

(2019) 07 BOM CK 0150

In the Bombay High Court

Case No : Criminal Writ Petition No. 590 Of 2004

Santumal Assudomal Gogia

APPELLANT

Vs

Sub Divisional Magistrate And Ors

RESPONDENT

Date of Decision : 31-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 145, 146, 145(6), 146(1)
Constitution Of India, 1950 — Article 227

Citation : (2019) 07 BOM CK 0150

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : P.D. Dalvi, S.A. Malkani, M.R. Tidke

Final Decision : Allowed

Judgement

1. Brief facts leading for filing the present petition are as under:-

It is the case of the petitioner that respondent no. 4 filed a complaint on 3.11.2000 with the respondent no. 2 and alleged that the petitioner has grabbed his property bearing Room No. 1425, barack No. A-713, situated at Prem Nagar, Ulhasnagar-5 and requested to take action against the offender and the vacant possession be given to him. It is submitted that respondent no. 2 submitted his report on 25.01.2001 to the Respondent No. 1 under the provisions of Section 145 of Criminal Procedure Code (for short 'Cr.PC'). It is also alleged that he had filed a complaint on 3.11.2000 and 15.1.2000 and claimed that he is a owner of the disputed property and the petitioner is harassing to his family. He further claimed that his possession may be restored. It is further submitted that the respondent no. 1 exercised his jurisdiction contemplated under Section 145 of Cr.PC and issued notice to petitioner and respondent no. 4 and filed their reply. The petitioner came with the specific case before the respondent no. 1 that the suit property was in possession of Shri. Tahelram Sevrarn Makhija. The said Tahelram died on 27.1.1976 by leaving behind his widow by name Jassibai. The said Jassibai executed will on 19.3.1986 and handed over possession to

Chetandas Shevram Makhija. The petitioner is also paying Municipal Taxes to the Ulhasnagar Municipal Corporation. It is the case of the petitioner that the said Chetandas sold out the said property to the petitioner on 7.11.1993 and right from the day, the petitioner is in possession of the suit property. It is further submitted that after impugned order passed by the respondent no. 1, the respondent no. 4 executed an Agreement in favour of the petitioner and by accepting Rs. 2 lacs, out of said amount Rs. 1,30,000/- paid by cash and Rs. 70,000/- paid by cheques drawn on Dena Bank, Ulhasnagar, and purchased the said property from the Respondent No. 4. In the agreement of sale dated 9.5.2002, the respondent no. 4 accepted and admitted that the petitioner will be sole and exclusive owner of the disputed property alongwith the the construction standing thereon admeasuring 14.5Ft. X 75 Ft. The consideration of the suit property also accepted by the respondent no. 4 and the payment which was made by cheque was credited in the account of respondent no. 4.

2. It is the case of the petitioner that the respondent no. 4 before respondent no. 1 stated that, he is the owner since he has purchased said property from one Gopaldas Uttamchandani, who is permanently settled at Mumbai. It is submitted that the possession of the suit property be given to him. It is further submitted that the proceeding was heard by the Magistrate, and he had observed in his order that, the parties claiming possession by their documents and without recording finding of possession or without giving any finding in respect of breach of peace directed to handover possession to respondent no. 4. It is submitted that while passing the order annexed at Exhibit-C to the present petition, the respondent no. 1 exercised powers under Section 145 of the Code of Criminal Procedure, and directed to hand over possession of the disputed property to respondent no. 4. It is the further case of the petitioner that petitioner filed criminal revision application no. 41 of 2002 before the Sessions Court at Kalyan and Challenged the order of Respondent No. 1. By way of revision, the petitioner challenged the order of Respondent no. 1 on the ground that the Magistrate has no jurisdiction to pass an order under Section 145 Cr.PC, as there is no finding about breach of peace due to dispossession of the complainant from the suit land. Nor there is any allegation of dispossession at the hands of the respondent no. 1 within a period of two months from the report of concerned police station as required under Section 145 of Cr.PC.

3. It is the case of the petitioner that the Revision was heard by the 1st Ad-hoc Additional Sessions Judge, Kalyan and by his order dated 11.3.2004, dismissed the Revision and confirmed the order of respondent no. 1. In the judgment, the Revisional Court has held that the order of respondent no. 1 is legal, proper and correct. The Revisional Court also held that, there is no title or occupancy right of the disputed property of Chetandas Makhija nor the probate of will of Jassibai was issued. Therefore, the Revisional Court found that the Magistrate may restore the possession under Section 145 (6) of Cr.PC, and further held that the order of the Magistrate is proper.

