
(2008) 09 UK CK 0007
In the Uttarakhand High Court

Rameshwar Havelia

APPELLANT

Vs

Asian Agro Farms India Ltd. and Another

RESPONDENT

Date of Decision : 05-09-2008

Acts Referred:

Constitution of India, 1950 — Article 227

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

Citation : (2009) CriLJ 2753 : (2008) 3 UC 1919 : (2008) 2 UD 240 : (2006) 2 UD 240

Hon'ble Judges : B.C. Kandpal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.C. Kandpal, J.—By way of this petition, under Article 227 of the Constitution of India, the petitioner has sought the relief to issue a writ, order or direction in the nature of certiorari, quashing the order dated 30-7-2007 (Annexure No. 1 to the petition), passed by City Magistrate, Dehradun u/s 146(1) Cr.P.C. as well as the order dated 29-5-2008 (Annexure No. 2 to the petition), passed by 2nd Additional District & Sessions Judge, Dehradun in Criminal Revision No. 107 of 2007, Rameshwar Havelia v. State of Uttarakhand and Anr.

2. According to the petitioner he purchased the property bearing No. 183-1/1, Rajpur Road, Dehradun vide registered sale deed dated 30-1-2003 from respondent No. 1 for Rs. 55 Lakhs. The entire payment was made through cheque, which was duly encashed by the respondent No. 1 and since then the petitioner is owner in possession of the said property. The name of the petitioner has also been mutated in the Municipal records and all the taxes pertaining to the aforesaid property ever since the date of purchase are being paid by the petitioner. The further allegation of the petitioner is that after the purchase of the aforesaid property, one Sri Jagdish Prasad had been permitted to reside in a portion of the aforesaid property, who expired on 22-7-2007 without leaving any heir. One Pradeep Sharma, ex-employee of Jagdish Prasad was also staying with

Jagdish Prasad as his guest at the time of his death. After the death of Jagdish Prasad, Pradeep Sharma was requested to leave the aforesaid property, but he started claiming the right of residence and also started to encroach upon the aforesaid property and creating disturbance in the peaceful possession of the petitioner over the aforesaid property and ultimately he left the aforesaid property on 25-7-2007. The petitioner also alleged in the petition that Pradeep Sharma, who is the permanent resident of Australia conspired with the police and some land mafias and started claiming his right over the aforesaid property. Therefore on 30-7-2007 the petitioner was compelled to file a civil suit for injunction (Suit No. 319 of 2007) before the Civil Judge (S.D.) Dehradun along with interim injunction application and on the same day learned Civil Judge granted temporary injunction in favour of the petitioner, restraining the defendant Pradeep Sharma from interfering in peaceful possession of the petitioner over the property in question. On 6-8-2007 Pradeep Sharma put his appearance in the aforesaid suit of injunction and filed an application stating therein that in case the suit is decreed, he has no objection. Pradeep Sharma also moved an application before the City Magistrate, Dehradun for initiation of proceedings u/s 145 Cr.P.C.

3. The petition further reveals that, the City Magistrate passed an order on 30-7-2007 u/s 145(1) Cr.P.C. and u/s 146(1) Cr.P.C. and illegally attached the property as the injunction order has already been passed on 30-7-2007. Thereafter Pradeep Sharma also appeared before the City Magistrate in the proceeding u/s 145 Cr.P.C. and moved an application on 6-8-2007 stating therein that he has no concern with the property in question, as he has already left the same and now there is no dispute between Rameshwar Havelia-petitioner and Pradeep Sharma with regard to the property in question, as such the proceeding Under Sections 145(1) and 146(1) Cr.P.C. be dropped. Subsequently the petitioner also filed an application before the City Magistrate for dropping the proceedings, but the learned City Magistrate instead of dropping the proceedings, exceeded his jurisdiction by unnecessarily keeping the property under attachment and also tried to usurp the jurisdiction of the civil court.

4. Against the order dated 30-7-2007 passed by the City Magistrate, the petitioner preferred a criminal revision before Sessions Judge, Dehradun (Crl. Rev. No. 107 of 2007). During the pendency of the criminal revision, the respondent No. 1 filed a suit for cancellation of the sale deed and the said suit was registered, which is still pending before the Civil Judge (S.D.) Dehradun.

