
(2009) 04 BOM CK 0008

In the Bombay High Court

Case No : Criminal Application (Main) No. 134 of 2009

Mr. Apollianario Menezes, Manquerial Wada, St. Estevam,
Ilhas, Goa

APPELLANT

Vs

State and Ors

RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

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

Citation : (2009) 04 BOM CK 0008

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : Rohit Bras De Sa, for the Appellant; C.A. Ferreira, Public Prosecutor,
for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—Heard Shri Rohit Bras De Sa, the learned Counsel on behalf of the petitioner (party no.2) and Shri Ferreira, the learned Public Prosecutor on behalf of the respondent no.1-State. The dispute started as a dispute as regards possession between the petitioner (party no.2) and respondent no.2 (party no.1) in relation to the property surveyed under No. 104/20 of Village Jua, which as far as the survey records go has been surveyed in the name of Braz Ambrosio de Silva Pizarro e Sa.

2. The petitioner (party no.2) has their house in sub-division 19 and the said private respondent (party no.1) has their house in sub-division 23, both of survey no.104. Both the said parties filed written statements in support of their respective claims. The learned sub-divisional Magistrate by order dated 28/11/2007 has held that the respondent (party no.1) is in possession and enjoyment of the said property and were entitled to remain in possession until evicted therefrom in due course of law. The petitioner (party no.2) challenged the said order as well as the order dated 29/04/2008, issued towards the execution of the first order, before the learned Sessions Judge and the learned

Additional Sessions Judge by order dated 12/03/2009 proceeded to dismiss the revision petition. In dismissing the revision petition, the learned Additional Sessions Judge observed that the petitioner/party no.2 had admitted in his written statement, firstly that the petitioner had no right, title or interest in the property in dispute and secondly that he was using the said property by keeping his motor vehicle and doing other things and in view of the said admission by the petitioner and taking into consideration the documents produced by party no.2, the SDM did not think it was necessary to hold an inquiry, and, it was rightly so.

3. Shri Rohit Bras De Sa, the learned Counsel appearing on behalf of the petitioner/party no.2 has firstly submitted that there was no preliminary order made in the proceedings before the learned SDM. Learned Counsel further submits that the second order dated 29/04/2008 shows that the petitioner/party no.2 was in possession of the subject property. Learned Counsel further submits that although the affidavits were filed no inquiry as contemplated by sub-section 4 of Section 145 of the Code was held by the learned SDM and considering the above factors, this is a fit case to set aside the orders of the Courts below and remand the case for inquiry.

4. Shri Bras De Sa, in support of his submissions has placed reliance on the case of *Flori Rodriques & Anr. V/s. Maxie Jureme Danial Cabral & Ors.* (BCI 1978 (0) 83) wherein this Court held that it was not open to the Magistrate to dispose of the proceedings u/s 145 of the Code on the basis of the affidavits. Reliance is also placed on the case of *Vishwanath Kashinath Virkar and Others Vs. Nitinchand Keshavji Gala and Others*, wherein it is stated that the object of Section 145 is to prevent breach of peace and to provide a speedy remedy by bringing the parties before the Court, and ascertain who of them was in actual possession and to maintain status quo until their rights are determined by a competent Court. It was further held that the proceedings u/s 145 are primarily concerned with the prevention of breach of the peace of declaring the party found in possession to be entitled to remain in possession until evicted therefrom in due course of law and are not meant for the purpose of evicting any person from any land. Reliance is also placed on the decision of the Apex Court in the case of *Shanti Kumar Panda V/s. Shakuntala Devi* (2004 (2) Bom. C.R. (Cri.) 250) wherein the Apex Court has stated as follows;

10. Possession is nine points in law. One purpose of the enforcement of the laws is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc. as defined in sub-section (2) of section 145 having arisen, causing a likelihood of a breach of the peace, section 145 of the Code authorises the Executive Magistrate to take cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings u/s 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive or police action. The purpose of the

provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in proviso to sub section (4) of section 145, and maintain the status quo as to possession until the entitlement to possession was determined by a Court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned.

5. Shri Ferreira, the learned Public Prosecutor on behalf of the respondent no.1/ State has submitted that both the Courts below have rightly come to the conclusion that no inquiry was required to be held in view of the admission by the petitioner (party no.2) in the reply filed by him in the proceedings and, therefore, the order of the Courts below could not be faulted.

6. It appears from the first impugned order of the learned SDM that although an inspection was fixed no inspection was held because of non-cooperation of the petitioner/party no.2. It is not possible to accept the submission of learned Counsel on behalf of the petitioner that there was no preliminary order passed because the order dated 28/11/2007 itself states that the then SDM had issued an order u/s 145 (1) of the Code. The order dated 29/04/2008 of the learned SDM certainly could not give anything more to the petitioner than was claimed by the petitioner in the written statements, filed by him. In the said written statement dated 25/06/2007, on the basis of which both the Courts below have concluded the proceedings, the petitioner had clearly and unequivocally stated that he had no personal or bad interest to damage or occupy the property. The petitioner had also stated that he was only keeping his motor vehicle sometimes as the owner of the said property was not occupying the land. The petitioner has not at all claimed that he was in possession of the subject property and on the contrary had stated that he was using it only to keep his motor vehicle sometimes as the owner of the said property was not occupying the same and sometimes to boil water, as his house was close to the main road and there was no proper space to keep the vehicle.

(Emphasis supplied)

7. On the other hand, the respondent/party no.1 had categorically pleaded that in the subject property there was a pakka room on the concrete slab having toilet, bath room, septic tank, soak pit, a small shed and their family members

were in absolute possession and enjoyment of the same from the time of their ancestors. As the petitioner (party no.2) had not claimed that he was in possession of the said property nor the right or intention to possess the same, in my view, the findings of the Courts below rendered on the basis of the pleadings filed by the petitioner (party no.2) could not be faulted. In the circumstances, this is not a fit case to exercise extraordinary jurisdiction against the findings given by the Courts below. Since the respondent (party no.1) are held to be in possession, all that the SDM could do was to direct that his possession be not disturbed in terms of sub-section 6 of Section 145 of the Act. Since petitioner (party no.2) was never in possession, there was no question of directing him to vacate the premises. He could only be restrained from interfering with the possession of respondent (party no.1). To that extent alone, the order dated 29/04/2008 will stand modified. Otherwise, there is no merit in this petition and therefore the same is hereby dismissed.