

(2005) 04 AHC CK 0038

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 6172 of 1999

Rameshwar Nath Pahak and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 13-04-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 146(1), 482

Citation : (2005) 2 ACR 2159

Hon'ble Judges : Poonam Srivastava, J

Bench : Single Bench

Advocate : Daya Shanker Mishra, Ramanand Pandey and Pradeep Narain Pandey, for the Appellant; A.G.A., for the Respondent

Judgement

Poonam Srivastava, J.—This application u/s 482, Cr. P.C. has been filed for quashing the order dated 17.8.1998, passed by the Sub-Divisional Magistrate/ Additional District Magistrate, Menhadawal and the order dated 15.9.1999, passed by the Special Judge (S.C./S.T. Act), Basti in Criminal Revision No. 162 of 1998, Ramesh Nath Pathak and Ors. v. Dashrath Kishore Singh and Ors. Criminal Revision No. 162 of 1998. The notices were issued to the opposite party Nos. 2 to 4 to file counter-affidavit within one month by this Court on 8.12.1999. Thereafter another order was passed on 23.7.2004 staying the operation of the impugned orders dated 17.8.1998 and 15.9.1999. The office report dated 20.5.2000 mentions that notices issued to the opposite party Nos. 2 to 4 fixing 6.1.2000 has been returned back after service but no one has put in appearance nor any counter-affidavit has been filed. The application has been listed again today and there is no one on behalf of the contesting opposite parties.

2. Heard Sri Daya Shanker Mishra, learned Counsel for the applicants and learned A.G.A.

3. The facts of the case are that the proceedings u/s 145, Cr. P.C. commenced on the report dated 28.7.1997 of the Police of Police Station Menhadawal, District Sant Kabir Nagar. The learned S.D.M. passed a preliminary order on 5.8.1997

which is Annexure-2 to the affidavit. On 6.8.1997, the learned Magistrate passed an order u/s 146(1), Cr. P.C. after being satisfied that it is a case of emergency and there are likelihood of breach of peace on account of the disputed plot Nos. 643/1, 643/2 and 640/2 and also in respect of the partial constructions standing on the said plots. The learned Magistrate had expressed his satisfaction that it was a case of great emergency and in the circumstances, the order of attachment was passed. The Station House Officer, Police Station Menhadawal was required to submit his compliance report. The report was submitted on 9.8.1997. Subsequently an application for recall of the order u/s 146(1), Cr. P.C. was moved at the behest of the contesting opposite parties on 8.8.1997 which is Annexure-4 to the affidavit. Sri D. S. Mishra, advocate had placed the said application and a perusal of the same shows that it was contended by the contesting opposite parties that the order u/s 146(1), Cr. P.C. was an ex parte order and in violation of principles laid down by this Court in the case of Salag Ram v. State of U. P., 1996 ACC 671. The application was directed to be put up with record on 10.8.1997 and order u/s 146(1), Cr. P.C. dated 6.8.1997 was set at naught on 17.8.1998. A criminal revision was filed in the court of Special Judge (S.C./S.T. Act), Basti, which was also dismissed on 15.9.1999. Both the orders are impugned in the present application.

4. Sri D. S. Mishra has emphatically argued that the order dated 17.8.1998 is an order recalling the earlier order u/s 146(1), Cr. P.C. and the Magistrate has no power or authority to review his own order. He has placed reliance on a latest decision of the Apex Court in the case of Adalat Prasad v. Roop Lal Jindal and Ors. 2004 (3) SCC 1370: (L) 2004 ACC 924 . The Apex Court had held that unless the power to review or recall the order is provided in the statute, the Court cannot review its own order. He has further cited another decision of Madras High Court in the case of Nandipi Nagi Reddy Vs. Vadde Venkatappa, of the aforesaid decision, it is submitted that Madras High Court has disapproved the action of the Magistrate and held it without jurisdiction while reviving the proceedings merely because an arbitration proceedings proved ineffective. In the circumstances, the Magistrate cannot review or revive earlier proceedings without drawing up fresh proceeding if it was found to be necessary. In paragraph 12 of the said decision it was further held that in case the dispute was referred to arbitration and the Magistrate recorded a finding that further proceedings were not necessary, it was concluded that the said order was in terms of Section 145(5), Cr. P.C and the Magistrate ceased to have jurisdiction.

5. I have perused the two judgments which are impugned in this application. Before I proceed to record any finding on merits, it is relevant to quote Section 146(1), Cr. P.C.:

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.

6. A bare reading of aforesaid provisions, it is clear that in a case of emergency, the Magistrate can pass an order of attachment if he is satisfied that there exists an apprehension of breach of peace as it has been done in the instant case. The Magistrate while passing the order dated 6.8.1997 has recorded his satisfaction on the basis of the police report that there are chances of criminal breach of peace in respect of the disputed land and has, therefore, no other option but to pass an order of attachment. The proviso to Section 146(1), Cr. P.C. clothes the Magistrate with jurisdiction to withdraw the attachment at any time if he is satisfied that there is no longer any apprehension of breach of peace with regard to the subject matter of dispute. It is, therefore, evident that while passing the impugned order the Magistrate has clearly recorded his satisfaction that the apprehension of breach of peace exists no more and in the circumstances, exercised powers under the proviso of Section 146(1), Cr. P.C. and withdrew the order of attachment and also recorded a finding that there is no longer any likelihood of breach of peace. The subjective satisfaction was arrived at by the learned Magistrate after taking into consideration all the aspects and after hearing the parties. I have gone through the revisional order passed by the learned Sessions Judge, who has dismissed the revision by a well discussed and reasoned judgment. The S.D.M./Executive Magistrate is fully empowered to withdraw the attachment if he comes to a conclusion that there is no apprehension of breach of peace and does not warrant continuation of attachment of the property in dispute. The impugned order passed u/s 146(1), Cr. P.C. does not amount to review of the earlier order, it is an order of withdrawal of the attachment in exercise of powers given to the Magistrate under the provisions of Section 146(1), Cr. P.C.

7. Sri D. S. Mishra has lastly argued that the Apex Court has ruled that when the statute requires an act to be done in a particular manner it has to be done accordingly and there should be no deviation from the procedure prescribed by law. The proposition of law argued by Mr. Mishra is absolutely correct but in the instant case he has not been able to show, how the Magistrate or the Sessions Judge failed to follow the procedure of law and deviated from the statute while deciding the controversy. The order of attachment was withdrawn in exercise of powers under proviso to Section 146(1), Cr. P.C.

8. I have given a careful consideration to the arguments advanced by the counsel for the applicant and the learned A.G.A., and also gone through the record, I am not in agreement with the submission of Sri Mishra that the impugned orders

amount to reviewing the earlier order u/s 146(1), Cr. P.C. or the courts below have failed to adopt the legal procedure provided by the Code. The Magistrate was well within his right to withdraw the attachment in case there was no apprehension of breach of peace. Perusal of the two orders already show that the entire matter was thrashed out after hearing both the parties and the order of attachment was withdrawn only after the Magistrate was satisfied that there is no likelihood of any apprehension of breach of peace. The revisional court has also discussed the entire matter in detail while concurring with the view of the Magistrate and there appears no illegality in the impugned order.

9. For the reasons discussed above, I do not find it a fit case for interference u/s 482, Cr. P.C. The impugned orders are absolutely legal and do not call for any interference. The application is accordingly rejected.