
(1985) 12 OHC CK 0005
In the Orissa High Court
Case No : Criminal Revision No. 322 of 1984

Hussain Jan Suleman

APPELLANT

Vs

Bhaktawar and Another

RESPONDENT

Date of Decision : 20-12-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145, 145(4), 145(5), 146(1)

Citation : (1986) 61 CLT 355

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : M. Misra, for the Appellant; S.S. Swain and S.K. Das, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatrat, J.—This revision is directed against the order passed by the learned Sessions Judge, Jeypore refusing to interfere with an order passed by the learned Executive Magistrate, Jeypore on a petition u/s 452 of the Code of Criminal Procedure ("Code" for short) filed by the Petitioner.

2. The facts in brief may be stated. Late Amir Mul Khan was indisputedly the owner of the disputed land and the house. Claiming to be his son, the Petitioner, a foreign national, initiated a proceeding u/s 144 of the Code in respect of the disputed land and house against opposite party No. 1. The learned Executive Magistrate apprehended breach of peace and by preliminary order dated 14-3-1983 initiated a proceeding u/s 145 and simultaneously attached the disputed land and house u/s 146(1) of the Code. The Officer-in-Charge of Kundra Police Station attached the house on 20-3-1983 while the Petitioner was residing therein and gave the house in his custody. On the same day he attached the land and gave the same in the custody of an outsider.

3. Opposite party No. 1 contested the proceeding and claimed to be the legally married wife of late Amir Mul Khan. She staked her claim and asserted

possession of the disputed land and house after death of her husband on 1-12-1982 not only as heir of her late husband but also on the basis of a deed of will.

4. During the pendency of the proceeding opposite party No. 1 filed a petition before the learned Executive Magistrate standing therein that there was no apprehension of breach of peace and so the proceeding should be dropped u/s 145(5) of the Code. After hearing both parties the learned Executive Magistrate by order 14-7-1983 held that there was no apprehension of breach of peace relating to the disputed land and house and so he dropped the proceeding. While doing so, he vacated the order of attachment of the disputed land and house and directed the officer-in-charge of Kundra Police Station to deliver the same to the party from whom they were attached. Being aggrieved with the aforesaid order, the Petitioner filed Criminal Revision No. 77 of 1983 before the learned Sessions Judge, Jeypore, which, by order dated 7-5-1984 was dismissed.

5. Subsequently both the parties claimed restoration of possession of the disputed land and house in their favour. The learned Executive Magistrate, heard their respective claims and by order dated 27-10-1983 u/s 452 of the Code held that the opposite party No. 1 was entitled to possess the disputed property. Therefore, he directed restoration of possession of the disputed land and house in her favour. Being aggrieved with this order, the Petitioner filed Criminal Appeal No. 139 of 1983 before the learned Sessions Judge, Jeypore, which was dismissed by the impugned order on 7-5-1984.

6. The learned Counsel appearing for opposite party No. 1 raised a preliminary objection that the revision is not maintainable u/s 397(3) of the Code. According to Sub-section (3) of Section 397, if a criminal revision has been preferred before the Sessions Judge by a person, the same person cannot prefer another revision in the High Court. In other words the same person cannot prefer two revisions u/s 397(1) of the Code before the Sessions Judge and the High Court. The Petitioner in this case preferred Criminal Appeal No. 139 of 1983 against the order of the learned Executive Magistrate on 27-10-83 according to the provisions of Section 454(1) of the Code which makes provision for such an appeal. Being unsuccessful in the said appeal, the Petitioner made an application in this Court u/s 397(1). These patent facts show that the Petitioner has not preferred a second revision in this Court u/s 397(1).

Therefore Section 397(3) of the Code does not operate as a bar and the point raised regarding maintainability is misconceived.

