

(1997) 03 GUJ CK 0030
In the Gujarat High Court

Jagdishbhai Dharamsi Thakore

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 17-03-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(4), 145(5), 146
Penal Code, 1860 (IPC) — Section 114, 323, 506

Citation : (1997) 2 GLR 1553

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Judgement

N.N. Mathur, J.—This Special Criminal Application under Articles 226 & 227 of the Constitution of India has been filed, seeking direction to quash the order passed by the Sub-Divisional Magistrate, Ahmedabad dated 22-10-1996 in Chapter Case No. 16 of 1996 and the order of the learned City Sessions Judge, Court No. 4 in Revision Application No. 272 of 1996 confirming the order of the S.D.M. - Ahmedabad.

2. From the facts set out in the impugned order dated 22-10-1996 passed by the Sub-Divisional Magistrate, Ahmedabad, it appears that the respondent Nos. 4 to 7, viz., Rameshchandra Laxmandas Panchal, Ishwarlal Madhavlal Prajapati, Manoharsingh Bhawarsingh Shekhawat and Rameshabhai Shyamlal Sharma instituted Chapter Case No. 16 of 1996. According to them, they had purchased the property bearing survey No. 342/A situated at Saijpur Bogha by registered sale deed from Jagdishchandra Manprasad Master and they were holding and managing the said property. The said property was of the ownership of Manprasad Gordhandas Master, who expired on 24-12-1989 and thereafter, the said property stands in the name of Jagdishchandra Manprasad and deceased's wife Saraswatiben etc., as the living legal heirs of the deceased. The further say of the original applicants is that the opponents, i.e., Jagdishchandra Dharamsinh Thakor (petitioner in the present Special Criminal Application), Mukesh Jagdishbhai Bhadoria, Pappu @ Ghanshyamsinh Amrutsinh Bhadoria, Badarkhan

Abdulkhan Pathan and the watchman Bhagwansinh committed trespass on the said land on 14-6-1996 in their absence and hence, the applicants lodged a complaint against the said Bhagwansinh for offence u/s 323, 506, 114 I.P.C. An apprehension was expressed that, if the applicants go to occupy the said land, then the opponents may disturb the breach of peace.

3. The learned Magistrate, after setting out the said facts in the impugned order, further said the English Translation which is reproduced as follows:

The applicants filed a complaint against the opponents under an oath u/s 146 of the Criminal Procedure Code and hence, enquiry was made on 5-10-1996 through the Police Officer of the police station about the same and hence, the Police Sub-Inspector of Anil Starch police chowki has said in his enquiry report that if the procedure is taken u/s 146 of the Cr. PC. with respect to the disputed property, then the breach of peace can be avoided between the parties. The Police Inspector of Sherkotada has also observed in his endorsement on 17-10-1996 about the subject-matter that with respect to the possession of the said land that there is every possibility of breach of peace and hence, request is made to pass an order u/s 146 of Cr. P.C.

4. The learned Magistrate by the said order treated the survey No. 342/A as a disputed property and further in order to prevent the breach of peace, ordered to seal the same taking in attachment u/s 146(1) of the Code of Criminal Procedure and the P.I., Sherkotada police station was appointed as the Receiver.

5. The order does not indicate the life of the impugned order of attachment. However, in the warrant of attachment issued on the same day, it is said that the Receiver shall hold the said property under attachment until the decree or order of competent Court determining the rights of the parties or the claim to possession have been obtained. The English translation of the relevant portion of the warrant is extracted as follows:

Therefore, authorities are given to you and you are ordered that sealed the property and take over possession of same and attached, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certify the manner of its execution.

6. Mr. K.B. Anandjiwala, learned Counsel, assailing the impugned order, submits that the order passed by the learned Magistrate is ex facie, perverse and without jurisdiction inasmuch as the order u/s 146(1) of attachment has been passed without drawing a preliminary order u/s 145(1) of the Cr. P.C. Advancing the contention, learned Counsel submits that the reading of the order dated 22-10-1996 clearly shows that no satisfaction with respect to the breach of peace has been recorded by the learned Magistrate, no date and time has been specified to put the written statements of the respective claimants of the parties with respect to the actual possession of the disputed property. It is submitted that a preliminary order u/s 145(1) is a condition precedent for an order of

attachment u/s 146 of the Cr. P.C. He further submits that the impugned order is contrary to law laid down by the Supreme Court in case reported in Mathuralal Vs. Bhanwarlal and Another, . In the said case, it is held that, when the attachment made on the ground of emergency, the Magistrate's jurisdiction to proceed with the enquiry u/s 145 does not come to an end and it is not necessary to wait for determination of rights of parties by the competent Court. It has been further pointed out by the learned Counsel that, without holding an enquiry u/s 145(4) of the Cr. P.C, the learned Magistrate, as is evident from the warrant of attachment, has directed the Receiver to hold the property until the decree or order of competent Court or the claim to possession has been obtained.

