

(1983) 04 AHC CK 0002

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 4145 of 198/2

Nathuni Rai and Others

APPELLANT

Vs

State of Uttar Pradesh and Another

RESPONDENT

Date of Decision : 26-04-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(2), 145(8), 146
Penal Code, 1860 (IPC) — Section 107, 116, 323

Citation : (1983) 04 AHC CK 0002

Hon'ble Judges : M. Wahajuddin, J

Bench : Single Bench

Advocate : Sankatha Rai, for the Appellant; A.G.A. and C.K. Rai and Ram Nihor Singh, for the Respondent

Judgement

M. Wahajuddin, J.—The applicants have assailed the order dated 5th June 1982 of the Sub-Divisional Magistrate, Zamania, District Ghazipur directing attachment u/s 146 Code of Criminal Procedure vide Annexure XI as well as the order dated 26th June 1982 of the Sessions Judge, treating the order of the Sub-Divisional Magistrate as interlocutory order and rejecting the revision on such ground. The case has a chequered history. Proceeding was initiated u/s 145 Code of Criminal Procedure by passing a preliminary order dated 29th September 1980, Annexure III. Opposite party No. 2 Smt. Ram Piari claims to be the daughter of Ram Yas Rai, the last owner of the property involved while applicant No. 4, Smt. Rajpati is the mother of Ram Yas Rai who died in the year 1979 and according to applicants, Ram Piari is not the daughter of Ram Yas Rai and applicant No. 4 Smt. Rajpati happened to be the sole heir and legal representative of Ram Yas Rai. According to the applicants, Smt. Rajpati executed sale deeds in favour of applicants Nos. 1 to 3 in September 1979 and February 1980 in respect of plots Involved in the present proceeding and some other plots and since then applicants Nos. 1 to 3 are in peaceful possession of the property. According to the applicants, one Radha Kishun Rai is interested in grabbing the property and Ram Piari, his sister, acted in collusion with him. An application was preferred by

Smt. Ram Piari to the Superintendent of Police, Ghazipur, Annexure I and the Superintendent of Police sent the application to the SDM Zamania who called for the police report. It is further urged that the aforesaid Radha Kishan Rai got a collusive police report from the Station Officer of P.S. Gahmar vide Annexure II and on basis of such report the SDM passed a preliminary order on 29th September 1980. It is alleged that thereafter on 21st February 1981 Smt. Ram Piari prayed for attachment of the property Annexure IV and another application was preferred on 27th February 1981 to obtain a report from the police officer and ultimately the police officer reported that the crop has already been thrashed and taken away by the applicants vide Annexure IX. Radha Kishun Rai lodged a report about causing Injury on 2nd May 1982. The matter was not further pursued. It could appear from Annexure XI that the Magistrate observed that earlier application of opposite party was lying without order and she then filed two applications dated 12-3-82 and 25-3-1982 for attachment and the police report was called which was vague to the effect that crop is ripe and both the parties are making preparation for thrashing it and after hearing the parties on 2-4-1982 the Magistrate passed an order u/s 145(8) Code of Criminal Procedure for protecting the crops and then a report was received on 12-4-1982 that one Nathuni Ram Basula has already thrashed and removed the crop and ultimately a report dated 14-5-1982 of the Station Officer Gahmar was received, conveying that there has been exchange of blows between the parties centering round the land and house and one Radha Kishun has lodged the report u/s 323 IPC and proceeding u/s 107/116 has been initiated. It was recommended that the property may be attached. The Magistrate has then mentioned the various documents he perused including police report, injury report, report of FIR etc. The Magistrate then concluded the matter by observing that after the perusal of the report dated 14-5-1982 of the Station Officer Gahmar, copy of the FIR and Photostat copy of the injury report he is satisfied that the apprehension of breach of peace continues and the situation is grave and to prevent the breach of peace it is necessary to attach the property and the Magistrate then passed the impugned order. The order in question is quite a detailed one. The applicants maintained that the reports of the Naib Tahsildar and Tahsildar indicated that there was no apprehension of breach of peace and Smt. Ram Piari has no concern with the disputed property and she has been set up by Radha Kishan Rai. It is further alleged that the Magistrate has passed his order dated 5th June 1982 on the unauthorised and collusive report of the police authority and the Tahsildar and the Naib Tahsildar gave reports favourable to the applicants that they are in possession and there is also no apprehension of breach of peace.

2. The first point urged is that as the earlier application of the opposite party preferred in February 1981 did not prompt the Magistrate to pass any order it may be inferred that there could not be any apprehension of breach of peace for any emergency attachment. I have considered the argument. It is not that the two applications were rejected. If any prompt action on the same was not taken neither the opposite party is to suffer for that nor from such lapse it can be

concluded that any apprehension of breach of peace did not exist.

3. It has been further urged that as any actual breach of peace as such did not take place in between upto 5th June there would be no occasion to make any emergency attachment in this manner. Firstly a report was lodged u/s 323 IPC regarding causing hurt, secondly, there was an ultimate report of the Station Officer, Gahmar conveying that there was serious apprehension of breach of peace. It was next urged that the order of the Magistrate does not show that any apprehension of breach of peace existed. That again is not correct. In his impugned order of 5th June Annexure 11, in the concluding paragraph after discussing the materials before the Magistrate I he observed that he is of the opinion that the apprehension of breach of peace continues and situation is grave and it is necessary to make the attachment to maintain peace. The observations are thus exhaustive on the point and they discussed the further stand of the applicants that any apprehension of breach of peace did not exist. Sections 145 Code of Criminal Procedure and 146 Code of Criminal Procedure are interlinked sections. They are preventive in the nature and deal with preventing any breach of peace and not that they are attracted only after actual breach has necessarily taken place. It is the primary duty of the Magistrate to take preventive action whenever he feels that there is such apprehension and the Magistrate has been vested with the emergency powers to attach the property u/s 146 Code of Criminal Procedure to prevent the breach of peace. It is always the subjective satisfaction of the Magistrate and matter open to be considered is whether such satisfaction has been based on some relevant materials or not. So far as that aspect goes, before coming to a conclusion the Magistrate has fully discussed all the materials before him.

