

(1985) 10 BOM CK 0021

In the Bombay High Court

Case No : Criminal Writ Petition No. 338 of 1985

Jayantilal Padamshee Shah

APPELLANT

Vs

Chandu Khushaldas Udhwani and others

RESPONDENT

Date of Decision : 01-10-1985

Acts Referred:

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

Citation : (1986) 1 BomCR 153 : (1985) 87 BOMLR 688 : (1986) MhLj 855

Hon'ble Judges : M.S. Jamdar, J

Bench : Single Bench

Judgement

1. This petition raises following two questions in respect of the procedure which a magistrate is expected to follow before passing an order under S. 145(1) Cr.P.C. :-

(i) whether a Magistrate is competent to hear both the parties before passing a preliminary order under S. 145(1) Cr.P.C. for the purpose of arriving at the satisfaction that a dispute likely to result into a breach of the peace exists ? and

(ii) whether hearing the parties before passing an order under S. 145(1) Cr.P.C. renders illegal and invalid the subsequent proceedings and the final order ?

2. The dispute in the matter relates to Gala No. 5, Shaikh Sahajani Industrial Estate, Sonawala Cross Road, Goregaon, Bombay, The Inspector, Goregaon Police Station made a report to the Addl. Chief Metropolitan Magistrate on 23-5-1984 about the existence of a dispute contemplated by S. 145(1) Cr.P.C. The learned Addl. Chief Metropolitan Magistrate did not make preliminary order on the basis of the report, but instead issued notice to the petitioner and respondent Nos. 1 and 2, calling upon them to show cause why order under S. 145(1) Cr.P.C. should not be made. Both the parties appeared in pursuance to those notices. They filed some documents in support of their rival contentions and were also heard. After hearing them, the learned Addl. Chief Metropolitan Magistrate passed a preliminary order under S. 145(1) Cr.P.C. as also order under S. 145(1) Cr.P.C.

attaching the property in question. This order was passed on 14-7-1984. Thereafter the parties filed their written statements, produced documents in support of their respective claims and led oral evidence. On consideration of the evidence, the learned Magistrate found that the surrender of the tenancy any respondent No. 1 Chandru in favour of the landlord was unauthorised, that respondent No. 1 was wrongfully dispossessed and the petitioner inducted wrongfully and that respondent No. 1 was the person in actual possession on the material date and that he was entitled to get possession of the disputed property. Being aggrieved by this decision, the petitioner filed a Criminal Revision Application to the Sessions Court, Bombay. The said order was challenged not only on merits, but it was also contended that in view of the procedure adopted by the learned magistrate in issuing notices to and hearing the parties before passing the preliminary order, the whole proceedings were rendered illegal and the final order invalid. The learned Addl. Sessions Judge rejected this legal objection and found that the conclusions of the magistrate are in accordance with law, common sense, ordinary behaviour of human beings and are absolutely just. This order passed by the learned Additional Sessions Judge is not challenged on merits, but on the abovementioned points of law.

3. Shri Thakar, the learned Advocate for the petitioner, contended that the magistrate exercising powers under S. 145 Cr.P.C. has no authority to hear both the sides before making the preliminary order. According to him if the police report does not set out enough material about the likelihood of breach of peace, it is not open to the magistrate to collect information either by hearing the parties or otherwise. It is difficult to accept this contention.

4. Sub-section (1) of S. 145 Cr.P.C. lays down :-

"(1) Wherever an Executive Magistrate is satisfied from a report of 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."

