P.C. and fixed further date asking both the parties to produce their evidence.

5. This order of Sub Divisional Magistrate was challenged by way of filing revision No. 06 of 2006 and learned Sessions Judge after hearing the parties, dismissed the revision on 17.03.2007 on merits whereagainst this petition has been filed challenging the orders of Sub Divisional Magistrate as well as Sessions Judge aforementioned.

6. It has been argued by learned counsel for the applicants that Ganga Prasad filed original suit No. 17 of 2005 in the court of Civil Judge (Junior Division), Uttarkashi against Girish Prasad and Vikas Prasad pertaining to dispute of raising construction and the injunction application moved in that suit was rejected on merits on 03.08.2005. After rejection of the injunction application, Ganga Prasad filed Misc. Appeal No. 14 of 2005 in the court of District Judge, Uttarkashi, which was also dismissed on 04.05.2006 in favour of Girish Prasad and his brother. Later on, the above suit was dismissed on 10.11.2006 in non prosecution, so learned counsel for the applicants has relied upon the precedent of Phool Mohammad Vs. State of U.P. reported in LIII 2005 ACC 428. In sum and substance, the above precedent states that when the matter is already subjudice in the court of Civil Judge, then it was not open for the Executive Magistrate to initiate proceedings u/s 145 Cr.P.C. and pass any order u/s 146(1) Cr.P.C. This precedent referred two authorities of Hon'ble Apex Court one in the case of Ram Sumer Puri Mahant Vs. State of U.P. reported in II 1985 ACC 45 (SC) and second in the case of Jhunamal alias Devandas Vs. State of Madhya Pradesh and others reported in XXV 1988 ACC 401 (SC).

7. It has also been argued that proceedings u/s 107, 116 Cr.P.C. initiated between the parties were extinguished after expiry of six months on dated 21.05.2005 because prior to this date no report was received to the Magistrate regarding breach of peace.

8. On the other hand, learned counsel for the respondent No. 2 drew attention of this Court that original suit No. 17 of 2005 as well as Misc. Appeal No. 14 of 2005 mentioned hereinabove did not adjudicate the controversy regarding construction of double storey building raised by Girish Prasad and Vikas Prasad in the joint yard but that was pertaining to water hand pump which had been installed by Girish Prasad in the open yard and for this reason Executive Engineer, Uttaranchal, Jal Sansthan as well as State of U.P. were also made parties in that original suit. These facts adverted by learned for the opposite party finds veracity in the pleadings and relief claimed in the civil suit aforementioned. But the present controversy in the matter before Executive Magistrate u/s 145 and 146 Cr.P.C. was regarding construction of double storey building which has been raised by Girish Prasad and Vikas Prasad in the joint yard. This way the precedent relied upon by the applicants are neither relevant nor applicable to the present controversy. As regards to the finding of Sub Divisional Magistrate while extinguishing the proceedings u/s 107 & 116 Cr.P.C. on 21.05.2005 is also worthless because those proceedings were done away with because of the expiry of prescribed period of six months under the Act and it was natural not to receive the report of breach of peace between the parties because every time Ganga Prasad cannot be supposed to make hue and cry behind Girish Prasad and Vikas Prasad, particularly, when matter has been seized by learned Sub Divisional Magistrate u/s 145, 146 Cr.P.C. The order of Sub Divisional Magistrate clearly indicates that construction has been raised on the joint open yard, which is hampering the enjoyment of sunshine, shade and open air to Ganga Prasad and his family. Applicants Girish Prasad and Vikas Prasad could not show any document to the effect of purchase of share of Hirdey Prasad and Jagdish Prasad. This way petition filed by the applicants is bereft of merits and deserves dismissal. The petition is dismissed. Stay order dated 02.05.2007 granted by this Court is hereby vacated. Let the order be communicated by Registry to Sub Divisional Magistrate, Bhatwari (Uttarkashi) through District Magistrate to proceed the case pending in his court between the parties.