7. Mr. A.J. Memon, learned Counsel appearing for the original applicants - respondent Nos. 4 to 7 submits that the impugned order is justified in the facts and circumstances of the case and does no call for any interference by this Court. He has also raised the preliminary objection to the effect that the order of the learned Magistrate dated 22-10-1996 was challenged by the petitioner by way of Revision which has been rejected by the order of the learned City Sessions Judge dated 10-1-1997. Therefore, the Second Revision is barred u/s 397(3) of the Cr. PC. A person cannot be allowed to take a recourse to Second Revision by way of petition under Article 226 as it would amount to circumvent the provisions of Section 397(3) of the Cr. P.C. In support of this contention, learned Counsel placed reliance on the decision reported in Dharampal and others Vs. Smt. Ramshri and others, . On the merits of the case, he submits that careful reading of the impugned order dated 22-10-1996 clearly shows that a preliminary order u/s 145(1) has been drawn by the learned Magistrate. He submits that the law permits a composite order, i.e., the order u/s 145(1) and order u/s 146(1) Cr. P.C. by one order. He also submits that, for an order u/s 146(1), it is not necessary to hear the opponents in case of emergency. In support of this contention, he placed reliance on the decision of the Division Bench of Rajasthan High Court reported in Asgarali Shabab and etc. Vs. State of Rajasthan and Another, . He further submits that when a civil litigation is pending, it is not proper to have a parallel proceedings and it is desirable to drop the criminal proceedings u/s 145 Cr. P.C. He placed reliance on the decision of the Apex Court reported in Ram Sumer Puri Mahant Vs. State of U.P. and Others, .

8. So far as the preliminary objection raised by the respondents is concerned, it is submitted by Mr. K.B. Anandjiwala, learned Counsel appearing for the petitioner, that both the cases relied upon by Mr. A.J. Memon, learned Counsel, i.e., Dharampal's case and Ranjankumar's case (supra), has been considered recently by the three Bench Judges in Krishnan v. Krishnaveni, reported in 1997(1) SC 628. The Apex Court, considering all the earlier cases, held that ordinarily when a Revision has been barred by Section 397(3) of the Cr. P.C., a person accused/ complainant cannot be allowed to take recourse to the Revision to High Court u/s 397(1) or under inherent powers of the High Court under Sec, 482 of the Code since it may amount to circumventing the provisions of Section

397(3) or Section 397(2) of the Code. However, the Court dealing with the provision of Sections 401 and 483 of the Code of Criminal Procedure held that, in an appropriate case, when the High Court, on examination of the record, finds that there is a grave miscarriage of justice or abuse of process of the Court or the required statutory procedure has not been complied with or there is a failure of justice or order passed or sentence imposed by the Magistrate requires correction, discharge the duty of the High Court to correct and the incept lapse grave miscarriage of justice would ensue.

9. Bearing in mind the ratio laid down by the Apex Court, I shall deal with the preliminary objection on the facts of the case after considering the contentions of the parties on merits.

10. In order to appreciate the rival contention of the parties on the merits, it will be necessary to briefly acquaint with the provisions of Sections 145 and 146 of the Code of Criminal Procedure. It is not necessary to reproduce the said provisions, as the Apex Court in Mathuralal's case (supra) has examined this scheme in depth and detail. A reading of the provisions clearly show that Section 145 contemplates first to satisfaction of the Magistrate that there exists a dispute likely to cause breach of peace concerning the land or water or their boundaries and secondly, the issuance of an order commonly called as the preliminary order stating the ground of his satisfaction and requiring the parties concerned to attend the Court and put in written statements of their respective claims as regards the fact of actual possession of the property in dispute.

11. I have read the English translation of the order dated 22-10-1996. No preliminary order in the manner laid down u/s 145 of the Cr. P.C. has been drawn up. There is no order requiring the parties to attend the Court and to put in written statements of their respective claims with respect to the actual possession of the land in dispute. No satisfaction has been recorded with respect to the apprehension of breach of peace.

12. Mr. Memon, learned Counsel, justifying the order submits that the impugned order is a composite order. He further submits that the order u/s 146(1) can be passed ex parte also. He further submits that it is not necessary to separately pass and sign the order u/s 145(1). He placed reliance on the decision of the Rajasthan High Court reported in case of Asgarali Shabab (supra).

13. I have gone through the said judgment and in my view, it does not advance the case of the respondents. In the said case, it is held that the Magistrate can pass a composite order, i.e., order u/s 145(1) and order of attachment u/s 146, which may be signed at one place. The Court further held that such an order shall be valid in the following circumstances:

(a) The order u/s 145(1) should be separately drawn than the order u/s 146(1) Cr. P.C.

(b) That the order u/s 145(1) must precede order u/s 146(1) Cr. P.C.

(c) It must be borne out from both the orders that they satisfy separately the existence of the conditions for drawing such orders under the two sections.

14. In fact, the aforesaid case, instead of helping the respondents, supports the contentions of the petitioner. While reading the said order, I asked Mr. A.J. Memon if he can point out or even extract any portion from the order dated 22-10-1996 which may indicate that a preliminary order has been drawn, on which the learned Counsel has pointed out to the following portion of the order, which reads:

The property bearing survey No. 342/A of Mouje Saijpur Bogha Village of City Taluka is treated as disputed property.

