
(1997) 03 J&K CK 0013
In the Jammu And Kashmir High Court
Case No : 17/96

Hatoema	Vs	APPELLANT
Zamrooda		RESPONDENT

Date of Decision : 07-03-1997

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 145

Citation : (1997) KashLJ 585 : (1997) SriLJ 410

Hon'ble Judges : M.Y.Kawoosa, J

Bench : Single Bench

Advocate : Z.A.Shah, Advocates appearing for the Parties

Judgement

1. Petitioner has taken a refuge under 561A Cr.P.C. while coming to this court. She has prayed for quashing the impugned orders dated

26.8.1995 and 30.12.1995 and 9X1996 passed by Judicial Magistrate, (Forest Magistrate) Srinagar. Shorn of details, Petitioner No.1 is he

owner of a shop situated at Dalgate, Srinagar, respondent MstZamrooda who is the widow of Ghulam Mustafa Mir initiated proceedings against

the petitioners under Section 145 Cr.P.C. in the court of Judicial Magistrate (Forest Magistrate) Srinagar, and the court below passed the

impugned orders including the order of attachment of the shop. According to the petitioners, the shop was under the tenancy of husband of

respondent, who before his death had surrendered his possession during his life time in favour of the petitioner No. 1. Therefore, the proceedings

under Section 145 Cr.P.C. are not maintainable because, no dispute arises at the spot. The shop in dispute was never in the possession of

respondent No. 1, however, this is a dispute of civil nature, proceedings under Section 145 Cr.P.C. could not lie. She has pleaded that petition

under Section 145 Cr.P.C. is not maintainable under law and is liable to be dismissed for, preliminary order has not been framed and no opportunity was given to the petitioner to give objection regarding the attachment of the suit shop. It has further been contended that the compliance of Clause III of Section 145 regarding the publication of preliminary order has not been shown. This is the main point on which the petitioner has harped and is seeking aforementioned orders to be quashed. Respondent No.1 in her objections has refuted the claim of the petitioner to be in possession of the disputed shop while saying that the shop in dispute was under the tenancy of her husband, but after his death when they all were busy at grave yard in burrying the deceased, the petitioner forcibly broke open the lock of the shop and entered into it, so she filed an application under Section 145 Cr.P.C. In consequence of which order dated 26.8.1995 which is impugned came to be passed by the trial Magistrate.

2. This order is a composite order, two in one, the trial Magistrate, has passed the preliminary order under Sub Clause 1 of Section 45 and in the last lines has taken action under SubSection 4 and has ordered the attachment of the shop in dispute. The shop was attached. Another two impugned orders relates to different applications, wherein the court has ordered that the disputed shop be sealed, the respondent has apprehended that the seal of the shop has been tampered with so the court has directed the police concerned to report whether the seal has been tampered with or not. However, these two orders are not material for the purpose of disposal of this petition.

3. Heard learned counsel for the parties at length. So far as this petition is concerned, the main point on which the petitioner has laid stress is, that the shop in dispute was never in possessing of the respondents. According to him, the possession has been surrendered lawfully to husband of respondent who was tenant of the shop, so the proceedings under Section 145 Cr.P.C. could not have been initiated. Secondly counsel for the petitioner contended that no preliminary order has been passed, which tantamounts the failure to comply the mandatory provision of Sub clause 1 of Section 145 Cr.P.C. Thirdly, he has contended that the petitioner was not given the opportunity of being heard regarding the order passed for

the attachment of the shop.

4. So far as the first point is concerned, it is pure and simple a factual assertion which can be dealt with by the trial magistrate, after marshaling the

evidence, this court cannot interfere under section 561 A Cr.P.C. with the factual aspect of the case by way of quashing the impugned order dated

26.8.1995. Virtually the petitioner should have made such application before the trial magistrate and should have contested this point before him

who is in a position to decide this point after weighing the evidence of both the sides.

