

(2015) 01 GUJ CK 0087

In the Gujarat High Court

Case No : Special Criminal Application No. 2385 of 2012

Kanaiyanand

APPELLANT

Vs

Bindadevi Hiranand Pandey and Others

RESPONDENT

Date of Decision : 06-01-2015

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 107, 145, 145(1), 146, 146(1)
Partnership Act, 1932 — Section 12, 47
Penal Code, 1860 (IPC) — Section 114, 323

Citation : (2015) 2 GLR 1680

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : Mrudul M. Barot, for the Appellant; R.F. Bhagat, Advocates for the Respondent

Judgement

J.B. Pardiwala, J—By this application under Art. 227 of the Constitution of India, the petitioner calls in question the legality and validity of the order dated 6th August, 2012 passed by the Sub-Divisional Magistrate and City Deputy Collector (East), Ahmedabad, in M.A.G./C.R.P.C. -145/Case No. 6 of 2011. By the said order, the Sub-Divisional Magistrate, in exercise of his powers under Sec. 146 of the Code of Criminal Procedure, ordered attachment of the property in question, directing the Police Inspector of the Odhav Police Station to be in-charge of the disputed property till the rights of the parties were determined by the competent Civil Court.

2. The facts giving rise to this petition may be summarised as under:

"The dispute between the parties is with respect to an industrial shed constructed on Plot No. 336 of the Gujarat Vehpari Mahamandal Sahakari Audhyogik Vasahat Limited, situated at Odhav."

3. To put it briefly, the case of the private respondents herein before the authority was that the industrial shed running in the name of the H.K.

Engineering Works is a partnership asset. According to the private respondents, a partnership deed was executed between them and the petitioner herein and the business was to be carried out jointly by the partners. On the other hand, the case of the petitioner herein is that although there is a partnership deed entered into between the parties, yet the partnership deed has nothing to do with the disputed property. The partnership deed is with respect to some other business. According to the petitioner, he is the sole owner of the H.K. Engineering Works situated at the Plot No. 336 as referred to above.

4. Thus, on one hand, the private respondents herein claim to be the partners of the plot and the shed in question, whereas the petitioner claims to be the sole owner of the shed standing on Plot No. 336.

5. It appears that on account of such dispute between the parties, an offence was also registered being II-CR No. 11 at the Odhav Police Station for the offence punishable under Sec. 323 read with Sec. 114 of the Indian Penal Code.

6. The private respondents herein initiated proceedings under Sec. 145 of the Code before the Sub-Divisional Magistrate, Ahmedabad, numbered as 6 of 2011. It appears that notices were issued to the respective parties in the proceedings in that regard and the Police Inspector of the Odhav Police Station also filed his report in that regard. The Police Inspector of the Odhav Police Station expressed apprehension of breach of public peace and tranquility on account of the serious dispute between the parties as regards the property in question.

7. The Sub-Divisional Magistrate also took notice of the fact that the petitioner herein had filed a Regular Civil Suit No. 650 of 2011 in the Court of the learned City Civil Judge, Ahmedabad, for a declaration and injunction, however, till the date of the passing of the impugned order, the learned City Civil Judge had not passed any orders on the Notice of Motion.

8. Taking into consideration the dispute between the parties and the apprehension of breach of public peace and tranquility, the Sub-Divisional Magistrate finally took the view that it was not possible to arrive at any definite conclusion as to which of the parties was in possession of the property, and therefore, thought fit to pass an order of attachment and appointed the Police Inspector of the Odhav Police Station as the Receiver to take care of the property.

9. The petitioner herein, the opponent in the original proceedings, being dissatisfied, has come up with this petition.

10. Mr. Mrudul Barot, the learned Advocate appearing on behalf of the petitioner, vehemently submitted that the Sub-Divisional Magistrate committed a serious error in passing the impugned order. Mr. Barot submitted that when a civil litigation was pending for the property wherein the question of right, title and interest of the property including the question of possession is involved, then ordinarily, the authority should restrain itself from exercising powers under Sec. 145 of the Code. Mr. Barot submits that while passing the order of attachment,

the Magistrate failed to record any finding that the case was one of "emergency". Merely by mentioning reasons that there was an apprehension of breach of peace, would not bring the matter under "case of emergency".