I fail to understand as to how the said portion of the order can constitute as a preliminary order u/s 145(1) Cr. P.C. There is no direction asking the parties to file the written statements, no date in this regard has been shown. In between the aforesaid extracted portion and a direction for attachment, there is one sentence saying "To prevent the breach of peace". The learned Counsel has not been able to show as to whether the said sentence has been used for drawing preliminary order u/s 145 or order of attachment u/s 146 Cr. P.C.

A reading of the order clearly shows that the said sentence has been used with a direction for attachment. Thus, the learned Magistrate did not apply his mind and arrived at the conclusion on the facts of the case that there is a apprehension of breach of peace. In the decision of the Rajasthan High Court (supra), it is held that in a case of composite order, it must be borne out from both the orders that they satisfy separately the existence of conditions for drawing such orders under two sections.

Thus, in my view, no preliminary order as required by Section 145(1) of the Code of Criminal Procedure has been drawn by the learned Magistrate.

15. Once it is held that no preliminary order as required u/s 145(1) has been drawn up, the order of attachment u/s 146(1) becomes ex facie illegal and void, as for an order u/s 146(1), the condition precedent is of a preliminary order u/s 145(1). Thus, in my view, the impugned order of the learned Magistrate dated 22-10-1996 is not only manifestly illegal but also without jurisdiction.

16. The impugned order is ex facie illegal for one more reason that the learned Magistrate thought that his jurisdiction has come to an end after the order of attachment has been made u/s 146(3) and therefore, he ordered that the attachment shall continue till the dispute is settled by the Civil Court. If the learned Magistrate wanted to say so, he ought to have said so in the original order itself. However, this part has been indicated in the warrant of attachment. This is erroneous in itself.

17. Section 146(1) of the Code of Criminal Procedure contemplates three contingencies whereby an order of attachment of the subject-matter of dispute may be made, viz.,

- (i) Where the Magistrate considers the case one of the emergency.
- (ii) If the Magistrate decides that none of the parties was in possession on the date the order u/s 145(1) of the Cr. P.C. was made or even within two months preceding it in the case of dispossession, or
- (iii) If the Magistrate is unable to satisfy himself as to which party was in such possession.

The Scheme of Section 145 indicates that, after the preliminary order u/s 145(1) is drawn, a summary enquiry is to be held by the Magistrate under Sub-section (4) of Section 145 to decide whether any and which of the parties was on the date of the order made by him under Sub-section (1) in possession of the subject property of dispute. Therefore, the second and third contingencies can possibly arise only after" the Magistrate has concluded the enquiry as contemplated by Section 145(4) of the Code and the Magistrate may pass an order of attachment at that stage until the competent Civil Court has determined as to which of the parties are entitled to possess the subject property of dispute. Whereas in the case of first contingency, an order of attachment may be made at the time after proceeding under 145 is drawn up and before order u/s 146(6) of the Code is made. Therefore, the proceedings are still alive after an order of attachment in the case of emergency is made and the Magistrate does not become functus officio after passing such an order. This is the view which the Supreme Court has taken in Mathuralal's case (supra). The Supreme Court has held that:

The scheme of Sections 145 and 146 is that the Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements. Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the preliminary order. On the other hand, if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such possession, he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations, he attaches the property. Thus, a proceeding began with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties to go to the Civil Court. Proceeding may, however, be stopped at any time, if one or other of the parties satisfies the Magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the Magistrate disappears. The Magistrate then cancels the preliminary order. This is provided by Section 146 Sub-section (5). Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order u/s 145(1) must run its full course. Now, in a case of

emergency, a Magistrate may attach the property at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There is no expressed stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145 Sub-section (4) is against any such implication. Suppose, a Magistrate draws up a preliminary order u/s 145(1) and immediately follows it up with an attachment u/s 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile, if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment u/s 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

18. Mr. A.J. Memon, learned Counsel has relied on the decision of the Apex Court reported in *Ram Sumer Puri Mahant Vs. State of U.P. and Others*, . In the said case, it is held that when a Civil litigation is pending for the property wherein a question of possession is involved and has been adjudicated, initiation of parallel criminal proceedings u/s 145 of the Code would not be justified. Learned Counsel has failed to point out that there is any civil proceedings pending involving the question of possession of the subject property and further, that the dispute has been adjudicated by a Civil Court. In view of this, the said authority is of no help to the respondents. Thus, in view of the said decision, the impugned order has reflected from the warrant of attachment to continue the attachment till the rights of the parties are determined by the Civil Court, is also manifestly, illegal and erroneous.

19. Having examined the record, I find that the learned Magistrate has not complied with the mandatory statutory provisions which has resulted into failure of justice inasmuch as the learned Magistrate has directed to continue the attachment till the matter is decided by the competent Civil Court. In order to secure the ends of justice, it is expedient that such an order is quashed. Thus, on the facts of the case, the preliminary objection raised by Mr. Memon fails.

In view of the aforesaid, this Special Criminal Application is allowed. The impugned order dated 22-10-1996 and the Warrant of Attachment issued on the same day and so also, the order of the learned Sessions Judge dated 10-1-1997 are quashed and set aside. Rule made absolute.