5. The petitioner's further case is that the respondent No. 1 moved various applications dated 18-9-2007, 11-12-2007, 11-1-2008 and 5-2-2008 before the Court of 2nd Additional District & Sessions Judge Dehradun and also sought adjournments. Hence on account of the same the aforesaid criminal revision could not be decided. The petitioner approached the High Court by filing Criminal Misc. W.P. No. 292 of 2008 (M/S) seeking relief for expeditious disposal of the revision and the same was decided vide order dated 21-2-2008, whereby the

high Court directed the revisional court to decide the revision expeditiously preferably within a period of 3 months. Thereafter the 2nd Additional District & Sessions Judge, Dehradun dismissed the revision on the ground that the order impugned therein is interlocutory order, and revision is not maintainable.

6. The petitioner has preferred the present petition on the ground that the City Magistrate has no jurisdiction Under Sections 145(1) and 146(1) Cr.P.C. to pass the order, as the matter is already seized with the civil court, where the right of parties is to be finally adjudicated and the order dated 30-7-2007 (Annexure No. 1) passed by City Magistrate, Dehradun u/s 146(1) Cr.P.C. as well as the order dated 29-5-2008 (Annexure No. 2) passed by 2nd Additional District & Sessions Judge, Dehradun in Crl. Revision No. 107/2007, are liable to be quashed.

7. The respondent No. 1 contested the writ petition by filing the counter affidavit and denied the averments made in the petition. It is alleged that late Jagdish Prasad was not authorized to alienate the property belonging to the respondent and no sale deed was ever executed by late Jagdish Prasad. According to the respondent No. 1, Mr. Pradeep Kumar Sharma was actually the caretaker of the property and was holding possession of the property on behalf of respondent No. 1. The respondent further alleged that the proceeding u/s 145 Cr.P.C. was initiated by the police and not by the respondent. If there is an apprehension of breach of peace the City Magistrate does have a jurisdiction Under Sections 145 and 146 Cr.P.C., even though the title of the property is yet to be decided by the Civil Court. The respondent No. 1 also alleged that all the taxes including property tax, municipal charges, and water tax, electric charges, telephone charges are being paid by him till date. Sri Jagdish Prasad was residing in the property with the permission of the company while the ownership remained with the respondent No. 1 and Mr. Jagdish Prasad during his lifetime never parted with possession to anybody. Pradeep Sharma was not a guest but a caretaker of the company property and he use to stay in the house in the said capacity. The respondent No. 1 also alleged that the City Magistrate has validly kept the property under attachment, as there is a dispute of ownership between the petitioner and respondent No. 1. The respondent therefore, alleged that both the orders dated 30-7-2007, passed by City Magistrate as well as order dated 29-5-2008, passed by 2nd Additional District and Sessions Judge in Crl. Rev. No. 107-of 2007 are absolutely legal and liable to be sustained and no remedy is available to the petitioner.

8. The petitioner also filed rejoinder affidavit and reiterated the facts mentioned in the petition.

9. Heard Sri Alok Singh, Senior Advocate, appearing on behalf of the petitioner and Sri M.C. Bansal, learned court for the respondent No. 1 and perused the record.

10. The learned Counsel for the petitioner Sri Alok Singh has firstly submitted that the order u/s 146(1) Cr.P.C. is absolutely against the spirit of the provision

envisaged in the Criminal Procedure Code. The learned Magistrate, of course had jurisdiction to attach the property u/s 146 Cr.P.C., but unless in view of Sub-section (1) of Section 146 Cr.P.C., three reasons mentioned therein exist, there was no justification for the Magistrate to pass the order u/s 146(1) of the Cr.P.C.

11. Learned Counsel for the respondent No. 1, Mr. M.C Bansal, has made the rival submission that the Magistrate has recorded a finding that there was an apprehension of breach of peace, hence the order u/s 146(1) Cr.P.C. passed by the Magistrate, is absolutely justified.

12. In order to determine the question it would be relevant to quote the provisions of Section 146 of the Cr.P.C. which reads as follows:

146. Power to attach subject of dispute and to appoint receiver. - (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 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.