11. Mr. Barot submits that even according to the report of the Commissioner appointed by the City Civil Court, his client was found to be in possession of the disputed property. Mr. Barot submits that the preliminary order of the Magistrate under Sec. 145(1) of the Code must indicate that he was satisfied from the police report and other information that a breach of peace was likely to be caused and grounds for finding that there was likelihood of breach of peace. According to Mr. Barot, the Magistrate failed to record any such satisfaction in the preliminary order, and what is being termed as a preliminary order, is nothing but the notices which were issued to the parties for appearing before the authority. Thus, according to Mr. Barot, in the absence of any valid and proper preliminary order, the final order impugned in this petition deserves to be quashed and set-aside solely on such ground.

12. Mr. Barot has placed reliance on two decisions of the Supreme Court; (i) Mahar Jahan and Others Vs. State of Delhi and Others, (2004) 13 SCC 421 , and (ii) Ram Sumer Puri Mahant Vs. State of U.P. and Others, AIR 1985 SC 472 : (1984) 2 SCALE 1014 : (1985) 1 SCC 427 .

In such circumstances referred to above, Mr. Barot prays that there being merit in this petition, the same deserves to be allowed.

13. On the other hand, this petition has been vehemently opposed by Mr. R.F. Bhagat, the learned Advocate appearing on behalf of the private respondents. Mr. Bhagat submits that no error, not to speak of any error of law, could be said to have been committed by the learned Sub-Divisional Magistrate in passing the impugned order.

14. Mr. Bhagat submits that the High Court, in exercise of its supervisory jurisdiction under Art. 227 of the Constitution of India, should not in ordinary circumstances go into the question of sufficiency or otherwise of the material upon which the Magistrate proceeded to take action under Sec. 145 of the Code. Mr. Bhagat submits that the stance of the petitioner is dishonest. According to Mr. Bhagat, his clients and the petitioner are partners according to the partnership-deed which is on the record.

15. The petitioner claims to be the sole owner of the property and was not allowing the respondents herein to enter the premises in question. According to Mr. Bhagat, on account of such dispute, the learned Sub-Divisional Magistrate rightly thought fit to attach the property and appoint a Receiver for the same. Mr. Bhagat further submitted that pendency of a civil suit filed by the petitioner herein by itself would not be a ground to terminate the proceedings initiated under Sec. 145 of the Code.

In such circumstances referred to above, Mr. Bhagat prays that there being no

merit in this petition, the same deserves to be rejected.

16. Mr. H.S. Soni, the learned A.P.P. appearing on behalf of the State has also opposed this petition, submitting that the order impugned is just and proper and no interference is warranted in the facts and circumstances of the case.

Analysis:

17. Having heard the learned Counsel appearing of the parties and having gone through the materials on record, the only question that falls for my consideration in this petition is, whether the Sub-Divisional Magistrate committed any error in passing the impugned order.

18. Section 145 falls in Chapter X of the Code of Criminal Procedure, 1973. The Chapter X of the Code relates to the maintenance of public order and tranquility. Section 145 reads thus:

"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.

(2) For the purposes of this Section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by the Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall men, without reference to the merits or the claims of any of the parties, to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any as he thinks necessary, and if possible, decide whether and which of the parties was, at the date of the order made by him under sub-sec. (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-sec. (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-sec. (1).

(5) Nothing in this Section shall preclude any party so required 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 thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-sec. (1) shall be final.

(6)(a) If the Magistrate decides that one of the parties was, or should under the proviso to sub-sec. (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-sec. (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-sec. (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this Section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this Section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this Section shall be deemed to be in derogation of the powers of the Magistrate to proceed under Sec. 107."

19. Section 145 is intended only to provide a speedy remedy for the prevention of breach of peace arising out of the dispute relating to the immovable property by maintaining one or other of the parties in possession.

20. The object of this Section is to enable a Magistrate to intervene and pass a temporary order in regard to the possession of property in dispute, having effect until the actual right of one of the parties has been determined by a competent Civil Court. The Magistrates should guard themselves against the Section being abused by person using it with the object of getting possession of the property and driving the other side to figure as a plaintiff and prove his title. In a proceeding under Sec. 145, a Magistrate has not to enter into the question of

title or the right to possess and the foundation of his jurisdiction is the existence of a dispute likely to cause breach of the peace. The proceedings under Sec. 145 of the Code are quasi-judicial and quasi-administrative in nature.