5. It is thus clear that no preliminary order can be passed unless the magistrate is satisfied that a dispute likely to cause breach of peace exists. He is also enjoined with a duty to state the grounds of his being so satisfied. He can arrive at his satisfaction from the report of the Police Officer or upon other information. Even though the police report, which sets out sufficiently substantial reasons for believing that a dispute likely to cause breach of peace exists, can be good foundation for proceeding under S. 145(1) Cr.P.C. the magistrate is in no way bound to act on all that is stated in the report. Similarly, even if the police report states that no dispute likely to cause breach of peace exists, it is open to the magistrate to be satisfied otherwise if there is any other material before him to

come to that conclusion. He is expected to exercise his own judgment upon the materials placed before him and to arrive at a conclusion whether upon those materials there is likelihood of breach of peace. He would not be justified in acting merely upon an expression of opinion by the police either way. He is competent to base his satisfaction upon other information.

6. The words "other information" is not defined and in the absence of anything to indicate restrictive meaning, the words must be given as wide a meaning as is possible to attach to them. It is not possible to lay down any rule as to the amount of evidence which should satisfy the magistrate. It is also nowhere stated what type of "other information" the magistrate can act upon and how and from what source this information is to be collected by him. The information may be contained in the statements of witnesses recorded by the police or in the documents tendered by the parties to the police. The information may be placed on the record of the magistrate by statements on oath or by affidavits of the party aggrieved or of any witness produced by it. It may be contained in the application given to the magistrate by such a party. The words "other information" have been held to include an application by the party dispossessed. Such a party can place on record material by way of documentary evidence or affidavits of witnesses. It would, therefore, be equally open to the other party, if called upon by the magistrate, to place on record material which would justify a contrary conclusion. S. 145(1) does not lay down that the magistrate is bound to take into consideration only such material as is placed on record either by the police or by the party dispossessed. It also does not preclude the Magistrate from asking the opposite party to place on record material which would justify a conclusion that in fact there is no likelihood of breach of peace. It would, therefore, be open to the magistrate to call upon the parties to place on record material for enabling him to arrive at a conclusion as to whether a dispute likely to result in a breach of the peace exists or not. It would be open to the Magistrate to collect information from both the parties, if necessary, by issuing notices to them. No doubt S. 145 Cr.P.C. is intended to provide speedy remedy and is an emergent provision for prevention of breach of peace arising out of dispute relating to Immovable property. But, that does not mean that the magistrate must act solely on the police report or on the application of the party claiming to be dispossessed. As stated above, he is entitled to collect information sufficient to satisfy him as to the existence or otherwise of a dispute contemplated by S. 145(1) Cr.P.C. It is open for him to call upon the parties to satisfy him whether dispute likely to cause breach of peace exists or not.

7. This is not to say that the magistrate is bound to issue notices to the parties concerned before arriving at his satisfaction. He may arrive at the satisfaction on the basis of the report and other material filed by the police officer. He may in a given case arrive at the satisfaction on the application given by the party aggrieved and the material placed on record by him. Even in a case where there is no police report and the magistrate acts on the application of one of the parties to the dispute, it is not incumbent upon him to issue notice to the

opposite party. S. 145(1) Cr.P.C. does not contemplate hearing the parties before arriving at the satisfaction. But at the same time S. 145(1) Cr.P.C. does not prevent a magistrate from issuing notices to the parties calling upon them to place on record, information necessary for the purpose of arriving at the satisfaction contemplated by S. 145(1) Cr.P.C. The fact that S. 145 Cr.P.C. does not contemplate issuing notices to the parties concerned, does not necessarily mean that the Magistrate is prevented from doing so. As observed earlier, it is for the magistrate to be satisfied that a dispute likely to cause a breach of the peace exists and to collect the information necessary for the purpose of arriving at a correct conclusion.

