

**(1976) 10 AHC CK 0034**  
**In the Allahabad High Court**

Sankatha Prasad Mishra and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision :** 05-10-1976

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 151

Criminal Procedure Code, 1973 (CrPC) — Section 145

**Citation :** (1977) AWC 7 : (1977) CriLJ 361

**Hon'ble Judges :** K.B. Asthana, C.J.; Satish Chandra, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

K.B. Asthana. C.J.

1. In respect of certain plots situate in village Sultanpur, Police Station Ram Nagar, District Varanasi, Sankatha Prasad Mishra and his three sons, hereinafter referred to as the "applicants", filed a suit in the court of Munsif on 18-9-1967 for a permanent injunction against Janki Prasad Singh and Sharda Prasad Singh, hereinafter called as the "opposite parties" restraining them from interfering with the applicants' possession. This suit was dismissed on 29-5-1971 as the applicants failed to establish their possession over the disputed plots. The applicants then filed an appeal, which was declared to have abated as a Notification u/s 4 of the U.P. Consolidation of Holdings Act was issued bringing the area in which the disputed plots were situated under consolidation. The applicants had also filed a suit u/s 229-B of the U.P. Zamindari Abolition and Land Reforms Act in the court of the Judicial Officer against the opposite parties for a declaration that the applicants were Sirdars of the said plots. On 10-6-1971 the said suit was decreed ex-parte. An application by the opposite parties for setting aside the exparte decree was dismissed on 16-7-1971. Since the dispute about possession of the said plots continued, the applicants filed an application u/s 145 of the Criminal Procedure Code in the court of the Sub-Divisional Magistrate on 18-7-1971. The applicants were the first party and the opposite

parties were the second party to this application. After having obtained a report from police that there was an apprehension of breach of the peace, the learned Magistrate passed a preliminary order on 19-7-1971, attached the disputed plots and gave them in the custody of a Supurdar. Meanwhile, the matter relating to rejection of the application for setting aside the ex parte decree in the suit u/s 229-B of the U.P. Zamindari Abolition and Land Reforms Act was pursued by filing an appeal against the said order. The Additional Commissioner allowed the appeal and remanded the case to the trial court. The applicants then filed a revision before the Board of Revenue which was admitted and further proceedings in the suit u/s 229-B of the U.P. Zamindari Abolition and Land Reforms Act were stayed. Meanwhile, the proceedings in the case u/s 145 of the Criminal Procedure Code continued and on the material on the record the Sub-Divisional Magistrate found the applicants to be in possession of the disputed plots on the date of the preliminary order and two months prior to it. By an order dated 25-3-1972 the disputed plots were ordered to be released in favour of the applicants. On 26-3-1972 the applicants took possession of the disputed plots. They have been in possession of the disputed plots since then and cultivating them. The opposite parties filed a revision before the learned Sessions Judge, Varanasi against the order of the Sub-Divisional Magistrate dated 25-3-1972. The learned Sessions Judge made a reference to the High Court by his order dated 20-6-1973 recommending that the plots be released in favour of the opposite parties. On 19-12-1973 the High Court accepted the reference and directed that the disputed plots be released in favour of the opposite parties. In pursuance of the order of the High Court the opposite parties moved an application before the Sub-Divisional Magistrate for release of the disputed plots in their favour. This move was opposed by the applicants on the ground that the possession has already been delivered to them long ago by the Supurdar under the orders of the court and there "being no provision in the Criminal Procedure Code for restitution the learned Magistrate was functus officio and no effective order could be passed by him. The learned Sub-Divisional Magistrate rejected the application and by his order dated 19-1-1974 directed that the disputed plots "be released in favour of the opposite parties. The applicants then filed this application purporting to be u/s 561-A (old) Criminal Procedure Code questioning the validity of the said order of the Sub-Divisional Magistrate dated 19-1-1974 and have prayed that the said order be quashed.

2. The question that arises in the case appeared to the learned Single Judge of some difficulty on account of conflicting case-law and he referred the case to a larger Bench, This is how the matter is now before us.