Being aggrieved and dissatisfied by the judgment and order dated 11.3.2004, passed by 1st Ad-hoc Additional Sessions Judge, Kalyan in Criminal Revision No. 41 of 2002, and order dated 4.4.2002, passed by Sub-Divisional Magistrate, Ulhasnagar Division Ulhasnagar under Cr.PC, in Case No. 3 of 2001, the petitioner has approached this Court under Article 227 of the Constitution of India.

4. Learned counsel appearing for the petitioner submits that the Executive Magistrate has no jurisdiction to pass an order under section 145 of Cr.PC, thereby directing the petitioner to handover the possession of the subject property to respondent no. 4. In support of aforesaid contention learned counsel relied upon the reported judgment of the Learned Single Judge (Coram:- G.R. Majithia, J.) in the case of Vishwanath Kashinath Virkar & others Vs. Nitinchand Keshavji Gala & others, reported in 1995 (3) Bom CR 525, (1995) 97 BOMLR 280 and the authoritative pronouncement of the Supreme Court in the case of Ashok Kumar Vs. State of Uttarakhand & ors (2013) 3 Supreme Court Cases 366.

It is submitted that, proceedings under Section 145 Cr.P.C. are not meant for the purpose of evicting any person from any land. The object of section 145 of Cr.PC is to prevent, breach of peace to provide a speedy remedy by bringing the parties before the Court, and ascertain, who of them was in actual possession, and to maintain status quo until their rights are determined by the competent court. In the present case, it is an admitted fact that by agreement dated 9.5.2002, the respondent no. 4 accepted the possession of the petitioner and he has sold out the said property for Rs. 2 lakhs. He specifically stated that, dispute is amicably settled between the parties, and he has no grievance whatsoever. The respondent no. 4 also admitted the exclusive ownership of the petitioner over the disputed property. Learned counsel submits that orders passed by Civil Court are in favour of the petitioner. Therefore, relying upon the pleadings and grounds taken in the petition, learned counsel prays that petition may be allowed.

5. On the other hand learned counsel appearing for respondent no. 4 relying upon the averments in the affidavit in reply and also reasons assigned by the Sessions Court, Kalyan while dismissing the revision filed by the petitioner submits that, the Sessions Court Kalyan confirmed the order dated 04.04.2002 passed by Sub Divisional Magistrate, Ulhasnagar directing to restore the possession of property i.e. Room No. 1425, BK A-713, Premnagar, Ulhasnagar-5. It is submitted that thereafter the petitioner had filed Special Civil Suit bearing No. 45/2004 in the Court of Civil Judge (S.D.) Kalyan on 23.03.2004 i.e. suit for declaration and possession against the respondent no. 4, and also filed present writ petition on 29.03.2004 challenging the impugned orders dated 04.04.2002 and 11.03.2004 respectively passed by court below.

6. It is further submitted that suit filed by the petitioner has been decreed on 22nd June 2011 rejecting the prayers made by the petitioner for declaration of title and possession, however, learned Civil Judge (S.D.) Kalyan, granted permanent injunction restraining defendant from disturbing the possession.

Learned counsel invites attention of this Court to the judgment and decree passed by the Civil Judge (S.D.) Kalyan, which was challenged by filing Civil Appeal No. 106 of 2011 in the Court of District & Sessions Judge, Kalyan. The said court partly allowed the appeal and modified Clause 2 of the decree passed by Civil Judge, (S.D.), Kalyan, thereby permanently restraining defendant from obstructing the possession from the disputed portion of common passage admeasuring 3 X 75 Ft. for beneficial enjoyment of portion of suit property in his possession. It is submitted that order dated 25th September 2013 in aforesaid appeal cannot be construed as an injunction in relation to the property in question, in the present petition. It is submitted that common portion of 3 X 75 Ft. shall not be affected in any manner in restoration of property in question. Learned counsel invites attention of this Court to the observations made in Para 3 and 7 of the order passed by Appellate Court and submits that, those observations are relevant to decide controversy over property in question. It is submitted that the Respondent No. 4 has electricity connection and electricity supply in his house from the disputed property in question. Therefore, learned counsel submits that order passed by the Executive Magistrate under section 145 of Cr.PC is legally sustainable. In support of aforesaid contention, learned counsel appearing for respondent no. 4 has placed reliance on law laid down in the case of Jhummal Alias Devandas Vs. State of Madhya Pradesh & others, (1988) 4 Supreme Court Cases 452.