21. Section 146 of the Code confers power upon a Magistrate to attach subject of dispute and to appoint a Receiver. Section 146 of the Code reads thus:

"146. Power to attach subject of dispute and to appoint receiver:--(1) If the Magistrate at any time after making the order under sub-sec. (1) of Sec. 145 considers the case to be one of emergency, or if he decides that none of the parties was men in such possession as is referred to in Sec. 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.

(2) Whom the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908):

Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, me Magistrate--

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just."

22. Section 146 is a corollary to Sec. 145. A Magistrate is empowered under Sec. 146(1) to attach the subject of dispute in three cases, namely, (i) if it is a case of emergency; or (ii) if none of the parties was in possession; or (iii) if no decision is possible as to the possession.

23. In the present case, the dispute between the parties is very peculiar. According to the petitioner herein, he is the sole owner of the disputed property and the respondents have no right, title or interest over the same. The petitioner herein has also filed a civil suit which is pending as on today in the City Civil Court at Ahmedabad. The Civil Suit is for a declaration that the petitioner is the sole owner of the property and also for an injunction restraining the respondents herein as defendants from interfering with the possession of the petitioner. It is not in dispute that the suit is of the year 2011. Till this date, the petitioner as the

plaintiff has not been able to obtain any interim relief. On the other hand, the respondents claim that the disputed property is not of the sole ownership of the petitioner but the same forms a part of the partnership assets. They rely on a partnership deed executed and duly signed by each of the parties. If we go by the report of the Commissioner appointed by the City Civil Court in the suit proceedings, then prima facie it appears that items like water tanks, boiler, computer, printer, etc. were found in the premises of the ownership of the petitioner. One peculiar feature of this litigation is that although the respondents herein claim to be the partners along with the petitioner, yet they are quite happy with the order of attachment and appointment of the Receiver by the Sub-Divisional Magistrate. The business has come to a standstill since the year 2012. It is only the petitioner who is pursuing the remedy available in law for the purpose of challenging the impugned order.

24. Let me assume for the moment that the disputed property is a partnership property. Section 12 of the Partnership Act, 1932, clearly lays down that subject to contract between the partners, every partner has a right to take part in the conduct of the business and by virtue of Sec. 47 thereof, the mutual rights and obligations of the partners continue even after the dissolution of the firm notwithstanding the dissolution so far as may be necessary to wind up the affairs of the firm and to complete the transaction begun but unfinished at the time of the dissolution but not otherwise. Consequently, every partner shall have the right to take part in the conduct of the business, after the dissolution, in the same manner as he could have prior to the dissolution. Therefore, if there be no contract between the partners, which one of them shall be in possession and shall manage the business of the firm, every partner shall be deemed to have a right to take part in the conduct of the business and ordinarily it can be assumed that every partner is in possession of the assets of the partnership firm.

25. In the proceedings under Sec. 145, Cr.P.C. the Courts are concerned with the question of possession and not the title of the parties. The material question for consideration in such proceedings is always, who was in possession, was it exclusive or joint. Naturally, the proceedings under Sec. 145, Cr.P.C. can be taken only if there is an apprehension of the breach of the peace.

26. The Supreme Court in the case of *Champan Cane Concern Vs. State of Bihar and Another*, AIR 1963 SC 1737 : (1963) 49 ITR 152 : (1964) 2 SCR 921, pointed out the main difference between co-ownership and partnership. Those are as under:

"1. Co-ownership is not necessarily the result of an agreement, whereas partnership is.

2. Co-ownership does not necessarily involve community of profit or loss, but partnership does.

3. One co-owner can without the consent of the other, transfer his interest etc., to a stranger. A partner cannot do this.

4. In a partnership each partner acts for all. In a co-ownership one co-owner is not as such the agent, real or implied, of the other."

27. In *Ram Shanker Tewari and Another Vs. The State and Others*, (1970) CriLJ 770 , the Allahabad High Court emphasized that, "the mere fact that a certain person or certain persons are in actual possession implies his or their actual possession to the exclusion of any other. In the case of property over which several persons have a joint right no doubt actual possession of one of the co-sharers may be deemed in law possession for himself and on behalf of the other co-sharers but in that case the other co-sharers will be deemed to be in constructive possession as distinct from the possession of the co-sharer in whose actual possession the property is at a given time."

