
(1975) 06 PAT CK 0002

In the Patna High Court

Md. Muslehuddin and Another

APPELLANT

Vs

Md. Salahuddin

RESPONDENT

Date of Decision : 27-06-1975

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 144, 145, 146, 482

Citation : (1976) CriLJ 1150 : (1975) 8 PLJR 514 : (1975) PLJR 514

Hon'ble Judges : C.K. Tiwary, J

Bench : Single Bench

Judgement

C.K. Tiwary, J.—This is a petition u/s 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") for quashing the order of the Sub-Divisional Magistrate, Arrah dated the 14th of March, 1975 drawing up a proceeding u/s 145 of the Code by converting a proceeding u/s 144 into one u/s 145 and attaching the lands in dispute u/s 146(1) of the Code.

2. Petitioners Mohammad Musle-huddin and Mohammad Nayeemuddin and the opposite party Mahammad Salahuddin are full brothers. Their father Abdul Heyat died on the 14th of February, 1975. Abdul Heyat is said to have executed a will and thereafter made a gift of his properties in favour of the petitioners on the 27th of January, 1975. The opposite party filed a petition before the Sub-Divisional Magistrate on the 1st of March, 1975 for action u/s 144 of the Code. He alleged in the petition that on the death of his father Abdul Hevat he and the petitioners inherited all his properties and came in possession of the same. It was also alleged that the opposite party being the eldest son was in actual possession of the lands left by Abdul Heyat and was managing and controlling the same. It was further said that the petitioners on the basis of a forged, fabricated and concocted deed of gift said to have been executed by Abdul Heyat in their favour were creating trouble in peaceful possession of the opposite party over the lands specified in Schedule A of the petition and they were also creating trouble in the peaceful possession of the opposite party over the lands mentioned in Schedule B of the petition and they were ready to loot away the standing

crops which were ripe for harvesting. On the basis of this petition the learned Sub-Divisional Magistrate, Arrah drew up a proceeding u/s 144 of the Code against the parties on the same day (1-3-1975). The petitioners filed show cause petition on the 13th of March, 1975 stating inter alia, that Abdul Heyat executed the deed of gift and thereafter on the 27th of January, 1975 gifted the lands to them and they came in possession of the disputed lands during the lifetime of Abdul Heyat by accepting the gift. The petitioners thus denied the claim of the opposite party to have a share in the lands. According to them, the opposite party never got possession over any portion of the disputed lands.

3. The learned Sub-Divisional Magistrate on perusal of the show cause and after hearing the counsel of the parties by his order dated the 14th of March, 1975 converted the proceeding u/s 144 into one u/s 145 of the Code and considering the case to be one of emergency attached the disputed lands u/s 146(1) of the Code. It is against this order that this petition has been filed.

4. It is urged on behalf of the petitioners that the opposite party has also filed a suit being Partition Suit No. 20 of 1975 of the Court of the Subordinate Judge, Arrah on the 21st of February, 1975 claiming one-third share in the properties of Abdul Hayat and has stated in the plaint that he (opposite party) along with the petitioners is coming in possession of the disputed lands and there is unity of the and possession and that the parties are coming in possession according to their share. The learned Counsel for the petitioners submits that when a title (partition) suit filed by one of the parties in respect of the subject-matter of dispute is pending the initiation of a proceeding u/s 145 of the Code is misconceived. He has relied upon some decisions of this Court in support of his contention. Facts of the case *Kamo Sharma v. Jagdambi Mahto* 1968 Pat LJR 427 are not similar to the facts of the instant case. In that case a proceeding u/s 144 of the Code was started on the 30th of November, 1967. Opposite party Jagdambi Mahto had filed a Title (Partition) Suit on the 19th of July, 1966 in the Court of the Subordinate Judge. He filed an application for appointment of a receiver on the 13th of November, 1967 in that partition suit. The Subordinate Judge held that the plaintiff (opposite party Jagdambi) was not in actual cultivating possession of the land and the paddy crop had been grown by the defendants (petitioners). He accordingly rejected the application of the plaintiff (opposite party Jagdambi) for appointment of a receiver by order dated the 5th of December, 1967. Having failed to obtain possession by appointment of a receiver the plaintiff (opposite party Jagdambi) came before the Criminal Court for obtaining possession over the lands in dispute. In those circumstances, the initiation of a proceeding u/s 145 of the Code was quashed. In the instant case, there is no such finding of the Civil Court, In that case the learned Judge had relied upon the following observations of Narasimham, C. J.:

The primary object of initiating a proceeding u/s 145 of the Criminal Procedure Code is to prevent breach of peace and hold a summary inquiry for the purpose of ascertaining which of the rival parties is in actual possession of the property

and to maintain the possession of that party until the rival party seeks appropriate relief in the Civil Court. But when the parties have already applied to the proper forum for the purpose of effectively giving final relief to them, there is no point in subsequently starting a proceeding u/s 145 of the Criminal Procedure Code. It must be left to the parties to seek an appropriate interim relief by way of injunction, appointment of a receiver or otherwise, in the very Civil Court where the litigation is pending. Here such an interim relief was actually asked for and was refused to Musammat Tejawanti Kuer.

The learned Counsel for the petitioners has placed much reliance on those observations of Narasimham, C. J. The learned Counsel appearing on behalf of the opposite party however, submits that those observations of Narasimham, C.J. are not applicable to the facts of the instant case. According to learned Counsel for the opposite party the title (partition) suit brought by the opposite party is not a simple suit for partition and the opposite party cannot get a separate takhta for his share carved out in the partition suit unless the deed of gift executed by Abdul Heyat in favour of the petitioners is set aside. Hence the opposite party cannot seek appropriate interim relief by way of injunction or appointment of a receiver or otherwise in the partition suit filed by him and, therefore, initiation of a proceeding u/s 145 of the Code cannot be said to be misconceived.

5. Another case relied upon by learned Counsel for the petitioners is 1973 PLJR 69 (Jalim Mian v. Raghunath Prasad), In that case there was a proceeding u/s 144 of the Code in which the order was made absolute against the opposite party Raghunath Prasad on the 26th of August, 1971. While that proceeding was going on opposite party Raghunath Prasad filed a Title (Partition) Suit No. 114 of 1971 in the Court of the Subordinate Judge. In that suit he sought for a declaration of his title to the disputed land by virtue of purchase and also for being put in possession thereof after a separate takhta for his share had been carved out. In that case, according to the statement made in his plaint itself, the opposite party was not in possession of the land in dispute. In such circumstances, a subsequent proceeding u/s 145 of the Code started by order dated the 22nd of April, 1972 was quashed.

6. The third case relied upon by the learned Counsel for the petitioners is 1974 BBCJ 383, (Sia Saran Prasad Singh v. Jagdish Saran Prasad Singh). Sia Saran Prasad Singh was the son of Ganga Prasad Singh by his first wife and Jagdish Saran Prasad Singh was his son by his second wife. In that case Jagdish Saran Prasad Singh had filed a title suit in November, 1970 in the Court of the Subordinate Judge, Patna against. Sia Saran Prasad Singh and others claiming partition of his share. He had stated in the plaint that after the death of his father Sai Saran Prasad Singh had become practically the Karta of the family and had been managing the affairs of the family. It was, therefore, held that during the pendency of the partition suit with such an allegation proceeding u/s 145 of the Code was not proper. The learned Judge further observed-

In my opinion also, initiation of the proceeding u/s 145 of the Code cannot be held to be beyond jurisdiction of the learned Sub-Divisional Magistrate. The significant point, however, to be noticed is whether it is expedient to allow the proceeding u/s 145 of the Code to continue.

