

(1975) 12 PAT CK 0012

In the Patna High Court

Case No : Criminal Miscellaneous No. 968 of 1975

Khedu Mahto and 39 Others

APPELLANT

Vs

Shrimati Prem Sundari

RESPONDENT

Date of Decision : 04-12-1975

Acts Referred:

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

Citation : (1976) 9 PLJR 187

Hon'ble Judges : Sarwar Ali, J;Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : Janeshwar Singh, Uma Shankar Singh and Basant Kumar Singh, for the Appellant; J.P. Shrivastava and Keshav Shrivastava, for the Respondent

Final Decision : Allowed

Judgement

Nagendra Pd. Singh, J.—This is an application u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "new Code") for quashing an order, dated the 2nd January, 1975, passed by the Sub-divisional Officer, Sadar, Ranchi, converting a proceeding u/s 144 into a proceeding u/s 145 of the new Code and attaching the lands in dispute in purported exercise of powers conferred on him u/s 146 of the Code. The learned Magistrate has further directed the parties to file written statements and documents, if any, and has transferred the case to the file of another Magistrate. The petitioners are members of the second party to the said proceeding. According to the petitioners, on the 31st October, 1974, the opposite party Shrimati Prem Sundari filed an application before the learned Sub-divisional Officer for taking action u/s 144 of the new Code against the petitioners. In the said petition, she set out her case in detail regarding her claim of possession to the lands in dispute. According to the opposite party, the aforesaid plots of land belonged to her father, Santosh Ram Tiwari, and, after his death, she came in possession of the same. The learned Sub-divisional Officer called for a report from the local police. The police submitted a report recommending action under Sections 144 and 145 of the

Code against both the parties. The learned Sub-divisional Officer, being satisfied about the existence of an apprehension of a breach of the peace, drew up a proceeding u/s 144 of the new Code on the 8th November, 1974.

2. Cause was shown on behalf of both the parties and they were heard in support of their respective claims of possession over the lands in dispute, and, by the impugned order, dated the 2nd January, 1975, the learned Magistrate has converted the proceeding u/s 144 into one u/s 145 of the new Code and has attached the subject of dispute in purported exercise of powers u/s 146 of the new Code.

3. This case was initially placed for hearing before a learned Single Judge of this Court, who has referred it to a Division Bench. The main point for consideration in this case is, whether the order u/s 146 of the new Code could be passed along with the order u/s 145, and, after having passed the order u/s 146, whether the Magistrate could direct the parties to file written statements and documents for deciding the question of possession u/s 145. The other question which is germane to the decision of this case is as to whether in such case the whole order is to be quashed or only that part of the order by which the Magistrate concerned purports to attach the lands in dispute.

4. Sections 145 and 146 of the Code of Criminal Procedure have a chequered career and from time to time amendments have been made in order to expedite decision by the Criminal Court as to which of the claimants was in possession of the subject of dispute at the relevant date, in order to avoid breach of the peace, prior to the amendment of the Code of Criminal Procedure in 1955 (Act XXVI of 1955), a Magistrate, on being satisfied about the existence of an apprehension of a breach of the peace concerning possession over land, had to initiate a proceeding u/s 145 and to decide the same on the basis of documents and oral evidence adduced by the parties. Under the proviso to Sub-section (4) of Section 145, at any time before the final disposal of the proceeding, the Magistrate had power to attach the subject of dispute; if he considered the case to be one of emergency. u/s 146, as it stood then, if the Magistrate decided that none of the parties was then in possession, or he was unable to satisfy himself as to which of them was in such possession of the subject of dispute, he had to attach the subject of dispute until a competent Court determined the right of the parties thereto. Thus, there was a provision for interim attachment during the pendency of the proceeding and before passing of the final order as well as for attachment under certain conditions till, the dispute was decided by the competent Civil Court. In many cases, the properties remained attached for several years u/s 146 until the competent Civil Court used to determine the rights of the parties. Perhaps, that was why in the year 1955 by the aforesaid Act XXVI of 1955 Section 145 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "Old Code") as also Section 146 of that Code were amended u/s 145, in order to expedite the hearing of the proceeding, affidavits were substituted for oral evidence, and in cases where the Magistrate was of the opinion that none of

