

(2017) 02 AHC CK 0206

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 31915 of 2008

Jay Singh

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 14-02-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145(1), Section 146(1), Section 482

Citation : (2017) 98 ACrC 877

Hon'ble Judges : Shamsher Bahadur Singh, J.

Bench : Single Bench

Advocate : Pankaj Kumar Srivastava, Advocate, for the Applicant; Govt. Advocate, Sumit Daga, Vinay Sharma and Vivek Kumar, Advocates, for the Opposite Party

Final Decision : Dismissed

Judgement

Shamsher Bahadur Singh, J.—; Heard Sri Shamimul Hasnain and Sri Pankaj Kumar Srivastava, learned counsel for the applicants, Sri P.K. Jain assisted by Sri Vinay Sharma, learned counsel for the opposite party no.3 and learned AGA for the State.

2. By means of present application under Section 482 of the Criminal Procedure Code (hereinafter referred to as the "Cr.P.C."), the applicants who are father and sons have prayed for quashing of order dated 17.10.2008 passed by Sub-divisional Magistrate, Sadar, Muzaffarnagar in Case No.16 of 2008 (Mukesh Kumar v. Jay Singh and others) under Section 145(1)/146(1) Cr.P.C., whereby agricultural plot no.78/2 area 1.682 hectare, 966/1 area 0.053 hectare and 566/3 area 2.278 hectare situated at village Bilaspur, P.S. Nai Mandi, Tehsil Sadar, District Muzaffarnagar has been attached and given in the "Supurdagi" of "Supurdgars".

3. The factula matrix of the case is as follows:

4. That the opposite party no.3 moved an application dated 30.09.2008

addressed to S.S.P., Muzaffarnagar stating therein that he has purchased the land in dispute as above through two sale deeds dated 09.01.2002 and 09.10.2002 from heirs of Vidya Bhushan and his son Deepak Bhushan. The name has been mutated in revenue records. He further stated that he is owner in possession of disputed agricultural plots and one Jay Singh along with his two sons is claiming possession on the land in dispute on the basis of a forged "Thekanama" (lease deed) alleged to have been executed by Deepak Bhushan. Jay Singh and his two sons frequently use to come on land in dispute and criminally intimidated the labourers of opposite party no.3 and asked them to leave the possession. On this report, a police report dated 10.10.2008 addressed to the Sub-divisional Magistrate, Sadar was 2 submitted by police of P.S.Nai Mandi, stating therein that, the opposite party no.3 has purchased the land in dispute through two sale deeds dated 09.01.2002 and 09.10.2002 from heirs of Deepak Bhushan namely Sandeep Goyal and Radhika Goyal and his name was mutated in the revenue records at the time of submission of police report. The crops of sugarcane, paddy, gram and urad were standing and some part of land in dispute was vacant. The report further indicated that the opposite party no.3 was in possession and Jay Singh and other are also claiming their possession. Against both the parties proceedings under Sections 107/116 Cr.P.C. has been initiated on 23.06.2008 and is pending before the court concerned. Both the parties claimed that crops have been cultivated by them and in view of this fact, there is possibility of breach of peace. The police report was submitted along with necessary documents i.e. order passed by the Additional Commissioner, Saharanpur, photo copy of Khasra and Khatauni, copies of will deeds, copies of sale deeds and certain documents provided by the opposite party no.3. The Sub divisional Magistrate acting on police report vide order dated 17.10.2008 under Section 145(1) Cr.P.C. directed both the parties to appear on 23.10.2008 before him and to establish their claim about possession by way of written submission along with documents. By the second order, on the same day, under Section 146(1) Cr.P.C. the learned Sub-divisional Magistrate directed S.H.O., P.S. Nai Mandi to give disputed property in "Supurdagi" of two reliable and independent persons to avoid any dispute. In compliance of above order, the land in dispute along with crops standing thereon was given in "Supurdagi" of Jagdish Kumar and Sanjeev Kumar.

5. Being aggrieved from impugned orders, the applicants Jay Singh and his two sons have filed the present application under Section 482 Cr.P.C. with averment that on 21/23.05.1994, a letting was executed in favour of applicant no.1 Jay Singh by Deepak Bhushan for land in dispute at the rate of Rs.25000/per annum, which is Annexure-1 to the application and the possession was delivered to applicant no.1. Deepak Bhushan died issueless in the year 1995 and the applicant no.1 remained in possession of land in dispute. One Kumari Radhika entered into picture claiming herself legal successor of late Deepak Bhushan on the basis of a Will Deed dated 31.08.1993 and revenue entries in her favour. Applicant no.1 filed Original Suit No.217 of 1996 in the court of Civil Judge

(Junior Division), 3 Muzaffarnagar and the interim injunction order dated 15.03.1996 (Annexure-2 to the application) was passed in his favour and on 27.05.1997 the suit was decreed ex parte. Thereafter, one stranger Harish Kumar moved restoration application for recalling the order dated 27.05.1997 claiming himself to be successor and legal heir of late Deepak Bhushan on the basis of another will and the ex parte judgement and order dated 27.05.1997 was set aside. The applicant no.1 filed Misc. Civil Appeal No.4 of 2000 against the above order dated 20.12.1997 and the appeal was dismissed vide order dated 09.08.2002. The applicant filed Civil Misc. Writ Petition No.38534 of 2002 and vide order dated 16.09.2002, the proceedings of Original Suit No.217 of 1996 was stayed by this Court. The applicant no.1 also challenged the mutation in the name of Km. Radhika Goyal and Harish Kumar.