(2) When the Magistrate attached 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 arrangements 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 (5 of 1908);

Provided that in the event of a receiver being subsequently, appointed in relation to the subject of dispute by any Civil Court, the Magistrate:

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) May make such other incidental or consequential orders as may be just.

13. From a bare perusal of Sub-section (1) of the aforesaid Section, it appears that the Magistrate at any time after making the preliminary order u/s 145(1) Cr.P.C. considers - (a) that the case is of emergency or (b) if he decides that none of the parties was then in such possession as is referred to in Section 145, or (c) if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute.

14. In the instant case the perusal of the impugned order dated 30-7-2007

passed by the Magistrate u/s 146 Cr.P.C., shows that the Magistrate has not recorded any finding therein that the case is one of emergency. Merely by mentioning the reason that there is an apprehension of breach of peace, does not bring the matter under the "case of emergency". The Magistrate should have recorded a categorical finding before passing attachment order u/s 146(1) Cr.P.C. that it was a case of emergency and thus it would be essential to attach the property which is subject of dispute until the competent court determines the right of the parties. The order dated 30-7-2007 attaching the property in question by the Magistrate suffers with material illegality and the order is against the provision of law.

15. It is worthy to mention here that the Sub-Inspector, who submitted the report before the City Magistrate, Dehradun for initiating the proceeding u/s 145 Cr.P.C., has clearly mentioned in the report that in two rooms of the disputed house, the household belongings of Rameshwar Havelia were kept. This report has been annexed as Annexure-6 to the petition and on the basis of this report it is quite apparent that a part of the accommodation in question had been in possession of Rameshwar Havelia, who is the petitioner before this Court.

16. The learned Counsel for the respondent in support of his submission has cited before me the case of Rajpati Vs. Bachan and Another, which has been read by me thoroughly but I could not find anything in the cited judgment that it would not be necessary for the Magistrate while attaching the property u/s 146(1) Cr.P.C. to record a finding with regard to the case of emergency or to satisfy himself with regard to three necessary ingredients envisaged in Section 146(1) of Cr.P.C. The ruling cited by the learned Counsel for the respondent, therefore, does not apply to the facts and circumstances of the present case.

17. Learned Counsel for the respondent in support of his submission has further cited before me another decision of Dharampal and others Vs. Smt. Ramshri and others, . I have also gone through this decision but this decision is absolutely on a different point. This ruling cited before me is also not applicable to the facts and circumstances of the present case.

18. The learned Counsel for the petitioner has also raised next point before this Court that in view of the pendency of the civil suit before the court of competent jurisdiction, the Magistrate had no justification to proceed further in the matter under the provisions of Section 145 of the Cr.P.C. He has submitted that the preliminary order as well as the order u/s 146(1) Cr.P.C. dated 30-7-2007 shows that the matter was between the petitioner Rameshwar Havelia and one Pradeep Sharma. The respondent No. 1 had not come in existence at that time. It has also been submitted that in civil suit No. 319 of 2007, Rameshwar Havelia v. Pradeep Sharma, the injunction order was granted in favour of the petitioner (plaintiff in the suit). The order passed by the Civil Judge (S.D.), in O.S. No. 319/2007 has been annexed as Annexure-4 with the petition, which indicates that the defendant Pradeep Sharma was restrained from interfering in plaintiff/petitioner's possession. He has further submitted that during the pendency of

the criminal revision filed by the petitioner against the order dated 30-7-2007, the respondent No. 1 came into picture as he filed another suit No. 492 of 2007 before the Civil Judge (S.D.) on 20-11-2007 and that suit is still pending. The learned Counsel for the petitioner has cited three decisions of the Hon'ble Apex Court in support of his submission - (1) Amresh Tiwari Vs. Lalta Prasad Dubey and Another, (2) Mahar Jahan and Ors. v. State of Delhi and Ors. reported in (2004) 13 Scc 421, and (3) Kunjbihari v. Balram and Anr. reported in (2006) 11 Scc 66.

19. Learned Counsel for the respondent No. 1 has argued that the decisions cited by learned Counsel for the petitioner are not applicable in the present case, in view of the fact that in the earlier suit No. 319 of 2007, the respondent No. 1, M/s Asian Agro Farms India Limited was not a party. He has further submitted that the suit No. 492 of 2007 filed by respondent No. 1 against the petitioner Rameshwar Havelia is for cancellation of the sale deed, and not for injunction or declaration of possession or title, therefore, the proceeding u/s 145 Cr.P.C. could very well be proceeded further even if the civil suit is pending before the court of competent jurisdiction.

