
(2007) 01 AHC CK 0139
In the Allahabad High Court

Smt. Gulab Devi

APPELLANT

Vs

State of U.P., Sub Divisional Magistrate, District Magistrate
and Smt. Maya Devi alleged wife of Late Harbans Lal
Goswami

RESPONDENT

Date of Decision : 09-01-2007

Acts Referred:

Constitution of India, 1950 — Article 162
Criminal Procedure Code, 1973 (CrPC) — Section 107, 145, 146

Citation : (2007) 01 AHC CK 0139

Hon'ble Judges : R.N. Misra, J; Amar Saran, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Amar Saran and R.N. Misra, JJ.—Heard learned Counsels for the parties and perused the materials on record.

2. This writ petition has been filed by the petitioner with the prayer to quash the order dated 13.11.2006 passed by respondent No. 2, Sub Divisional Magistrate, Chhata, Mathura, the copy of which, is Annexure-1 to the writ petition.

3. It appears that there is a temple known as Shri Ladiliji Mahraj in Barsana district Mathura and there is a dispute between the parties regarding the management and worship etc. Admittedly, the management scheme of the temple has been registered under the Societies Registration Act and each of the partners exercise their rights of Pooja, Rajbhog etc on their turn. The main dispute in the case is between the petitioner Smt. Gulab Devi and respondent No. 4 Smt. Maya Devi. Both have alleged themselves to be the legally wedded wife of late Harbans Lal Goswami, who was also entitled for the Pooja, Rajbhog etc of the temple for six months in rotation. Admittedly, Harbans Lal Goswami is dead. The petitioner has alleged that respondent No. 4 was the kept of a of Harbans Lal Goswami whereas in her counter affidavit, the respondent No. 4 has alleged herself to be the legally wedded wife of the deceased. The matter is

under litigation. During his lifetime Harbans Lal Goswami filed a suit for divorce against the petitioner which was decreed by the Trial Court. The first appeal No. 77 of 1991 preferred by the petitioner was allowed on 16.5.2002 by the then VIII Addl. District Judge, Mathura and decree for divorce passed by the Trial Court in Matrimonial Suit No. III of 1980 was set aside. Admittedly, the second appeal has been filed by the respondent No. 4, which is pending before this Court but no interim order has been passed. The Civil Suit No. 635 of 2000 filed by the present petitioner was dismissed in default on 14.8.2001 by the Trial Court in which ad interim injunction was passed in her favour and which automatically ceased to have any effect after the dismissal of the suit.

4. Another suit in the same matter has been filed by the petitioner, which is numbered as 234 of 2004 pending before civil Judge, Senior Division, Mathura. However, the anventre CA-11 filed with the counter affidavit shows that no interim order has been passed in that case. This is admitted position of law that the right, title and interest of the parties in the property in question cannot be decided by any executive order. A Will has also been set up by the respondent No. 4, which has been denied by the petitioner in her rejoinder affidavit. The genuineness and validity of the Will is also to be decided by the competent Civil Court. Since the matter is pending before the Civil Court, therefore, the parties should await its decision.

5. The impugned order Annexure-1 to the writ petition has been passed by the Sub Divisional Magistrate, Barsana district Mathura in his executive capacity. The learned Counsel for the petitioner has argued that in the worse case this order can be presumed to have been passed u/s 145 Cr.P.C. But we do not agree with this contention. No where the law provides for passing such order in the executive capacity, Even if for a moment, it is presumed that this order has been passed u/s 145/146 Cr.P.C. even then it is illegal because the prescribed procedure was not followed and the petitioner was not given opportunity to be heard. Moreover, by the impugned order the petitioner has been dispossessed from the disputed property which cannot be legally done by the Sub Divisional Magistrate concerned. During the argument also, learned Counsels for the respondent No. 4 admitted the legal position and termed this order to be illegal. Since the Civil Suit is pending before the competent court, therefore, both the parties have right to get suitable interim orders for the management, preservation and protection of the property in dispute. The Civil Court is also empowered to decide the dispute in respect to the possession also, For this purpose the parties can approach the said Court.

6. The learned Counsel for the respondent No. 4 has contended that there was serious dispute between the parties regarding possession, Pooja and Rajbhog etc of the temple and police had submitted such report that there was apprehension of breach of peace therefore, the learned Sub Divisional Magistrate, Chhata, Mathura has passed the impugmed order, But this argument has no legs to stand For the apprehension of breach of peace, the Executive Magistrate/Police is

empowered to proceed u/s 107 Cr.P.C. or in the worse case u/s 145 Cr.P.C.

7. In the case of Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc., the Hon"ble Apex Court has opined that the State Government cannot while taking recourse to the executive power of the State under Article 162 of the Constitution of India, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order.

8. In the case of Ved Prakash v. State of U.P. and Ors. 2006 (2) JC 177, the Division Bench of this Court has also clearly held that the Executive Magistrate cannot decide the civil rights of the parties by passing executive order. In the said case Sub Divisional Magistrate, Charra, district Aligarh had passed order allowing the Opp. Parties of The petitioner that case to raise construction on the disputed land with the help of the police.

9. In view of above, we are of the opinion that the impugned order is wholly illegal and if it is allowed to continue, this will seriously affect the civil rights of the parties, therefore, this writ petition is allowed and the impugned order passed by respondent No. 2, Sub Divisional Magistrate, Chhata, Mathura is set aside. If the parties are so advised they may move the Civil Court concerned for getting suitable order in the matter.

10. No order is passed as to costs.