28. Let me now consider the two decisions of the Supreme Court on which strong reliance has been placed by Mr. Barot, the learned Advocate appearing for the petitioner.

In *Mahar Jahan and Others Vs. State of Delhi and Others*, (2004) 13 SCC 421 , the Supreme Court made the following observations:

"4. It is not disputed by the learned Counsel for the parties that this very property which is the subject-matter of these criminal proceedings is also the subject-matter of the civil suit pending in the Civil Court. The question as to possession over the property or entitlement to possession would be determined by the Civil Court. The criminal proceedings have remained pending for about a decade. We do not find any propriety behind allowing these proceedings to continue in view of the parties having already approached the Civil Court. Whichever way proceedings under Sec. 145 Cr.P.C. may terminate, the order of the Criminal Court would always be subject to decision by the Civil Court. Inasmuch as the parties are already before the Civil Court, we deem it proper to let the civil suit be decided and therein appropriate interim order be passed taking care of the grievances of the parties by making such arrangement as may remain in operation during the hearing of the civil suit.

5. We direct the criminal proceedings initiated under Sec. 145 Cr.P.C. to be quashed. The parties are allowed liberty of approaching the Civil Court. As we have already noted that Civil Suit No. 404 of 2003 pending in the Court of Senior Civil Judge, Delhi, is a suit only for issuance of permanent injunction. We allow the parties liberty of filing any application for interim relief therein.

6. It is submitted by the learned Counsel for the appellants before us that respondent No. 2 brings anti-social elements and causes disturbance in their peaceful living in the house. On the contrary, it is submitted by the learned Counsel for respondent No. 2 that respondent No. 2 is an old-aged person and without any shelter over his head and presently he is almost at the mercy of others, and it would only be fair if he is allowed to live in at least a part of the suit property which belongs to him. We do not propose to enter into merits of the pleas raised by either party before us.

7. We have simply noted the contentions raised by the parties. The Civil Court, in our opinion, would be the most appropriate forum to take care of such grievances and pass such interim order as would reasonably protect the interests of both the parties. The Civil Court may issue an ad interim injunction, may appoint a Commissioner or Receiver or may make any other interim arrangement as to possession or user of the property which is the subject-matter of proceedings in the Civil Court exercising the power conferred on it by Sees. 94 and 151 of the Code of Civil Procedure.

8. In view of what has been stated hereinabove, the appeal is allowed. The proceedings under Sec. 145 Cr.P.C. are directed to be quashed. The parties may approach the Civil Court. We make it clear that looking to the relationship of the parties, the Civil Court shall feel free to make such ad interim order as it deems fit consistently with the facts and circumstances of the case without feeling embarrassed by the limited scope of the suit which is a suit for permanent injunction.

9. The Civil Court would be at liberty to grant interim relief without regard to the fact whether the application for that purpose is moved by the plaintiffs or the defendant. Such an application as and when made, shall be heard and decided expeditiously."

In Ram Sumer Puri Mahant Vs. State of U.P. and Others, AIR 1985 SC 472 : (1984) 2 SCALE 1014 : (1985) 1 SCC 427 , the Supreme Court made the following observations:

"When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under Sec. 145 of the Code. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the Criminal Court in a matter like the one before us. Counsel for respondent Nos. 2-5 was not in a position to challenge the proposition that parallel proceeding should not be permitted to continue and in the event of a decree of the Civil Court, the Criminal Court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the Civil Court and parties are in a position to approach the Civil Court for interim orders such as injunction or appointment of receiver for adequate protection of the property during dependency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue and the order of the learned Magistrate should be quashed. We accordingly allow the appeal and quash the order of the learned Magistrate by which the proceeding under Sec. 145 of the Code has been initiated and the property in dispute has been attached. We leave it open to either party to move the appellate judge in the civil litigation for appropriate interim orders, if so advised, in the event of dispute relating to possession."