6. Learned counsels appearing on behalf of both the parties admitted that revenue proceedings as on date stands culminated in favour of opposite party no.3 and his name is recorded in the revenue record on the basis of two sale deeds in his favour.

In addition to above, learned counsel for the applicants also submitted that matter is subjudice before Board of Revenue but neither any order in favour of applicants nor any document showing the pendency before the Board of Revenue has been brought on record. He further submits that on the basis of "Thekanama" dated 21.05.1994 the applicant no.1 entered into possession of land in dispute and after death of Deepak Bhushan, he was continuously in possession of land in dispute till date of impugned order. The order was passed ex parte without giving an opportunity of hearing to the applicants, therefore, bad at law.

7. Per contra, it has been argued on behalf of opposite party no.3 that Mukesh Kumar is owner of land in dispute by means of two sale deeds dated 09.01.2002 and 09.10.2002 and his name was duly recorded in revenue records, therefore, prima facie possession of opposite party no.3 was established over the land in dispute in view of revenue entries as well as police report submitted by S.H.O., P.S. Nai Mandi on the date of impugned order. The land in dispute has wrongly been given in "Supurdagi" of Supurdgars on 19.10.2008 in pursuance to impugned order dated 17.10.2008 and without any right the applicant no.1 Jay Singh disputed the 4 possession over the land in dispute, as such, proceedings under Sections 145 and 146 Cr.P.C. had been initiated. He further submits that the land in dispute was given to applicant no.1 on rental of Rs.20,000/on 21.05.1994 for limited period up to 30.04.1995. The applicant no.1 paid only Rs.3000/at the time of aforesaid forged "Thekanama" and remaining rental was payable up to 23.05.1994. There is no averment in the affidavit filed by applicants that remaining rental was paid by the aforesaid date. Further, it has been submitted that Late Deepak Bhushan was highly literate person and received his education from abroad also. There was no occasion for him to execute any "Thekanama" on plain paper, therefore, "Thekanama" appears to be

forged document to grab the land in dispute. It has been further submitted that no right ever accrued in favour of applicants on land in dispute on the basis of alleged forged "Thekanama" as the same was not got registered in view of provisions of Section 17 of Indian Registration Act, 1908. Further it has been submitted that even for collateral purpose if "Thekanama" is taken into account in view of provision of Section 49 of Indian Registration Act, 1908, then no right will continue in favour of applicants after April, 1995.

8. In view of above respective submissions made by both the parties the merit of application has to be seen. The provisions relating to show cause and attachment are incorporated in Sections 145 and 146 of the Cr.P.C. which runs as under:

"145. Procedure where dispute concerning land or water is likely to cause breach of peace-(1) Whenever an Executive magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local 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 pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

146. Power to attach subject of dispute and to appoint receiver-.(1) If the magistrate at any time after making the order under subsection (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute."

9. Now the point for determination is propriety of impugned order passed by Sub-Divisional Magistrate. The Hon"ble Supreme Court in the case of Ashok Kumar v. State of Uttrakhand 2013 (80) ACC 599 (SC) has held as under :

"12. The above order would indicate that the SDM has, in our view, wrongly invoked the powers under Section 146(1),Cr.P.C. under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145 Cr.P.C. It can only be read in the context of Section 145 Cr.P.C. If after the enquiry under Section 145 of the

Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

13. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

14. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant Ashok Kumar, whether it is legal or not, is not for the SDM to decide."

10. From perusal of the impugned order, it transpires that Sub-divisional Magistrate acted on police report dated 10.10.2008 along with six enclosures which were provided by opposite party no.3, to ascertain actual possession of either parties. The Sub-divisional Magistrate did not make any additional inquiry at the time of passing the impugned order. The police report indicated dispute for harvesting the crops on land in dispute and both parties were challaned under Section 107/116 Cr.P.C. which is preventive action for maintaining peace.

11. It appears that on the basis of interim injunction order dated 6 15.03.1996 as well as ex parte decree dated 27.05.1997, the applicants intended to claim or dispute the possession over the land in dispute but on the date of impugned order there was no injunction order in favour of applicants as ex parte judgement and decree was set aside on restoration application moved by Harish Kumar and Misc. Civil Appeal preferred by Jay Singh was also dismissed. In Writ petition, the Hon"ble High Court has only stayed the proceedings of original suit vide order dated 16.09.2002. The High Court has also not granted any injunction in favour of applicants in respect of possession over the land in dispute. The name of applicant no.1 was never recorded in the revenue records on the basis of alleged "Thekanama" which was for a limited period and right, if any, extinguished after

April, 1995. If it is accepted that Deepak Bhushan died issueless as stated by the applicants in that eventuality also the applicants could not claim ownership and possession of land in dispute. The above facts and circumstances demonstrates that there was a dispute between both the parties regarding possession and harvesting of crops standing on land in dispute at the time of impugned order and it is also apparent from the police report that both the parties were challaned under Sections 107/116 Cr.P.C. prior to impugned order.