5. So far as the contention of learned counsel for the petitioner is concerned that there is no preliminary order passed, the impugned order dated

26.8.1995 is virtually an order of attachment under Clause IV of Section 145 Cr.P.C , so the whole proceedings required to be quashed, because

there is no compliance of the mandatory provision of law under Sub Clause 1 of Section 145 Cr.P.C. I have gone through the preliminary order,

though there are formal defects in it, but the order is composite one and is in detail. The learned Magistrate, has given the facts of both the sides

and has drawn the preliminary order on the basis of the facts and on the basis of record produced before him and in the last lines he has taken

action under Sub Clause IV and attached the disputed shop. First I am of the view that the composite order in such cases to be made should be

avoided by the Magistrates, because subsection 1 of Section 145 confers the jurisdiction on the Magistrate to decide the fact of actual possession,

so preliminary order must be framed strictly in accordance with sub section 1 of Section 145 Cr.P.C. It should contain all the ingredients of Sub

Section 1 i.e. (i) a statement that the Magistrate is satisfied as to acceptance of the dispute likely to cause a breach of peace; (ii) the correct

description of the property; (iii) the grounds involved in dispute to attend his court within time to be fixed and to file the written statement of their

claim in respect of the issue of actual possession and (v) further direction to produce all documentary and effective evidence on which they rely

6. After passing the valid preliminary order, then the Magistrate has to go ahead in accordance with other SubClauses. After the action is taken

under clause 1, jurisdiction vests with the Magistrate to proceed on. It is why the order to be passed under last proviso of Sub Clause (Vis to be

passed subsequent to the passing of the preliminary order, on being satisfied with its requirements. However, if the composite order is passed and

all the ingredients of preliminary order are included in it and subsequent to it in the same order magistrate possess an order under SubClause IV,

this can be said to be a formal defect and not of substance, on this defect impugned order cannot be quashed, but if in this composite order,

mandatory directions under Sub Clause I are not complied with, preliminary order is defective and in violation of mandatory directions, then the

said order cannot be considered to be the preliminary order and in the absence of such preliminary order, order passed under sub Clause IV in the

same order cannot be held to be valid In short, if in the composite order requirements of sub section 1 are not strictly complied with, then the

whole composite order is bad in law. My view is fortified by SLJ 1980 page 585 in which Hon'ble Mr. Justice Mufti BahuudDin, Acting Chief

Justice, as he then was, has held:

Composite order made by the Magistrate of satisfaction regarding the existence of dispute not included in the order passed under clause (1) but

mentioned in the order passed under clause (4) Proceedings not without jurisdiction. It has been held that the defect is formal and not of

substance.

7. In this case, though the order is composite but no fatal defect has been pointed out in the pleadings. A detailed preliminary order has been

passed covering all the ingredients and then the subsequent order for attachment has been made under Clause IV of Section 145 Cr.P.C.

8. Lastly it was contended that the petitioner was not given the opportunity of being heard before passing the order under sub section 4. This

argument is not convincing one, because, the order to be passed under sub section 4 is of emergency nature. In case the magistrate is satisfied that

there is immediate apprehension of breach of peace, he can pass the order of attachment without notice. It is kept open to the respondent to place

the documents and the evidence on the record and satisfy the Magistrate that there is no apprehension of breach of peace and there is no dispute,

it is always open to the Magistrate to drop the proceedings once he is so satisfied. So it is not necessary for passing the order under Sub Clause

IV to issue a notice to the otherside before passing such order, if the Magistrate

is satisfied that there is apprehension of imminent breach of peace

9. Here in this case, from the pleadings, it is obvious that no defect in the composite order has been pointed out excepting noncompliance of clause

III of sub Section 5.

10. Before parting with the file, I feel that I may fail in my duties, if I will not point out the defects in the impugned order which is composite one

consisting of both preliminary order and order for attachment of the suit property under subclause IV. These defects have not been pointed out in

the application under Section 561A, which is under disposal nor my attention towards these facts has been drawn by counsel for the petitioner

during the course of arguments, however, while examining the whole file, I feel that the learned Magistrate, while drafting the impugned order has not

employed the method and manner in drafting the impugned order which is required under Section 145 Cr.P.C. While recording the facts on two

full pages and on its third page, operative order of which reads as under has been passed:

.....I have considered the affidavits and the statements above quoted and all other documents on record and am of the opinion that grounds have

been disposed at this stage which hint at the likelihood of breach of peace relating to suit property. This situation may turn and may be a reason of

loss of life or limb or anyone of the parties...