29. The Supreme Court in the case of Amresh Tiwari Vs. Lalita Prasad Dubey and Another, AIR 2000 SC 1504 : (2000) CriLJ 2226 : (2000) 4 JT 466 : (2000) 3 SCALE 206 : (2000) 4 SCC 440 : (2000) 2 UJ 1030 : (2000) AIRSCW 1467 : (2000) 4 Supreme 665 , has held that:

"We clarify that we are not stating that in every case where a civil suit is filed, Sec. 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the Civil Court then proceedings under Sec. 145 should not be allowed to continue. This is because the Civil Court is competent to decide the question of title as well as possession between the parties and the orders of the Civil Court would be binding on the Magistrate."

30. The Supreme Court in the case of Kunjbihari v. Balram, 2006 (11) SCC 66, has held that:

"Proceeding under Sec. 145 Cr.P.C. would be an abuse of process of Court and if any party claims to be in possession of property and seeks its protection, it is for the party to approach the Civil Court and get an appropriate order, but the proceeding under Sec. 145 Cr.P.C. cannot be allowed to be continued in the facts and circumstances of the case."

It is thus quite clear from the perusal of the aforesaid judgments of the Supreme Court that in view of the pendency of the civil suit in respect of the same property, the proceedings under Sec. 145 of Cr.P.C. should not be allowed to continue.

31. In the present case, I have noticed two material infirmities in the impugned order. The promulgation of a preliminary order as contemplated under Sec. 145(1) of Cr.P.C. is the foundation for the exercise of jurisdiction by the Executive Magistrate.

The jurisdiction conferred upon an Executive Magistrate under Sec. 145 of the Code is an exceptional one, and the provisions of the Section should have to be strictly followed while taking action under it. The object of the Section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manoeuvring for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. The very jurisdiction of the Magistrate to proceed under this Section, arises out of his satisfaction, of a dispute likely to cause breach of peace either on a report of a Police Officer or upon other information, which satisfaction must be reflected in the order which he should make in writing, stating the grounds of his satisfaction. This order which is the sine qua non of the proceedings, initiated under Sec. 145, Cr.P.C. must require 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 regards the facts of actual possession of the subject of dispute. After the passing of the preliminary order, a copy of the order shall be served in the manner provided for the service of summons by the Criminal Procedure Code, upon such person or persons as may be directed by the said Magistrate and at least one copy should be affixed at some conspicuous place at or near the subject of dispute. This service of the copy of the order is provided under Secs. 145(1) and (3) together. It is apparent that the service of a separate summons is not contemplated and the preliminary order itself shall have to be served in the same pattern as service of the summons. This Court on more than one occasion, had held, that under Sec. 145(1), Cr.P.C. a Magistrate having jurisdiction, shall make an order in writing that he was satisfied either from a police report or other information that a dispute likely to cause breach of peace existed, and the grounds of his satisfaction should be stated clearly to indicate the application of the mind of the Magistrate in passing the preliminary order. The provision of making the order in writing after initial satisfaction and stating the grounds of his satisfaction have been held to be mandatory. Though, the Magistrate is not obliged to elaborately set out the entire details of the information received by him, yet the preliminary order, on the face of it, should set out the grounds of the Magistrate being so satisfied or at least employ language to similar effect so as to indicate that he had applied his judicial mind to the information, in coming to the conclusion that there was in existence a dispute, which dispute was likely to cause the breach of peace, necessitating initiation of proceedings under Sec. 145, Cr.P.C. If there was absolutely nothing in the preliminary order showing expressly the grounds of his being so satisfied, which are in the nature of conclusions arrived at by him, on the report or information placed before him, it would be impossible for the parties called upon to put in their claims before him, to predicate as to what had led the Magistrate to pass such an order and to make their effective representations before him.

32. What I find from the materials on record available with me is that except the summons dated 17th December, 2011, there is no material on record to indicate the promulgation of a preliminary order as contemplated under Sec. 145(1) of Cr.P.C. which, as stated earlier, is the foundation for the exercise of jurisdiction by the authority. I am not impressed by the submission canvassed on behalf of the respondents that the reference in the summons to the dispute regarding the property and proceedings having been initiated under Sec. 145 of Cr.P.C. would be sufficient to presume not only the application of mind by the Magistrate to the facts placed before him but also his satisfaction arrived at on the materials so placed.