the parties was in possession at the relevant date, or he was unable to himself decide as to which of them was in such possession, he had to draw up a statement of the facts of the case and to forward the records of the proceeding to the Civil Court of competent jurisdictions for a finding on the question of possession, and, on receipt of the said finding, the Magistrate had to declare the party in whose favour the finding had been recorded by the Civil Court, to be in possession of the land in dispute. In the new Code many changes have been incorporated, including in Section 145 and 146. u/s 145, again, instead of taking evidence of the witnesses in the shape of affidavits, the witnesses have to be examined in Court. Now, there is no scope for interim attachment during the pendency of the proceeding, because the proviso to Sub-section (4) of Section 145 of the Old Code which empowered the Magistrate to make such attachment during the pendency of the proceeding has been deleted. The effect is that during the pendency of the proceeding the Magistrate cannot attach the land in dispute. Section 146 of the old Code has been substituted by a new Section 146, the relevant portion of which reads as follows--

146(i) 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.

5. From a bare reading of this Sub-section (1) of Section 146 of the new Code, it appears that at any time after drawing up a proceeding u/s 145, a Magistrate can attach the land in dispute--

- (i) If he considers the case to be one of emergency;
- (ii) If he decides that none of the parties was then in such possession as is referred to in Section 145; and
- (iii) If he is unable to satisfy himself as to which of them was in such possession.

Under the new Code the attachment is not an interim attachment which is to continue till the conclusion of the inquiry u/s 145; this attachment is to continue till the dispute is decided by the competent Court. In substance, Section 146 of the new Code is similar to Section 146 of the old Code as it stood prior to the amendment of the year 1955; the only difference being that then only under two conditions such order of attachment could be passed, and now there is a third contingency, that is, "the Magistrate considers the case to be of emergency." This attachment has to cease either when the competent Court decides the dispute

between the parties, or when the Magistrate is satisfied that there was no longer any likelihood of a breach of the peace with regard to the possession over the subject of dispute. In view of the aforesaid provisions, it is no more open to a Magistrate to draw up a proceeding u/s 145 and to simultaneously attach the subject of dispute and then to direct the parties to file written statements and documents for the purpose of deciding the proceeding u/s 145. Once the Magistrate decides that one of the three contingencies aforesaid has arisen in the proceeding u/s 145, he has to stay his hands after passing an order u/s 146.

6. The question for consideration is as to at what stage the order u/s 146 of the new Code can be passed : can it be passed Simultaneously while drawing up the proceeding u/s 145, as has been done in the case in hand, or only at a later stage ? Apparently, no such restriction has been prescribed in Section 146, as it says that the Magistrate at any time after making the order under Sub-Section (1) of Section 145 can pass an order u/s 146. But this does not mean that he has not to apply his independent mind to the question as to whether, after drawing up of the proceeding u/s 145, the situations call for an order of attachment, u/s 146. This is not an interim attachment, it is in the nature of a final order which is to continue for some time may be for several years till the dispute is decided by a Court of competent jurisdiction; as such, likely to affect the rights of the party concerned to remain in possession of the subject of dispute. In my opinion the learned Magistrate should not have passed the order of attachment in a casual and routine manner. He should have been conscious that by passing the order of attachment he was depriving the rightful owner of his right to remain in possession over the land in dispute till the matter is adjudicated upon by a court of competent jurisdiction. Proceedings u/s 145 are generally drawn up on the basis of a police report or on the application filed by any of the parties. The party who is not before the Magistrate is asked to file written statement and document in support of his claim. Once an order u/s 146 is passed behind the back of such party who may be in actual possession of the lands in dispute, he has no occasion to show to the Magistrate that the claim made on behalf of the other party was a mere pretence and by the order of attachment his valuable right had been put in jeopardy. In such a situation, the Magistrate cannot even withdraw the attachment later, although, after hearing the other side, he may be of the opinion that the claim of one of the parties was a mere pretence and it was he who was, responsible for creating apprehension of a breach of the peace; because, as I have already pointed out, he can withdraw the attachment in accordance with the proviso to Sub-section (1) of Section 146 only if he is satisfied that there was no longer any likelihood of a breach of the peace with regard to the subject of dispute. I have already pointed out that the present Section 146 is, more or less, similar to Section 146 as it stood prior to the amendment in the year 1955, except that under the present Section 146 the Magistrate can also attach the subject of dispute if he considers the case to be one of emergency. While examining the question as to at what stage a Magistrate could pass an order u/s 146, as it stood before 1955, it was held in several cases

