
(1966) 10 AHC CK 0028
In the Allahabad High Court
Case No : Criminal Ref. No. 498 of 1965

Haji Abdul Aziz Khan

APPELLANT

Vs

Abdul Aziz Khan and Another

RESPONDENT

Date of Decision : 27-10-1966

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1967) 37 AWR 133

Hon'ble Judges : D.P. Uniyal, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

D.P. Uniyal, J.—This reference has been made by the learned Civil and Sessions Judge, Allahabad recommending that the order of the Magistrate dated 31-5-1965 releasing the house in dispute in favour of two brothers Abdul Aziz Khan and Abdul Hamid Khan and prohibiting the Applicant Haji Abdul Aziz Khan from interfering with their possession may be set aside and it be held that the property being in joint possession of Abdul Aziz Khan and Haji Abdul Aziz Khan the proceedings u/s 145 Code of Criminal Procedure are misconceived and deserve to be quashed.

2. Shortly stated, the facts are as follows. On 17-10-62 Abdul Hamid Khan opposite party No. 2, (since deceased) sold house No. 197/127, situate in Mohalla Tulsipur Allahabad to Haji Abdul Aziz Khan Applicant for a consideration of Rs. 2,000/- and the vendor delivered possession of the house to the Applicant. It was alleged that Abdul Aziz Khan opposite party No. 1, brother of the vendor, forcibly dispossessed the vendee from the house in question on 23-10-62 and himself occupied the premises. This created tension between Abdul Aziz Khan and the vendee on the one hand and the vendor Haji Abdul Aziz Khan on the other. The police reported for action u/s 145, Code of Criminal Procedure and the Magistrate being satisfied that there was an apprehension of breach of the peace passed a preliminary order on 6-11-62 attaching the subject matter of dispute.

3. The parties were called upon to file their written statements, documents and affidavits in support of their respective claims, which they did. On a consideration of the documents and the affidavits filed in the case the Magistrate came to the conclusion that the vendor Abdul Hamid Khan had not delivered possession of the house to the vendee Haji Abdul Aziz Khan. For this he strongly relied on an affidavit filed by the vendor Abdul Hamid Khan wherein he had stated that after the sale deed he had not relinquished possession over the house. The Magistrate, it appears failed to notice that in his earlier affidavit Abdul Hamid Khan (the vendor) had clearly stated that soon after the sale deed he delivered possession of the house to the vendee. So far as the affidavit evidence of Abdul Hamid Khan is concerned it was contradictory and inconsistent and the Magistrate was, therefore, in error in accepting the same in support of the case set up by opposite party No. 1.

4. It has been brought to my notice that at one stage the Magistrate had sent the file to the court of the Munsif for decision of the question of possession in accordance with Section 146 Code of Criminal Procedure. On a revision being filed before the Sessions Judge the latter made a reference to this Court that the order passed by the Magistrate was illegal inasmuch as he had not drawn up a statement of facts relating to the subject matter of dispute before referring it to the civil court for decision. This Court accordingly passed an order on 7-9-1964 suggesting that the Magistrate may, if he was so advised, after drawing up a proper order, refer the question of possession to the civil court for decision. After the remand the Magistrate did not choose to proceed in accordance with the suggestion made in the order of this Court. On the other hand, he proceeded to examine further evidence and passed an order whereby he directed release of the home in favour of Abdul Aziz Khan opposite party No. 1. The learned Sessions Judge was of the view that the order passed by the Magistrate was illegal inasmuch as he had clearly ignored the fact that Abdul Hamid Khan, the vendor, had transferred his share of the house to Haji Abdul Aziz Khan Applicant and that in his first affidavit Abdul Hamid Khan had admitted the possession of the vendee over the house in dispute. He further found that on the showing of Abdul Aziz Khan opposite party No. 1 the house was the joint property of himself and his deceased brother Abdul Hamid Khan. Consequently the Magistrate had no jurisdiction to pass on order u/s 145 Code of Criminal Procedure.

5. I have heard learned Counsel for the parties at considerable length and I am of opinion that the best course would be to remand the case to the court of the Magistrate and to direct him to draw up a statement of facts and refer the question of possession to competent civil court in accordance with Section 146 of the Code of Criminal Procedure.

6. I accept the reference and quash the order of the Magistrate dated 31-5-1965 and direct the Magistrate to draw up a statement of facts of the case and forward the record of the proceedings to a civil court of competent jurisdiction to decide if any or which of the parties was in possession of the subject matter of dispute at

the date of the preliminary order, or 2 months next before the date of the said order.