7. Learned Counsel for the Petitioner urged that by order dated 14-7-1983 while dropping the proceeding u/s 145 of the Code, the learned Executive Magistrate vacated the order of attachment and directed delivery of possession of the disputed land and house to the party from whom they were attached. After the aforesaid order was passed he became functus officio and so he was not justified in starting an ancillary proceeding u/s 452 of the Code. Therefore the order of

the learned Executive Magistrate dated 27-10-1983 was without jurisdiction. In view of the aforesaid contention the point that arises for consideration is whether after disposal of the main proceeding, a separate proceeding u/s 452 of the Code is maintainable. In order to decide this point it is necessary to refer to a few decisions. In *Deopujan Mahto Vs. Kukur Ahir*, , a Division Bench interpreted Section 517 of the Code and took the view that the section cannot be read as requiring that the order for disposal of property must be passed simultaneously with the judgment of the case unless words that are not in the section are read into it. The order may be passed at the time of the conclusion of the trial or at a later date. Although the passing of such order should not be unreasonably postponed, still the lapse of time does not relieve the Court of the duty and the corresponding jurisdiction to pass orders for the disposal of the property which is in the Court's custody or under its control. In *Smt. Kaniz Fatima Bibi Vs. State of Uttar Pradesh and Others*, , a Division Bench took an identical view and held that after dropping proceedings u/s 145(5), the Magistrate has no further jurisdiction to take any proceedings u/s 145, but he has specific powers u/s 517 to pass such incidental orders regarding delivery of possession of the property under attachment which are in the nature of winding up proceedings, restoration of status quo ante and such orders as may be necessary for preservation of the property till the rights of the parties could be determined. Even without taking recourse to the powers conferred on him u/s 517, the Magistrate has inherent powers to pass similar orders as regards delivery of property under attachment after cancellation of proceedings u/s 145(5) of the Code. In *Dasa Mohanty and Anr. v. Gadadhar Samal and Ors.* (1957) 23 C.T.T. 37, Narasimham, C.J. held as follows:

The learned Magistrate is clearly in error in thinking that once he passes an order dropping the proceeding he became *functus officio* and had no jurisdiction to pass any ancillary order regarding the custody of the property or of the attached crops. Whatever might have been the old law on the subject, it is now well settled by a series of decisions reported in *Jam Bhambo Khan v. Makhdam Muhammad Hasan* AIR 1942 Sind 117 (A), *Rajdeo Singh Vs. Emperor through Sadloo and Others*, and *Velur Devasthanam Vs. A. Sambandamurthi Nainar*, that after dropping a proceeding Section 145 Code of Criminal Procedure the Magistrate has jurisdiction to pass further orders of an ancillary nature in respect of the attached property.

In *Narasingha Rou Vs. Sricharan Panda and Others*, , G.K. Mista. J. (as his Lordship then was) held as follows:

So far as this Court is concerned, it is well settled that after cancellation of order u/s 145 Code of Criminal Procedure the Magistrate has full Jurisdiction to direct restoration of the attached property and the crops to the party from whose possession they were taken. There is no express provision u/s 145 for passing ancillary or incidental orders for disposal of the attached property. The Magistrate has jurisdiction to invoke the power conferred upon him u/s 517(1), Code of

Criminal Procedure and return the attached property to the person from whose custody it was taken.

Dispelling doubts as to whether Section 517(1) of the Code will apply only in case of movable property and was inapplicable with regard to immovable property, his Lordship held that Section 517(1) did not confine itself to movable property. It spoke of "any property which included both movable and immovable property. An identical view was taken by the Madhya Pradesh High Court in the case reported in State of Madhya Pradesh Vs. Sitaram Vishwanath and Others, . It was held that when a property is attached u/s 145(4) and the proceedings are dropped under Sub-section (5), the court has power to make incidental orders for disposal of the attached property u/s 517. Though in Section 145 no express provision in this regard is made and it is not "further proceedings" within the meaning of Sub-section (5), the court while cancelling the preliminary order may as of necessity make an incidental order to restore possession to one of the parties.