A Magistrate before he starts proceedings under Sec. 145 has to state the grounds for his being satisfied that a breach of the peace was likely. In the proceedings under Sec. 145, the Magistrate must first be satisfied that there is a dispute concerning land, and secondly that the dispute is likely to cause a breach

of the peace. Merely because a petition has been filed under Sec. 145, Cr.P.C. it does not follow that there is a dispute concerning land. The Magistrate will have to distinguish between a case where one party is clearly in possession of the land and another party who is not in possession of the land attempts to interfere with the possession of the other party and thereby attempts to create breach of the peace and a case where a bona fide dispute regarding land exists, which is likely to create breach of the peace. It is only in the latter case that the Magistrate will start proceedings under Sec. 145. In the former case, where a party who is the aggressor attempts to interfere with the possession of the opposite party and thereby attempts to create a breach of the peace and files a petition stating that breach of the peace is likely, the proper course for the Magistrate is not to proceed under Sec. 145, but to take steps against the party attempting to create a breach of the peace under Sec. 107, Cr.P.C. and bind them to keep the peace. That is exactly what has happened in the present case.

33. It is a pity that the Police and the Magistrate have lent themselves to allowing the respondents to achieve their object. The petition filed by the respondents was a clear abuse of the process of Court and the Magistrate's orders starting proceedings under Sec. 145 must also be held to be an abuse of the process of Court. The Magistrate and the Police must remember that they have to discharge their duties in accordance with law and justice and that they must not by their conduct show that they have taken sides in such matters.

34. I have no doubt in this case, that the proceedings have to be quashed as it is a clear abuse of the process of Court. The proper course for the Magistrate is to proceed against the respondents under Sec. 107, Cr.P.C. to see that they keep the peace and that by their attempt to interfere with the possession of the petitioners of this land, they do not disturb public tranquility or create a breach of the peace.

35. The second ground on which the impugned order would fall is with regard to the exercise of power by the Magistrate under Sec. 146 of the Code. The condition precedent for attachment of a disputed property and appointment of a Receiver is the existence of a situation of emergency necessitating attachment to prevent breach of peace and the Court passing the order should record its satisfaction that there exists an emergency which requires attachment of the property. The case of emergency contemplated under Sec. 146 of the Code has to be distinguished from a case of apprehension of breach of peace. In the instant case, the perusal of the impugned order dated 6th August, 2012 passed by the Magistrate under Sec. 146 of the Code shows that the Magistrate has not recorded any finding therein that the case was one of emergency. Merely by mentioning the reasons that there was an apprehension of breach of peace, would not bring the matter under the case of emergency. The Magistrate was obliged to record a categorical finding before passing the attachment order under Sec. 146(1) of the Code that it was a case of emergency and thus it would be essential to attach the property which is subject of dispute.

To infer a situation of emergency, there must be some material before a Magistrate on record from the submissions of the parties, documents produced or evidence adduced and not upon the personal impression of a Magistrate. Such circumstance could also be inferred from the report submitted by any independent agency like the police.

36. It also deserves to be noted that the Magistrate in the impugned order has observed in the very first Paragraph that the possession of the plot was with the petitioner herein at the time when the proceedings under Sec. 145 of the Code were initiated.

37. The upshot of the whole discussion, therefore, is that the impugned order cannot be sustained. It is accordingly set aside and the subsequent proceedings, if any, based on it are also quashed. In such circumstances, the Sub-Divisional Magistrate is directed to restore the possession of the premises in question to the petitioner within a period of fortnight from today. Both the parties are directed to maintain peace and tranquility. If necessary, the Sub-Divisional Magistrate may proceed against the parties under Sec. 107 of the Code. The parties may be asked to execute a bond to maintain peace.

38. The learned City Civil Judge, Ahmedabad, is also directed to take up the Regular Civil Suit No. 650 of 2011 filed by the petitioner herein for hearing and see to it that the same is disposed of finally within a period of six months from the date of receipt of the writ of this order. Since, the dispute mainly is, whether the petitioner is the sole owner of the property or the property is of the partnership firm, the Civil Court shall frame appropriate issues in that regard and give top priority to this suit so as to bring an end to the entire dispute.

Rule is made absolute.

At this stage, Mr. Bhagat, the learned Advocate appearing on behalf of the private respondent, prays for stay of the operation of this judgment for a period of eight weeks as his client intends to approach the higher forum.

In the facts and circumstances of the case, the prayer is declined.