3. It has been contended on behalf of the applicants by their learned Counsel that the applicants' title to the disputed plots having been affirmed by a competent court in the suit u/s 229-B of the U. P, Zamindari Abolition and Land Reforms Act and they having been found in possession by the learned Magistrate in the proceedings u/s 145 of the Criminal Procedure Code and they having obtained possession of the disputed plots on the orders of a competent

Magistrate, the subsequent order of the High Court accepting the reference and directing that possession be delivered to the opposite parties, was infructuous and could not have been acted upon by the learned Magistrate as any order passed by him for releasing the disputed plots in favour of the opposite parties could not be executed the disputed plots no longer being in custodia leges, hence the impugned proceedings before the learned Magistrate were invalid and ought to be quashed. In answer on behalf of the opposite parties it was urged that the final order of the Magistrate u/s 145 of the Criminal Procedure Code being revisable under the law by the higher Court and once the revision is accepted and the order of the Magistrate is set aside, there being no subsisting and valid order to sustain possession taken in pursuance of the said order, it becomes the duty of the learned Magistrate in obedience of the revisional order of the higher court to restore possession to the party held to be in possession by the higher court.

4. No doubt in the Criminal Procedure Code there is no specific provision to meet such a contingency. It is difficult to take resort to the provisions contained in Section 522 of the Criminal Procedure Code as the proceedings u/s 145 of the Code of Criminal Procedure are not proceedings of the nature of convicting any party for any criminal act and in the instant case there was no allegation that possession was obtained by any party by criminal force or show of force or by criminal intimidation. The nature of the proceedings u/s 145 of the Criminal Procedure Code can be said to be preventive so that the peace may be preserved and the contending parties in a dispute over an immovable property do not take the law in their own hands and break their heads. The Magistrate on being satisfied from the police report or otherwise that there is apprehension of breach of peace over a dispute regarding an immovable property passes a preliminary order and then on the material on record if he is satisfied that one of the contending parties is in possession he will issue an order declaring such a party to be in possession thereof until evicted therefrom in due course of law and forbidding all disturbance in such possession and will also restore possession to the party found entitled to possession of the disputed plots. It is clear, therefore, that a Magistrate in exercise of his jurisdiction u/s 145 of the Criminal Procedure Code with a view to prevent the breach of peace has to take action and to restore possession to the party found by him to be entitled to the possession of the disputed plots. It is difficult, therefore, to agree with the contention of the learned Counsel for the applicants that the only function of a Magistrate in the exercise of his jurisdiction u/s 145 of the Criminal Procedure Code is to prevent the breach of peace and not to settle the question of possession. When a court passes the order that the disputed property "be released in favour of a certain party then what is meant is that the disputed plots which were attached be restored to the possession of that party. Pending the proceedings when the disputed property is attached and given in the custody of a Supurdar, that is, a neutral agency, it becomes the duty of the court after the proceedings have concluded finally to give necessary direction for the restoration of possession of

the property so attached in accordance with law. The order of the learned Magistrate including the order of release of the property in the sense explained above being subject to the orders of the higher court under the law the finality will not attach to the order of the Magistrate if a revision is finally accepted. The order of the learned Magistrate would merge in the order of the higher court and the position would be as if the order of the higher court which finally, determines the dispute was itself passed by the learned Magistrate. The learned Magistrate, therefore, would be bound to give direction relating to the disputed property in accordance with the order of the higher court. If the attachment of the disputed property continues till the order of the Magistrate is revised by the higher court, there would be no difficulty inasmuch as the Magistrate then in accordance with the order of the higher court will direct the Supurdar to deliver possession to the party found entitled "by the higher court to be restored to possession. This was not seriously disputed by the learned Counsel for the applicants.