11. The said order is not in consonance with the language and with the requirement of Section 145(1). It would be feasible to quote the

SubSection 1 of Section 145 Cr.P.C.

Whenever (Chief Judicial Magistrate, or any other Judicial Magistrate of the first class) is satisfied from a police report or other information that a

dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction

he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his

court in person or by pleading within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects

the fact of actual possession of the subject of dispute (and further requiring them to put in such documents, or to adduce, by putting in affidavits, the

evidence of such persons, as they rely upon in support of such claims) (provided

that where the dispute likely to cause a breach of peace concerns

any land as defined in the Jammu & Kashmir Agrarian reforms Act, 1976 the powers under this section shall be exercisable only by the District

Magistrate, or an Executive Magistrate of the first class).

12. After reading the language of Sub Section 1 of Section 145 Cr.P.C., it is obvious that the requirement of this sub section is that the Magistrate

should record satisfaction from the police report or other information i.e. dispute likely to cause breach of peace exists, what the Magistrate in the

impugned order has done is that he has used the word opinion instead of satisfaction. He has stated that in his opinion grounds have been disclosed

at this stage which hints the likelihood of breach of peace. This language is not in consonance with the requirement of law as envisaged in Clause I

of Section 145 Cr.P.C. The word Opinion, I think is not the substitute of word satisfaction and word opinion' at the face of it appears to be light in

weight vizaviz the word Satisfaction. The word opinion' is something more than mere impression. Meaning of word 'opinion in New Webster's

Dictionary has been shows as a judgement or belief i.e stronger than an impression but less firm than positive knowledge While the word

'satisfaction means satisfied. In judicial dictionary by Yudhishtra 1984 term Satisfied has been explained as free from doubt, anxiety or uncertainty.

13. So the word used by Magistrate that in his opinion is not in consonance with the language of Sub Clause I of Section 145 Cr.P.C. and cannot

replace the word satisfaction. The requirement of the mandate of law from the Magistrate is to record satisfaction on the basis of grounds regarding

existence of dispute likely to cause a breach of peace. Here also the Magistrate has in cursory manner written that the grounds have been disclosed

which hint at the likelihood of breach of peace. The word 'hint' also is not proper word. Requirement of law is that, it should not hint towards the

likelihood of breach of peace, but the Magistrate should be fully satisfied regarding the existence of dispute which may cause breach of peace. The

trial Magistrate has coined his own words, but they are not equivalent substitutes for the words used in the provision of law. The requirement of

law is that the Magistrate should be fully satisfied for the existence of dispute which is likely to cause the breach of peace. Had there been written

that he is of the firm opinion that the matter would have been different and it

would have been very near to the word satisfaction, but that has not been done. These two defects which I have pointed out in the preliminary order could be fatal to the whole proceedings but I uphold the impugned order on the ground that the trial Magistrate has perused all the documents and after perusing of the case, he has framed the opinion. I have also perused the file, I feel that there was sufficient ground for the trial court to proceed both under order 145(1) and (4). I also feel that he has taken the appropriate action, but the order has been poorly drafted, keeping alive so many defects in it. I maintain the impugned order only because, the substantial justice has been done in the case, otherwise if going to the technicalities, order could not sustain. No doubt Magistrate has perused the record and has applied his mind in right perspective, but he has drafted the order in a careless manner, leaving several defects in the order. It is enjoined upon on all the Magistrates dealing with the case of Section 145 Cr.P.C., that they should keep in view the requirements of mandates of law given under Section 145 Cr.P.C. and then pass the orders in accordance with the requirement of law, and secondly so far as possible, Magistrates should avoid to pass composite orders. Preliminary order vests the jurisdiction to the Magistrate and the order to be passed in Clause IV is to be subsequent to the preliminary order. 14. For these reasons, therefore, the application is dismissed. Record, if any, be sent back to the trial court. Srinagar 3/7/1997.