
(2019) 04 CHH CK 0130

In the Chhattisgarh High Court

Case No : Criminal Miscellaneous Petition (CRMP) No. 2161 Of 2018

Saeed Khan

APPELLANT

Vs

Atul Kumar Sahu And Ors

RESPONDENT

Date of Decision : 24-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 145, 146, 146(1), 146(2), 482

Citation : (2019) 04 CHH CK 0130

Hon'ble Judges : Goutam Bhaduri, J

Bench : Single Bench

Advocate : Awadh Tripathi, Saurabh Sharma, S. Harshitam, Anant Bajpai

Final Decision : Dismissed

Judgement

Goutam Bhaduri, J

1. The instant petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (for brevity "Cr.P.C.") against the order dated 05.10.2018 passed by the Sub Divisional Magistrate in Case No.694/2007 (State v. Atul Sahu & Another). By such order, the Sub Divisional Magistrate has passed an attachment of the property which is subject matter of the lis and further has issued a direction to the Station House Officer, Police Station Ganj to be appointed as Receiver of the said property.

2. The relevant necessary facts for adjudication of the case is that one complaint/ istegasa was prepared by the Station House Officer, Police Station Ganj on 25.10.2017 before the Sub Divisional Magistrate, Raipur. The said proceeding emanated from a complaint made by the Respondent No.1 Ashok Sahu that the Petitioner Saeed Khan has forcefully and wrongfully has taken over the possession of the Shop & Godown constructed over Plot No.6, 7, 8 & 9 situated at Khasra No.475, Maudahapara, Raipur. It was alleged that the said possession was taken by breaking open the lock. The Sub Divisional Magistrate subsequently vide order dated 13.02.2009 passed an order after enquiry under

Section 145 of Cr.P.C. on the basis of the statement and document available on the record and the Sub Divisional Magistrate found the possession of the petitioner over the disputed property, which was two months prior to the date on which the complaint was received. The said order when was subject of challenge was set aside and the case was remanded back to the Sub Divisional Magistrate for fresh consideration after affording an opportunity of hearing by an order dated 11.01.2011 passed in Criminal Revision No.231/2010. The petitioner herein subsequently alleged that the said property was sold to the Respondent No.2 namely Ajay Bajaj by the Respondent No.1 Ashok Sahu. Subsequently, the Respondent No.1 moved an application on 28.10.2015 before the Sub Divisional Magistrate for appointment of Receiver and attachment of the property. The said application was duly replied by the Petitioner. Subsequently, the report was called from the police twice and on the basis of the police report dated 27.02.2018 & 04.06.2018, the Sub Divisional Magistrate found that there is all likelihood of breach of peace and the case is to be one of the emergency, thereby the impugned order was passed.

3. Learned counsel for the Petitioner would submit that irrespective of the ownership of property undisputedly the possession of the Petitioner existed over the disputed property. It is further submitted that as per the averments of the Respondent alone, the Petitioner was in possession. Consequently, the order of attachment and appointment of Receiver under Section 146 of Cr.P.C. cannot be issued. Reliance was placed in the case of Ashok Kumar v. State of Uttarakhand & Ors. reported in (2013) 3 SCC 366 and would submit in the likewise issue unless the eminent danger exists, the impugned order of the like nature cannot be passed.

4. Per contra, learned counsel appearing for the Respondents supported the order of the Sub Divisional Magistrate and stated that Petitioner is not the owner of the disputed property and the order is well merited which do not require any interference. It is further contended that the Petitioner in view of order under Section 145 of Cr.P.C. is enjoying the valuable fruits of the property, which belong to the Respondent No.1 & 2 which in turn is causing great hardship and loss to the Respondents.

5. I have heard learned counsel appearing for the parties and perused the record.

6. The principles as has been laid down by the Supreme Court enumerates that attachment under Section 146 of the Cr.P.C. can only be made by the Sub Divisional Magistrate, if he considers the case to be of emergency, when he finds that none of the parties were in possession as is referred in Section 145 of Cr.P.C. or he is unable to satisfy himself as to which of the contending parties were in possession of the subject matter of the disputed land.

7. The Supreme Court in case of Ashok Kumar (supra) in para 10 & 11 has held as under :-

"10. The ingredients necessary for passing an order under Section 145(1) of the

Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

14. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant - Ashok Kumar, whether it is legal or not, is not for the SDM to decide.

8. Now reverting to the facts of this case, record shows that the matter when came up before the Sub Divisional Magistrate on 25.10.2007, when the complaint was filed by the concerned police, initially the possession of the petitioner was found. Subsequently, after the remand, the issue was pending adjudication and subsequent impugned order of attachment was passed and the appointment of Receiver was passed under Section 146(1) & (2) of Cr.P.C. on 05.10.2018 after the period of 11 years from the inception of this case, after examination of the material available on record. Undoubtedly, it goes to point out that the dispute exists in between the parties in relation to the possession of the disputed property, which is corroborated by the police report dated 27.02.2018 & 04.06.2018. However, the fact mentioned above there is likelihood of breach of peace has been made recorded as a routine manner, but nothing is there to substantiate the same. Apart from the aforesaid fact from the inception of case, the Sub Divisional Magistrate found the petitioner was in possession whether such possession was right or wrong it was not within the domain by Sub Divisional Magistrate to go beyond possession. The entire perusal of the order do not show that any emergency has been reflected as per the ratio laid down by the Supreme Court (*supra*). In order to pass attachment under Section 146 (1) of Cr.P.C. there has to be specific emergency is reflected on the face of it which otherwise must exist. The statement which is recorded of Respondent No.2 would show that the complaint was made that the Petitioner has raised illegal construction without any permission from the Municipal Corporation. Thereby the possession of the Petitioner has been admitted which can relate back right to 11 years back when the initial proceeding started. Therefore, what was the emergency existed to pass such order under Section 146 for attachment is completely missing.

9. In view of the aforesaid discussion, the order dated 05.10.2018 cannot be allowed to continue, therefore is quashed and the petition is allowed. Further, taking into consideration the period of pendency and nature of dispute, in the interest of justice, the Sub Divisional Magistrate is directed to conclude the matter within a period of three months from the date of receipt of a copy of this order. The parties shall appear before the Sub Divisional Magistrate on 25th June, 2019.