5. The question then reduces to this-Will it make any difference in the position if a disputed property had been directed to be delivered by the Supurdar in the possession of the party found by the Magistrate to be entitled to possession and the order executed? It was strenuously urged on behalf of the applicants that when the opposite parties intended to file a revision and filed a revision, they should have obtained an interim direction from the higher court restraining the delivery of possession by the Supurdar and therefore; they themselves are to be blamed for not protecting their right. We are not impressed with this line of argument inasmuch as failure on the part of a party to obtain an interim order would not affect the jurisdiction of the higher court for exercising its revisional power under the law. If such an argument is accepted, it will always be that if an order of a lower court is executed and there is no express provision for restitution in the law, the exercise of its power by the higher court will be a mere futility. We think, the effectiveness of the order of a higher court cannot merely be turned into ineffectiveness on such a fanciful argument. Desai, J. in the case of Gopal Krishna Goswami Vs. Bissey and Others, had observed that a Magistrate is not functus officio after releasing the property in favour of the party successful before him for it can be left to assumption that if he releases the property in favour of the party successful in his court, he can take it back under attachment if his decision is set aside and deliver its possession to the other party in whose favour the higher court has given the decision. In the case of Smt. Kaniz Fatima Bibi Vs. State of Uttar Pradesh and Others, a Division Bench of this Court observed that-

After dropping proceedings u/s 145(5), the Magistrate has no further jurisdiction to take any proceedings u/s 145 but he has specific powers u/s 517 to pass such incidental orders regarding delivery of possession of the property under attachment which are in the nature of winding up proceedings, restoration of status quo ante and such orders as may be necessary for preservation of the property till the rights of the parties could be determined.

The Bench further observed that-

Even without taking recourse to the powers conferred on him u/s 517, the Magistrate has inherent powers to pass similar orders as regards delivery of property under attachment after cancellation of proceedings u/s 145(5).

6. The Division Bench thus pointed out that the Magistrate has always power to give direction regarding the property attached by him in the proceedings u/s 145 of the Criminal Procedure Code even if they are dropped. There is no reason, therefore, to hold that the Magistrate will have no such powers even on the final culmination of the proceedings u/s 145 of the Criminal Procedure Code by a higher court and give directions for the disposal of the attached property in accordance with the decision of the higher court.

7. In the case of *Parag Parshad v. Mr. Ram Dulari* AIR 1943 Oudh 229 : 44 Cri LJ 459 in somewhat similar circumstances as prevail in the instant case where the order of the Magistrate for delivery of possession in favour of one party was set aside in revision by the High Court and the other party was found to be entitled to possession though the order of the Magistrate had been carried out and the successful party before the Magistrate had inducted a tenant, a learned single Judge held that the possession of the property should be delivered to the successful party in revision without any interference or obstruction from the unsuccessful party or from the tenant.

8. It was also urged on behalf of the opposite parties relying upon a Division Bench decision in the case of *Mst. Hosnaki and Others Vs. State*, that the object behind the provisions of Section 145 Cr, P.C. is merely to prevent a breach of the peace by maintaining one party to the dispute in possession and forbidding the other on pain of a penalty to interfere with it. The order that a Magistrate passes u/s 145 of the Criminal Procedure Code are merely "police orders" not affecting any civil right and title in regard to a disputed property. Hence when a superior court in revision passes any order reversing the order of the Magistrate, a duty is cast on the Magistrate to again pass "police order" in conformity with the order of the superior court and since the Magistrate will be exercising only a "police power" no question for consideration of doctrine of restitution. or custodia leges applicable to the exercise of civil jurisdiction would arise. We think there is much tenability in this submission.

9. Learned Counsel for the applicants drew our attention to a decision of Full Bench of this Court in the case of *Syed Ajaz Ali Khan and Others Vs. Mohammad Rafiq and Others*, in support of his contention that a Magistrate while exercising jurisdiction u/s 145 of the Criminal Procedure Code is not a court of general jurisdiction hence it has no inherent power to order restitution on the analogy of Section 151, C.P. Code or Section 561-A of Cr. P, C. and unless there was an express statutory provision to that effect in the Criminal Procedure Code the Magistrate cannot order restitution ex debito justitiae. We do not think the learned Counsel can derive any assistance from the ratio of decision of the Full

Bench cited above. In that case the decision turned on the specific provision of Sections 7, 7-A, 7-F and Rule 6 of the U.P. Rent Control and Eviction Act, 1947- There the District Magistrate or the Rent Control and Eviction Officer was not held to be a court but an authority or Tribunal of limited jurisdiction and not "being a court had no inherent power.

10. The result is that we do not find any merit in the contentions raised on behalf of the applicants and dismiss this petition.