7. The aforesaid decisions relied upon by the learned Counsel for the petitioners would show that the question whether initiation of a proceeding u/s 145 of the Code during the pendency of a civil suit in respect of the same property filed by one of the parties to the proceeding is proper or not will depend upon the facts and circumstances of each case. The pendency of a civil suit is no bar to the initiation of a proceeding u/s 145 of the Code, but ordinarily proceeding u/s 145 should be avoided when a civil suit is pending between the parties for determination of their rights. When there is an apprehension of breach of the peace in such a case, the Magistrate will use his discretion and see whether action u/s 107 or a proceeding u/s 145 of the Code would be more appropriate.

8. It is further contended on behalf of the petitioners that the order of the learned Magistrate attaching the lands in dispute u/s 146(1) of the Code as also directing the Parties to produce documents and evidence in order to enable him to decide the question of possession is not in accordance with law and is without jurisdiction. Relevant portions of Section 146 of the Code are as under:

(1) If the Magistrate at any time after making the order under Sub-section (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 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) When 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 arrangement 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.

9. Learned Counsel appearing on behalf of the opposite party contends that simply because the learned Magistrate has attached the property in dispute u/s 146(1) of the Code, his jurisdiction to decide the question of possession under Sub-section (4) of Section 145 does not cease and even after he has attached the property, he can decide as to which of the parties was in possession at the relevant time. In support of his contention he has referred to the provisions contained in Sub-section (2) and the proviso to Sub-section (1) of Section 146 of

the Code and has submitted that if the Magistrate can withdraw the attachment at any time under the proviso to Sub-section (1) and if he can appoint a receiver in respect of the property in dispute under Sub-section (2) after the subject-matter of dispute has been attached under Sub-section (1), it follows that his jurisdiction over the subject-matter of dispute does not cease and he can decide the question of possession u/s 145 even after he has attached the subject-matter of dispute u/s 146(1). I am unable to accept this argument. According to the proviso to Sub-section (1) of Section 146, the Magistrate can withdraw attachment only when he is satisfied that there is no longer any likelihood of breach of the peace in regard to the subject of dispute. In such a case the proceeding u/s 145 itself will have to be dropped and no question of deciding as to which of the parties was in possession at the relevant time would arise. When the Magistrate attaches the subject of dispute the property becomes custodia legis and, therefore, provision has been made in the Code that the Magistrate may, after he has attached the property, make such arrangement as is necessary and proper for looking after the property or if he thinks fit appoint a receiver thereof. In my opinion, the Magistrate is not entitled to proceed to decide u/s 145 as to which of the parties is in possession after he has attached the subject of dispute u/s 146(1) of the Code. Therefore, the order of the learned Magistrate directing the parties to adduce evidence in order to enable him to decide the question of possession after he has attached the subject-matter of dispute u/s 146(1) is illegal.

10. Alternative argument of learned Counsel appearing on behalf of the opposite party is that the portion of the impugned order by which the learned Magistrate has attached the lands in dispute is separable from the other portion and this may be struck down and the remaining portion of the impugned order by which the proceeding u/s 145 of the Code has been initiated may not be interfered with. If on the materials available before him the learned Magistrate considered that it was a case of emergency, he had jurisdiction to attach the lands in dispute u/s 146(1) of the Code. Therefore, the portion of the impugned order attaching the lands in dispute by itself cannot be said to be without jurisdiction. It is the composite order attaching the subject of dispute and directing the parties to adduce documents and evidence in support of their respective claim to enable the Magistrate to decide the question of possession which is illegal. If the Magistrate could legally attach the property u/s 146, he could not legally proceed u/s 145 of the Code to decide the question of possession. Once the Magistrate considers that it is a case of emergency and attaches the subject of dispute u/s 146(1) of the Code, he has no jurisdiction to take evidence and decide as to which of the parties was in possession at the relevant time. In the circumstances, the entire impugned order has to be quashed.

11. In the result, the application is allowed and the impugned order dated the 14th of March, 1975 is quashed. If the learned Magistrate feels satisfied at any time that there is still apprehension of breach of the peace, he may take appropriate action in accordance with law in the light of observations made

above.