8. Judicial opinion is thus consistent that the Executive Magistrate, while passing an order either cancelling or dropping a proceeding u/s 145 of the Code can, at the same time, give direction with regard to disposal of property both movable and immovable. After passing such order, he does not become functus officio. Even thereafter in an ancillary proceeding u/s 452(1) (identical to Section 517(1) of the old Code) he can in accordance with law pass orders with regard to disposal of property attached in the proceedings. So, the contention of the learned Counsel for the Petitioner is untenable.

9. The learned Counsel for the Petitioner next urged that when the learned Executive Magistrate dropped the proceeding he also gave directions to the Officer-in-Charge, Kundra Police Station to deliver the disputed land and house to the party from whom they were attached. In view of this direction which was substantially in compliance with Section 452(1) of the Code there was absolutely no necessity to make a separate enquiry and arrive at altogether a different decision with regard to delivery of possession of the attached property. In doing so the learned Executive Magistrate revived his earlier order although according to law he has no power of review. Accordingly the order passed by him on 27-10-1983 was without jurisdiction. Consequently the impugned order was not in accordance with Jaw. This contention is not without substance. In Dasa Mohanty's case (1957) 23 C.T.T. 37 (supra) Narasimham, C.J. held:

If it is possible to determine the status quo ante the appropriate order would be to direct that the attached property should be restored to the possession of the party from whom it was taken. If, however, the status quo ante could not be determined the proper procedure would be to retain the property and its usufructs in the custody of the Court and direct the party concerned to approach the Civil Court to obtain possession of the same. In the present case, however, there is no difficulty in determining the status quo ante.

10. In view of the aforesaid principle, it is to be examined from the materials on record if there was any difficulty for restoration of status quo ante. The report of the Officer-in-Charge, Kundra Police Station dated 20-3-1983 discloses that he effected attachment of the disputed house in accordance with the preliminary order dated 14-3-1983 from the possession of the Petitioner who was the first party in the proceeding u/s 145 of the Code. This being the position there could absolutely be no difficulty to determine the status quo ante and restore possession of the disputed house to the Petitioner. Under the Code there is no provision according to which a Magistrate can review his own order. Chapter XXXIV of the Code making provision for disposal of property has also made no provision, whereby a Magistrate can review his own order. Because of absence of provision of review in the Code the learned Executive Magistrate had no jurisdiction to review his own order dated 14-7-1983 by the subsequent order dated 27-10-1983 and thereby direct that possession of the disputed house should be restored to opposite party No. 1. But so far as the disputed land is concerned, the facts were different. The report of the Officer-in-Charge, Kundra Police Station dated 20-3-1983 shows that he effected attachment of the disputed land in the presence of the Petitioner, while opposite party No. 1 was not found in the village. Presence of the Petitioner did not indicate that the disputed land was attached while the same was in his possession. Even if opposite party No. 1 was absent in the village it could be possible that the attachment was effected when she was in possession of the land. While passing the order dated 14-7-1983 regarding disposal of property it was not possible for the learned Executive Magistrate to restore status quo ante with regard to the disputed land because, there was no material before him as to which of the parties was in possession of the disputed land when the attachment was effected. Therefore, in view of the principle laid down in Dasa Mohanty's cases (supra) an incidental enquiry for restoration of status quo ante with regard to the disputed land was necessary and competent. The learned Executive Magistrate made such an enquiry u/s 452 and directed restoration of possession of the disputed land to opposite party. No. 1 which order was confirmed in appeal by the learned Sessions Judge. No material was placed in this Court to take a different view. Therefore, this part of the order of the courts below with regard to restoration of possession of the disputed land to opposite party No. 1 cannot be disturbed and the earlier order dated 14-7-1983 will not operate as a bar on the ground of absence of jurisdiction for review under the Code.

11. In the ultimate analysis possession of the disputed house should be restored to the Petitioner and possession of the disputed land should be restored to opposite party No. 1. The Criminal Revision is accordingly allowed in part.