20. In order to resolve the controversy few events in this case, which emerge from the documents filed by the parties as well as from the petition, counter affidavit and the rejoinder affidavit filed before this Court, would be relevant.

21. Annexure No. 1, to the petition, is the order passed by the Magistrate u/s 146(1) Cr.P.C. and that order shows that the dispute with regard to the property in question was between Rameshwar Havelia, the petitioner before this Court and one Pradeep Sharma. This order shows that the respondent No. 1 was not in existence at the time of initiating the proceedings u/s 145 Cr.P.C. The record further reveals that Pradeep Sharma on 6th of August, 2007 moved an application before the City Magistrate, Dehradun in the proceedings Under Sections 145, 146 Cr.P.C. stating therein that he did not initiate any proceeding with regard to the property in question which has created the apprehension of breach of peace. It has further been stated by him in the application that he does not have any concern with the property in question and he is not in possession of the property. He has further prayed in the application that the proceeding Under Sections 145, 146 Cr.P.C. be dropped. Further Annexure-7 to the writ petition shows that Pradeep Sharma also moved an application before the Court of Civil Judge (S.D.), in O.S. No. 219/2007 Rameshwar Havelia v. Pradeep Sharma, stating therein that Pradeep Sharma neither had or has any right, title, possession or interest over the property in suit and he has no objection in the suit being decreed. The record further reveals that M/s. Asian Agro Farms India Limited who is the respondent No. 1 in this petition, thereafter moved an application before the court of Civil Judge (S.D.) in O.S. No. 219/2007 for his impleadment as a party. The Civil Judge (S.D.) after hearing Counsel for the parties rejected the impleadment application moved by respondent No. 1, M/s. Asian Agro Farms India Limited. The respondent No. 1 did not seek any redressal

against the rejection of his application by the Civil Judge (S.D.) in O.S. No. 319/2007. The record further reveals that suit No. 492/2007 was filed by the respondent No. 1, against the petitioner Rameshwar Havelia on 20-11-2007, i.e. after 6th of August, 2007 when the applications by Pradeep Sharma were moved before the court of City Magistrate u/s 145 Cr.P.C. as well as before the Civil Judge (S.D.), in O.S. No. 319/2007. Filing of the suit No. 492/2007 by respondent No. 1, appears to be an effort to create unnecessary obstruction in the matter. This factor might have travelled in the mind of respondent No. 1 that he is not going to achieve or gain any benefit in the proceedings u/s 145 Cr.P.C. or in the suit No. 319/2007. However pendency of the civil suit has not been denied by the respondent No. 1. It has also not been denied that Pradeep Sharma moved the applications before the court of City Magistrate in the proceedings u/s 145 Cr.P.C. as well as before the Court of Civil Judge (S.D) In OS No 319/2007. It is also not denied by the respondent No. 1 that his application for impleadment as party in O.S. No. 319/2007 has also been dismissed by the Civil Judge (S.D.), Dehradun.

22. Now I discuss as to what has been held by the Hon''ble Apex Court in the decisions cited before me by the learned Counsel for the petitioner.

23. The Hon''ble Apex Court (three Judges Bench) in the cited case Amresh Tiwari Vs. Lalta Prasad Dubey and Another, has held that-

We clarify that we are not stating that in every case where a civil suit is filed, Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil court then proceedings u/s 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil court would be binding on the Magistrate.

24. The Hon''ble Apex Court (three Judges Bench) in another cited case (2004) 13 Scc 421 (supra) has further held that-

We do not find any propriety behind allowing these proceedings to continue in view of the parties having already approached the civil court. Whichever way proceedings u/s 145 Cr.P.C. may terminate, the order of the criminal court would always be subject to decision by the civil court. Inasmuch as the parties are already before the civil court, we deem it proper to let the civil suit be decided and therein appropriate interim order be passed taking care of the grievances of the parties by making such arrangement as may remain in operation during the hearing of the civil suit.