that the Magistrate must make some inquiry for the purpose of ascertaining as to whether the dispute was of the nature which fulfilled the conditions laid down in Section 146. In this connection reference can be made to the cases of (1) Ambika V. Wazid Ali (23 CWN 910); (2) Daulat Ali Molla Vs. Hedail Molla and Others, and..... (4) Ram Bahal Singh and Others Vs. Rang Bahadur Singh, . In the case of Ram Bahal Singh, it was observed :--

After all, the order u/s 146 is almost the same as an act of confiscation and, therefore, the Magistrate should naturally be reluctant to make use of that section.

However, if any party or parties, after having been given adequate opportunities, decline to appear before the Magistrate and produce materials in support of his/their claims, the matter would be different and it will be open to the Magistrate to pass an order u/s 146 (Vide Bengali Parida and Others Vs. Banchhanidhi Panigrahi, . In that view of the matter, I am of the opinion that, before passing an order of attachment, a Magistrate must hear both the parties and apply his independent mind to the question as to whether any of the three contingencies mentioned in Section 146 (1) of the new Code existed, vesting in him jurisdiction to pass an appropriate order. It is true that in some cases the situation may be such as to call for immediate action to avoid breach of the peace. But in my judgment merely by passing an order making the property custodia legis, a breach of the peace cannot be avoided; for that, the Magistrate concerned has ample power under other sections of the Code of Criminal Procedure, apart from deputing the police force for the purpose. As such it has to be held that in the instant case the order of the learned Magistrate attaching the subject of dispute while drawing up the proceeding u/s 145, without applying his independent mind to the question as to whether any such order was called for, is Perse, illegal. Moreover, the learned Magistrate, having attached the lands in dispute, has directed the parties to file written statements and documents, which is not sanctioned by the new Code.

7. Now the question is as to whether, due to the aforesaid infirmity, the whole order, dated the 2nd January, 1975 drawing up the proceeding u/s 145 and attaching the subject of dispute u/s 146 is to be quashed. Learned Counsel for the petitioners, on the basis of a Single Judge decision of this Court, in (5) Md. Muslehuddin v. Md. Salahuddin (1975 PLJR 514) has submitted that the whole order has to be quashed as it was a composite order. In that connection it may be pointed out that another learned Single Judge of this Court, in (6) Hare Krishna Singh v. Shyam Singh (1975 BBCJ 681), however, took a contrary view and he set aside only that part of the order by which the learned Magistrate had attached the subject of dispute u/s 146 and a direction was given to the Magistrate to proceed with the hearing of the proceeding u/s 145 itself. If an order sought to be quashed is severable, on well established principle, only that part of the order is to be quashed upholding the other part which may be valid in the eye of law. In my opinion, the order attaching the lands u/s 146 is severable;

and, as such unless the other conditions for quashing the proceeding initiated u/s 145(1) are fulfilled, there is no reason for quashing the proceeding itself.