7. Heard learned counsel appearing for the Petitioner, learned APP appearing for Respondent/State and also learned counsel appearing for Respondent No. 2 at length. With their able assistance carefully perused the pleadings and grounds taken in the petition, annexures thereto, subsequent judgments passed by the Civil Court and also alleged agreement entered into between the petitioner and Respondent No. 4 on 9th May 2002. It appears that, this petition was filed in the month of March 2004. When this petition was initially heard the Court was pleased to issue notices to the respondents and thereafter by order dated 1st September 2005 issued Rule and directed the parties to maintain status quo in respect of the property in dispute, pending the writ petition. It appears that, on the basis of said interim order, the petitioner appears to be in continuous possession of the suit property. There are subsequent developments after filing this writ petition in as much as Special Civil Suit No. 45 of 2004 wherein Exhibit-89 has been decided by order 11th March 2004 thereby restraining Respondent No. 4 from causing an interference in the possession of the petitioner in subject property. Thereafter, it appears that, Respondent No. 4 filled Civil Appeal No. 106 of 2011 wherein the order passed by the Civil Court was modified to the extent of Clause 2. The said judgment and order is placed on record by Respondent No. 4 alongwith affidavit in reply. There are important developments after filing this petition. In the present petition, the order of Respondent No.1, dated 4th April 2002, which has been confirmed by Revisional Authority is under challenged. It appears that, after the order was passed by the Magistrate, the petitioner and Respondent No. 4 entered into an agreement on 9th May 2002. The Petitioner

has placed on record the copy of the agreement at Page 17 of the compilation of the writ petition. Prima facie it appears that, Respondent No. 4 agreed to waive his right in the property which is mentioned in the said agreement by accepting money which are mentioned in the agreement.

8. Upon perusal of order passed by Respondent No. 1, it clearly appears that, the application filed by Respondent No. 4 was with prayer to take the possession of the subject property from the petitioner and handover it to Respondent No. 4. It is also prayed in the said proceedings i.e. Cr.P.C. Case No. 3 of 2001 filed by Respondent No. 4 that an alleged unauthorized construction done by petitioner be removed and the possession of open space be given to Respondent No. 4. Therefore, the prayer of Respondent No. 4 was to take possession of the subject property from the petitioner and handover it to the Respondent No. 4. It appears that, the possession of the subject property i.e. Room No. 1425, Block No. A-713 was directed to be taken from the petitioner, and handover the same to the Respondent No. 4.

9. The Supreme Court had occasion to explain the scope and ambit of Section 145 and 146 of Cr.P.C. in the case of Ashok Kumar Vs. State of Uttarakhand & ors (2013) 3 Supreme Court Cases 366. Paragraph 6 of the said judgment reads as under:-

6. We are of the view that the SDM has not properly appreciated the scope of Sections 145 and 146(1) Cr.P.C. The object of Section 145 Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.

10. The Hon'ble Supreme Court in no uncertain words have stated that, the scope of enquiry under Section 145 of Cr.P.C. is in respect of actual possession without reference to the merits or claim of any of the parties who have right to possess the subject of dispute. In that view of the matter, the exercise under taken by Respondent No. 1 to adjudicate the rival contentions on merits, and further the said order is confirmed by the Sessions Court, Kalyan in Criminal Revision No. 41 of 2002 are not legally sustainable. Even the Sessions Court, Kalyan in para 7 of the impugned judgment has observed that, "Thus, it is seen that the learned Magistrate has rightly held that the opponent No. 1 has right to possess the subject of the dispute. It appears that, as per provision of Sub-Sec. 6 of Sec. 145 of Cr.P.C. the Magistrate may restore the possession of the property which has been wrongly dispossessed." Therefore, both the authorities adjudicated the rival claim for possession on merits, which is not permissible in view of exposition of law by Hon'ble Supreme Court in the case of Ashok Kumar (supra).

11. As already observed, there are subsequent developments in as much as

Exhibit-89 in Special Civil Suit No. 45 of 2004 has been decided in the year 2011 and Civil Appeal filed by Respondent No. 4 challenging the order in the aforesaid civil suit is also decided after filing the present petition. Therefore, ends of justice would be met in case the impugned judgments and orders of Magistrate and also Sessions Court in Revision are quashed and set aside, and parties are given liberty to resort to the appropriate proceedings for adjudication of their rights.

12. However, it is stated by the Respondent No. 4 in the affidavit in reply that, the electricity connection and electricity supply in his house is from the disputed property in question. In that respect and factually if the said electricity connection and electricity supply is from the disputed property in question, the same would not be disturbed by the petitioner for three months from today. Parties are at liberty to approach the Civil Court or any appropriate forum for redressal of their grievance. The observations made herein above are confined to the adjudication of the present petition only and will have no bearing on proceedings before the Civil Court or any other proceedings which would be initiated/instituted by the parties for redressal of their grievance in future.

13. With the above observations the impugned judgments and orders dated 04.04.2002 passed by the Sub Divisional Magistrate, Ulhasnagar and 11.03.2004 passed by Sessions Court, Kalyan, stand quashed and set aside. Writ Petition is allowed to above extent and stands disposed of accordingly. Rule made absolute in above terms.