25. The Hon''ble Apex Court (three Judges Bench) further in the cited case (2006) 11 Scc 66, (supra) has held that-

Proceeding u/s 145 Cr.P.C. would be an abuse of process of court and if any party

claims to be in possession of property and seeks its protection, it is for the party to approach the civil court and get an appropriate order, but the proceeding u/s 145 Cr.P.C. cannot be allowed to be continued in the facts and circumstances of the case.

26. It is thus quite clear that from the perusal of the aforesaid judgments of the Hon''ble Apex Court, the Hon''ble Apex Court has categorically observed repeatedly in all the judgments that in view of the pendency of the civil suit in respect of the same property the proceeding u/s 145 Cr.P.C. should not be allowed to continue.

27. The record of this case shows that the respondent No. 1 filed the suit No. 492/2007, on 20-11-2007 against the petitioner Rameshwar Havelia. The relief sought in this suit filed by respondent No. 1 is to declare the sale deed dated 30-1-2003 as fictitious, sham paper transaction, conferring no rights upon Rameshar Havelia and declare the plaintiff (Asian Agro Farms India Limited), owner in possession of suit property. The further relief sought is to grant permanent injunction against the defendant (Rameshwar Havelia, his workmen and agent) from asserting any right whatsoever of any kind over the suit property and also restrain him from Interfering the right, title and possession of the plaintiff (Asian Agro Farms India Limited) over the suit property in any manner. The copy of the O.S. No. 492/2007 has been annexed as Annexure-9 to this writ petition. As I have already mentioned above, the respondent No. 1 has not denied the existence of this suit. The reliefs claimed by the respondent No. 1 clearly indicate that the respondent No. 1 also sought the relief for grant of permanent injunction. It further shows that the respondent No. 1 also claimed his possession over the suit property. Therefore, it is very well clear that the suit was filed by the respondent No. 1 on 20-11-2007 during the pendency of the criminal revision filed by the petitioner before the court of Sessions Judge, challenging the order passed by the Magistrate u/s 146(1) Cr.P.C., the relief for grant of injunction was also claimed. This suit is still pending and it further appears that this suit was filed by the respondent No. 1 after 6-8-2007 when Pradeep Sharma moved applications before the City Magistrate in the proceedings u/s 145 Cr.P.C. as well as before the Civil Judge (S.D.) in O.S. No. 319/2007 for dropping the proceedings u/s 145 Cr.P.C. as well as for decreeing the suit in favour of the petitioner Rameshwar Havelia. As the respondent No. 1 could not achieve any benefit from the court: of Civil Judge (S.D.) in O.S. No. 319/2007, then it appears to me that the respondent No. 1 made a futile attempt by filing the suit for cancellation of the sale deed during the pendency of the criminal revision In which he also sought the reliefs for declaration of the title, possession as well as for injunction. The respondent No. 1 could not dare to deny that in case if the civil suit is pending before the court of competent jurisdiction, then the proceedings u/s 145 Cr.P.C. cannot be allowed to continue. He could not also show me any authority of the Hon''ble Apex Court propounding the law that in case If the civil suit is pending, the proceeding u/s 145 Cr.P.C. could be allowed to continue.

28. On the basis of the discussions made above and in view of the facts and circumstances of the present case as well as the observations made by the Hon"ble Apex Court in the decisions discussed by me in the body of the judgment, I am of the view that until the civil proceedings have achieved finality, the proceedings u/s 145 Cr.P.C. as well as the attachment order passed by the Magistrate u/s 146(1) Cr.P.C., would be certainly an abuse of process of Court. As the matter is still sub-judice before the court of civil court of competent jurisdiction, therefore, if any party claims to be in possession of the property, then it is for that party to approach the civil court and to get the appropriate order, but in any way the proceeding u/s 145 Cr.P.C. cannot be allowed to be continued.

29. For the reasons stated above, I allow this writ petition and quash the order dated 30-7-2007, passed by the City Magistrate, u/s 146(1) Cr.P.C. (contained in Annexure-1 to this petition), thereby attaching the property in question, as well as the Judgment and order dated 29-5-2008, passed by 2nd Additional District and Sessions Judge, Dehradun, in Criminal Revision No. 107/2007 (contained in Annexure-2 to this petition).