8. In support of his contention that the magistrate has no jurisdiction to issue notices to the parties to show cause why order under sub-section (1) of S. 145 Cr.P.C. should not be passed, Shri Thakar placed reliance on an unreported decision of this Court in *Tulsidas Parekh v. State of Maharashtra and others* (Cr. Writ Petn. No. 29 of 1985), decided on 14th/15th March, 1985 and the one in the case of *V.K. Rao Vs. Chandappa Appa Devadiga*, However, in both these cases the question that is posed before me did not arise for consideration. In the first case the magistrate had issued similar show cause notice calling upon the parties to show cause as to why preliminary order under sub-section (1) of S. 145 Cr.P.C. should not be passed and without passing any order under sub-sec. (1) of S. 145 Cr.P.C. he had issued show cause notice under sub-sec. (1) of S. 146 Cr.P.C. The learned single Judge (Kotwal, J.) observed that it was highly debatable whether any such show cause notice could have been issued before passing the preliminary order, having regard to the scheme and structure of the entire provisions of S. 145. In the second case, Hazarnavis, J. speaking for the Division Bench, consisting of himself and Agarwal, J. in furtherance to the proposition that it is advisable for the magistrate to record grounds of his being satisfied as required under S. 145 Cr.P.C. separately, but if he is satisfied by reading the police report or the application it is not obligatory for the Magistrate to record the grounds separately or examine the applicant, observed thus :-

"First he has to read the report, or the application and he may examine the applicant and then pass the preliminary order."

Shri Thakar interpreted this observation to convey that at the most the Magistrate may examine the applicant before passing the preliminary order, but he has no jurisdiction to hear the opposite party. There is no substance in this submission because the said observation is made in a different context and does not convey that the magistrate is prevented from collecting information from the opposite party.

9. Reliance is also placed on sub-section (5) of S. 145 Cr.P.C. which lays down that :-

"Nothing in this section shall preclude any party so require to attend, or any other person interested from showing that no such dispute as aforesaid exists or

has existed; and in such case the magistrate shall cancel his said order and all further proceedings therein shall be stayed, but subject to such cancellation the order of the Magistrate under sub-section (1) shall be final."

It was urged that an opportunity to show that no dispute exists is given to the parties concerned in the dispute or to any other person interest only after a preliminary order is passed and hence the Magistrate cannot give such an opportunity before passing the preliminary order. But, the magistrate issuing notices to the parties before passing the preliminary order does not do so for the purpose of giving opportunity to the parties to show that dispute likely to result in breach of peace exists or not, but for the purpose of getting on record material necessary for the magistrate to arrive at his subjective satisfaction about the existence or otherwise a dispute contemplated by S. 145(1). He is, however, not bound to do so and neither party has a right of being heard before the preliminary order is passed. Sub-section (4) of S. 145 Cr.P.C. confers such right not only on the parties concerned in the dispute, but also on any other person interested to show that no dispute as contemplated by sub-section (1) of S. 145 Cr.P.C. exists. But, simply because a statutory rights is conferred on the parties to the dispute by sub-section (4) after the preliminary order is passed to show that no such dispute exists, it cannot be said that the magistrate cannot, before passing the preliminary order, call upon the parties to place on record other information necessary for enabling him to arrive at the subjective satisfaction about existence of a dispute contemplated by S. 145(1) Cr.P.C. As held in V.K. Rao Vs. Chandappa Appa Devadiga, the magistrate has to pass preliminary order on the basis of the police report or other information and what that other information should be is entirely a matter which he has to decide."

10. Similar question arose for consideration of Allahabad High Court in Durga Din Vs. Smt. Rani Udai Kunwar, In that case the legality of the final order in a proceeding under S. 145 Cr.P.C. was sought to be challenged on the ground that the magistrate had issued notices to both the parties before passing the preliminary order. Rejecting the challenge, the learned single Judge held as follows :-

"It was not necessary for the magistrate to have issued notices to both the parties, but if he did so, the subsequent order will not become invalid on that ground. If a magistrate is very cautious enough to call the parties in order to satisfy as to whether there was or there was no apprehension of breach of peace and passes an order only after hearing them or in their presence, the order cannot be said to be invalid."

I am in agreement with this view. Consequently, I answer the first question in the affirmative and the second in the negative and reject the petition in limine as the final order is not challenged on merits.

11. Order accordingly.