

**(2016) 08 MP CK 0040**

**In the Madhya Pradesh High Court**

**Case No : Misc. Cri. C. No. 16355 of 2013**

Kaushlendra Kumar Singh

APPELLANT

Vs

Devendra Kumar Mishra

RESPONDENT

**Date of Decision : 01-08-2016**

**Acts Referred:**

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

**Citation : (2017) 169 AIC 602**

**Hon'ble Judges : C.V. Sirpurkar, J.**

**Bench : Single Bench**

**Advocate : Satyam Agrawal, Advocate, for the Applicants; Grish Shrivastava, Advocate, for the Respondent**

**Final Decision : Disposed Off**

## Judgement

C.V. Sirpurkar, J. - This miscellaneous criminal case has been instituted on an application under Section 482 of the Cr.P.C. It is directed against the order dated 27.11.2013 passed by the Court of 3rd ASJ, Bhopal in criminal revision no. 538/2013, whereby the order dated 10.09.2013 passed by Sub-Divisional Magistrate, Govindpura, Bhopal under Section 146 Cr.P.C., was affirmed.

2. The facts necessary for disposal of this miscellaneous criminal case may be summarized as hereunder: Respondent No.1 Devendra Kumar Mishra and his wife Smt. Neeva Mishra filed application dated 15.1.2013 before the police authorities to the effect that they had purchased disputed house situated at Plot No.59/3, ad-measuring 1500 sq.ft., by registered sale-deed dated 1.1.2011 from one Bhagwan Singh. Thus, they are owners in possession of the disputed house. However, on 15.1.2013, some criminal elements belonging to U.P. had tried to forcibly enter the disputed house and disposes the respondent no.1. They were claiming to be relatives of erstwhile owner Bhagwan Singh. They were threatening respondent no.1 and his wife with dire consequences if they cast eye upon the disputed house. The respondent no. 1 also received threats from unknown phone numbers with regard to the disputed house.

3. The case of the petitioners before the SDM was that Bhagwan Singh was their uncle. The petitioners have received the disputed house from Bhagwan Singh by way of Will. He never executed any sale deed in favour of respondent Devendra Kumar and his wife. Respondent No.1 was never put in possession of the disputed house by Bhagwan Singh. Thus, petitioners are owners in occupation of disputed house.

4. S.H.O., P.S. Govindpura, Bhopal filed a complaint under Section 145(1) of the Cr.P.C. in respect of the disputed house expressing apprehension of breach of peace, before the S.D.M. Pursuant to aforesaid complaint, SDM passed preliminary order under Section 145 (1) and issued notice to both the parties. The parties filed their reply. After filing reply, respondent no. 1 Devendra moved an application under Section 146 of the Cr.P.C. praying for attachment of the property and appointment of receiver for the same. Petitioners Kaushlendra etc. opposed the application claiming that they are in actual physical possession of the disputed house.

5. By order dated 10.09.2013, learned SDM observed that there is a dispute between the parties with regard to possession of the disputed house. It was further observed that the question of possession shall be considered at the time of final disposal of the case; however, since there is a dispute between the parties and there is apprehension of breach of peace, which may take a serious turn at any time, SHO, P.S.- Govindpura was directed to attach property forthwith and give it in the possession of some independent person.

6. The order dated 10.09.2013 was unsuccessfully challenged before the 3rd ASJ, Bhopal in criminal revision no.538/2013 on behalf of the applicants Kaushlendra.

7. Learned counsel for the applicants Kaushlendra etc. have assailed the orders of the Courts below on the ground that the party no.1 was admittedly in possession of disputed house. A civil suit between the parties is pending. Inviting attention of the Court to the judgment rendered by the Supreme Court dated 13-12-2012 passed in the case of Ashok Kumar v. State of Uttarakhand & Ors., (Criminal Appeal No. 2038/2012), it has been contended that the order passed by learned SDM under Section 146 (1) of the Cr.P.C. was without application of mind and was passed in a casual and mechanical manner resulting in serious prejudice to the applicants. The pre-conditions as mentioned under Section 146 of the Cr.P.C., were not considered in the matter; therefore, the order was without jurisdiction.

8. Learned counsel for the respondents, on the other hand, have supported the impugned order.

9. Though, it has been submitted that a civil suit is pending in the matter but no document with regard to the same has been filed.

10. A perusal of Section 145 reveals that whenever an Executing Magistrate is

satisfied from a report of the police officer or from other information that a dispute likely to cause a breach of peace exists concerning any land or water, such Magistrate shall make an order in writing, stating the grounds of his being so satisfied of existence of aforesaid condition and direct the parties to put in their written statements in respect of their claims with regard to the fact of their actual possession over the subject matter of dispute.

11. Sub-section 1 of Section 146 provides that if at the time of making an order under Section 145 (1), the Magistrate;

(i) considers the case to be one of emergency, or

(ii) if he decides that none of the parties was than in such possession as is referred to in Section 145, or

(iii) if he is unable to satisfy himself as to which of the two parties was than in such possession of the subject matter of dispute,

- he may attach such subject until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof.

12. The Supreme Court has observed in the case of Ashok Kumar (supra) that:-

"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.

13. In the opinion of this Court, aforesaid principles apply squarely to the fact situation of the present case. In this case also, learned SDM in his order dated 10.9.2013 has merely observed that a condition of dispute with regard to the possession of the suit house is prevailing between the parties, which may take a serious turn at any time. Aforesaid expression does not denote a situation graver than mere apprehension of breach of peace, which is condition precedent for taking cognizance of the matter under Section 145 (1) of the Code. As observed by the Supreme Court, SDM must distinguish between a mere apprehension of breach of peace as mentioned under Section 145 and existence of a situation of emergency as mentioned under Section 146. In other words, a situation graver than mere apprehension of breach of peace is required, in order to enable the Executive Magistrate to exercise jurisdiction under Section 146. The situation as prevailing on the relevant date has not been examined by learned SDM from aforesaid angle. After making a mechanical observation unaccompanied by any further discussion or unsupported by sufficient material that there is dispute which may take a serious turn at any time, the powers under Section 146 have been exercised. Such mechanical exercise of powers under Section 146 (1) is not sustainable in the eyes of law. Learned ASJ in revision also overlooked this aspect of the matter.

14. On the basis of foregoing discussion, this Court is of the view that orders of Courts below cannot be allowed to stand and are liable to be set aside.

15. Consequently, order dated 10.9.2013 passed by the SDM, Govindpura, Bhopal in case no. 2/2013 under Section 145 of the Cr.P.C. and order dated 27.11.2013 passed by the Court of 3rd ASJ, Bhopal, in criminal revision no.538/2013, are set aside.

16. The matter is remitted back to learned SDM to reconsider the application filed by the respondent no.1 Devendra etc. under Section 146 (1) of the Cr.P.C. afresh, in the light of the observations herein before made.

17. Till fresh disposal of the application by SDM, the parties shall maintain status-quo with regard to possession of the disputed house.