12. In view of above, it appears that at preliminary stage it was difficult for the Sub-divisional Magistrate to decide as to which of the party was in actual possession of land in dispute, therefore, he passed impugned order attaching the land in dispute treating the case of emergency and in followup action the land in dispute and crops standing thereon was given in "Supurdagi" of "Supurdgars". The impugned order passed by the Sub-divisional Magistrate appears to be an order to maintain the breach of peace and therefore just and proper.

13. The only unregistered document in favour of applicants in the name of "Thekanama" is in the teeth of provision of Sections 156 and 157 of U.P. Zamindari Abolition and Land Reforms Act, 1950 applicable in cases of letting. The provision of aforesaid two sections are as under:

"156. (1) No bhumidhar, sirdar, or asami shall let for any period whatsoever any land comprised in his holding, except in the cases provided for in section 157."

157. Lease by a disabled person.-(1) A bhumidhar [* * *] or an asami holding the land in lieu of maintenance allowance under [Section 11] who is-

[(a) an unmarried woman, or if married, divorced or separated from her husband or whose husband suffers from any of the disqualifications mentioned in clause (c) or (d), or a widow;

(b) a minor whose father suffers from any of the disqualifications mentioned in clause (c) or (d) or has died; and]

(c) a lunatic or an idiot;

(d) a person incapable of cultivating by reason of blindness, or other physical infirmity;

(e) [prosecuting studies in a [recognised educational institution] and does not exceed 25 years in age and whose father suffers from any of the disqualifications mentioned in clause (c) or (d) or has died];

(f) in the Military, Naval, or Air service of the Indian Dominion;

or

(g) under detention or imprisonment;

may let the whole or any part of his holding;"

14. Now the U.P. Zamindari Abolition and Land Reforms Act, 1950 stands replaced by the Uttar Pradesh Revenue Code, 2006 (U.P. Act No.8 of 2012) with effect from 12th December, 2012 and above restrictions under the old Act also find place in new Act under Section 94-95.

15. From a plain reading of the aforesaid sections, it transpires that except in cases of disabled person no letting of agricultural land was permitted. The case of applicant is not that Deepak Bhushan was a disabled person.

16. Learned counsel for the opposite party no.3 submits that on the basis of two sale deeds, revenue entries and other supporting documents filed by him along with counter affidavit as receipt issued by Irrigation Department in respect of land in dispute, prima facie, the opposite party no.3 is owner of land in dispute and there is reason to believe that he was in possession on the date of impugned order and "Supurdagi". However, his possession was disputed by applicant no.1 Jay Singh and therefore proceedings under Sections 145(1) and 146(1) Cr.P.C. had been initiated. This Court does not want to record any finding on above submission because the proceedings are still pending before Sub-divisional Magistrate and final order after hearing the both the parties has yet to be passed by Sub-divisional Magistrate.

17. Peculiar facts of the case are that counter affidavit was filed on behalf of opposite party no.3 in January, 2009 and amongst its enclosures there are number of applications addressed to Sub-divisional Magistrate, S.H.O. and S.S.P indicating forcefully harvesting of crops by applicants in December, 2008 and subsequent applications again indicating high handness on the part of applicants. Once the property was given in "Supurdagi" of "Supurdgars" equity and law both demands that when the order has been challenged before this Court, the applicants should have abided by the order passed by the Court. The interim order dated 05.12.2008 passed by this Court is only of status quo and prior above order the land in dispute and crops standing thereon was given in "Supurdagi" of Supurdgars" on 19.10.2008.

18. In reply to the counter affidavit, rejoinder affidavit has been filed by the applicants and it has not been denied that "Supurdagar" has moved application with incorrect facts. Therefore, prima facie, it shows that the applicants are floating the order of Sub-divisional Magistrate. In this background the land in dispute has to be protected.

19. In view of above discussion, the applicants have not approached the court with clean hand and their application lacks merit and deserve to be dismissed and is, accordingly, dismissed.

20. However, looking into the facts and circumstances of the case, let both the parties shall appear before the Sub-divisional Magistrate, Sadar, District Muzaffarnagar and place their evidences in respect of their possession. The Sub-divisional Magistrate shall decide the proceedings expeditiously preferably within a period of three months from the date of production of a certified copy of this

order as interim order was passed in year 2008 and now we are in 2017. The Sub-divisional Magistrate shall examine written submissions and documents, if any, filed before him to come to the conclusion as to which of party was in possession on the date of impugned order. As "Supurdagars" were not able to protect the land in dispute and crops, therefore, interest of justice demands that Sub-divisional Magistrate shall take immediate possession of land in dispute during final disposal of proceedings within time as ordered above and if he thinks necessary, he may appoint Court/Police receiver or Supurdagar to safeguard the interest of parties as well as the land in dispute.