4. It was next argued that the Magistrate having passed an order u/s 145(8) Code of Criminal Procedure he should not have gone beyond that. It is, however, noteworthy that the order passed u/s 145(8) Code of Criminal Procedure on 2-4-1982 was defeated and did not serve the purpose as it was reported that crop has already been thrashed. That being the situation the Magistrate would be justified in exercising his powers u/s 146 Code of Criminal Procedure and there is nothing illegal or irregular in it.

5. It was urged that the reports of the Tahsildar and Naib Tahsildar were favourable to the applicants and the report Annexure VI would indicate that no apprehension of breach existed. I have considered that aspect The Magistrate is not bound by the reports. He has to exercise his mind as to come to his independent judgment and assessment of the situation. The circumstances of this case go to indicate that Smt. Rajpati, applicant No. 4, and Smt. Ram Piari, opposite party No. 2 both are equally keen to grab the property of Ram Yas Rai claiming to be their sole legal representatives respectively and claiming through Rajpati applicants Nos. 1 to 3 as her transferees are also keen to grabbing the property and such a situation is bound to create apprehension of breach of peace. Apart from that it is noteworthy that the proceedings u/s 145 Code of

Criminal Procedure has been continuing since much before and it is the emergency attachment which is being challenged. The matter has therefore to be examined from the angle whether the Magistrate committed any illegality in making the emergency attachment at a subsequent stage. Section 146 Code of Criminal Procedure clearly lays down that the Magistrate can at any time after making the order u/s 145(1) Code of Criminal Procedure i.e. after initiating proceeding and passing preliminary order, attach property if the Magistrate considers the case to be one of emergency. When that is the position, attachment at any subsequent stage u/s 146 Code of Criminal Procedure when proceedings u/s 145 Code of Criminal Procedure are pending would be legal.

6. It was argued that the police report dated Nth May 1982 was a maneuvered one and was not called for by the Sub Divisional Magistrate. This averment was made in paragraph 17 of the affidavit supporting the application. It was argued that in paragraph 14 of the counter affidavit there was only a general denial without specifically denying the first part of the-assertion in paragraph 17 of the affidavit. It is noteworthy that the Magistrate has passed an order u/s 145(8) Code of Criminal Procedure for the protection of the crop and the police gave a report that Nathuni Ram Basula has already, thrashed. Such situation having developed and the police thereby becoming " incapacitated to give effect to the order passed u/s 145(8) Code of Criminal Procedure would be justified in giving any supplementary report in that connection and such a report cannot be considered as uncalled for. Apart from that the Magistrate has not treated this report as uncalled for and this Court exercising inherent powers would not interfere.

7. It was further argued that in any case the police officer concerned should have been examined to prove the report. Proceedings under Sections 145 Code of Criminal Procedure and 146 Code of Criminal Procedure are of summary nature. The Magistrate could very well act upon the police report in question without insisting upon the actual appearance of the police officer concerned who gave the report. In fact in so many cases such interorders are passed after perusal of the police report if the Magistrate is satisfied. It was argued that the FIR in question should have been proved by examining the maker of the FIR. First Information Report is a public document and a certified or photo stat copy of the document will be admissible in evidence particularly for inter interlocutory orders to be passed in a summary manner. It is not a case of regular trial. I may also mention that if the Court does not find any abuse of the process of law it would refrain from exercising powers u/s 482 Code of Criminal Procedure while exercising such powers the Court does not function as Court of appeal or revision.

8. It was argued that civil proceedings would be the proper course. I am unable to agree with such argument. When the Magistrate is satisfied on two points, firstly, that there is a dispute and which is likely to cause breach of peace and secondly that it concerns any land, water etc. including properties mentioned in Section 145(2) Code of Criminal Procedure he is bound to proceed u/s 145 Code

of Criminal Procedure and can also pass an order for emergency attachment u/s 146 Code of Criminal Procedure. In the present case proceeding u/s 145 Code of Criminal Procedure was already pending and on the authority of Kalapdin v. State 1970 AWR 410 and Jafar Hussain v. State 1969 AWR 199 the Magistrate has to conclude proceedings. This view further finds support from a case of R.A. Bhtani v. Miss Mani 1969 AWR 59 SC.

9. It was argued that the revision was rejected as not maintainable. The case of Indra Deo Pandey v. Smt. Bhagwati Devi 1981 AWC 314 is direct authority on the proposition that no revision lies against inter locutory order and the order u/s 146(1) Code of Criminal Procedure is inter locutory

10. I may also observe that so far as the proceedings u/s 145 Code of Criminal Procedure are concerned they are not to be stayed on account of any other pending or decided civil proceeding. I am fortified in this view by the pronouncements in Kalap Din v. State 1970 AWR 410 and Smt. Hasanki v. State 1955 AW locutory K 654.

11. In the result the application u/s 482 Code of Criminal Procedure is rejected and the stay order dated 12-7-1982 is vacated.