8. In support of the contention that the order converting the proceeding u/s 144 into one u/s 145 itself should be quashed Learned Counsel for the petitioners submitted that the learned Magistrate while converting the proceeding u/s 144 into one u/s 145, has not said that he was satisfied about the existence of an apprehension of a breach of the peace, which is a condition precedent to the exercise of the jurisdiction under that section. It has been emphasised on several occasions by this Court that, while drawing up a proceeding u/s 145, the Magistrate should record reasons for being satisfied about the existence of an apprehension of a breach of the peace concerning the land in question. However, when such orders are passed during the pendency of the proceeding u/s 144, the matter stands slightly on a different footing. In such cases the Magistrate can pass the final order u/s 144 making it absolute against one party to the dispute till the period of two months expires from the date of the initiation of the proceeding u/s 144. For that he need not again mention in any of his orders about the existence of an apprehension of a breach of the peace. In that view of the matter, how then the order converting the proceeding u/s 144 into one u/s 145 within the period of two months from the date of initiation of the proceeding u/s 144 can be said to be invalid merely because in such order it has not been mentioned that the Magistrate was satisfied about the existence of an apprehension of a breach of the peace ? This aspect of the matter was considered by a Bench of this Court in (6) Raja Lal Singh V. Ram Prasad Singh (1975 BBCJ 263), where it was observed at page 269 as follows:-- The Magistrate, who has heard the parties in the proceeding u/s 144, perused their show cause petitions and looked into the police report and other documents, can legitimately be satisfied on those materials that there is an apprehension of a breach of the peace relating to possession over land. I am unable to appreciate as to how if, on those very materials, the learned Magistrate, who could have passed an order initiating a proceeding u/s 145 within two months from the date of the initiation of the proceeding u/s 144, could not do so only on the next day of the expiry of the period of the said two months. The matter may be different if sufficiently long period has intervened between the date of the expiry of the proceeding u/s 144 and the date of the initiation of the proceeding u/s 145.

In my judgment, the order drawing up the proceeding u/s 145 passed during the pendency of the proceeding u/s 144 will not be illegal merely because the Magistrate has not said in the order in so many words regarding this satisfaction about existence of an apprehension of a breach of the peace. It is obvious that, if the Magistrate was not satisfied about existence of an apprehension regarding a breach of the peace, he would have dropped the proceeding u/s 144 itself, instead of converting it into a proceeding u/s 145.

Learned Counsel for the petitioners then submitted that, on the facts and in the circumstances of the case, the proceeding u/s 145 itself amounts to an abuse of

the process of the Court and it is liable to be quashed. In this connection he has drawn our attention to the fact that in the year 1973 a proceeding u/s 144 was initiated between Dukhan Singh and others, on one side, and Lilawati Devi, daughter-in-law of the said Santosh Ram Tiwari, on the other. Later, a compromise petition was filed and the possession of Lilawati Devi was accepted. It has also been mentioned that in connection with the aforesaid dispute. Title Suit No. 116 of 1967 had been filed by Lilawati Devi in which the aforesaid Dukhan Singh and others were defendants. The suit was decreed and in due course possession was delivered to Lilawati Devi through Court in execution of the decree of the title suit. The petitioners claim to have derived their title from the said Lilawati Devi and according to them the opposite party is not the daughter of Santosh Ram Tewari, but is an imposter and she has been set up to make a false claim over the disputed lands According to the Learned Counsel, in view of the judgment in the title suit the present proceeding was not at all maintainable. In my opinion, there is no substance in this contention. Admittedly, opposite party was not a party to any of the aforesaid litigations. Whether the petitioners were in possession or the opposite party has remained in possession in spite of the title suit and the delivery of possession in pursuance thereof to Lilawati, is a matter which is to be adjudicated upon by the learned Magistrate after hearing the parties and on a consideration of the materials on record. This fact will not oust the jurisdiction of the learned Magistrate to initiate the proceeding u/s 145. In the result, the application is allowed in part. The order attaching the subject of dispute u/s 146 of the new Code is set aside, but the proceeding u/s 145(1) of the new Code will proceed in accordance with law in the light of the observations made in this judgment. Sarwar Ali, J.

I agree.