

(2011) 05 MP CK 0009

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 868/10

Smt. Santosh Jain and Others

APPELLANT

Vs

Salim Khan and Others

RESPONDENT

Date of Decision : 13-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(4), 145(6), 146
Penal Code, 1860 (IPC) — Section 302

Citation : (2012) CriLJ 48 : (2011) 4 MPLJ 170

Hon'ble Judges : Giriraj Das Saxena, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

G.D. Saxena, J.

This revision petition u/s 397/401 of the Code of Criminal Procedure 1973 is directed against an order dated 07th September, 10 passed in Criminal Revision No. 89/2011, by the Additional Sessions Judge Sironj District Vidisha (M.P.), whereby the revisional court by allowing the revision petition of the Respondents, set aside the order dated 27th March, 10 of the Sub Divisional Magistrate Sironj M.P. for attachment of agricultural lands with standing crops after appointment of the receiver in order to hand over the attached properties to him in Case No. 57/145/2010 and remanded the matter back with a direction that after affording an opportunity of hearing to the parties, a fresh order u/s 146 of Code of Criminal Procedure may be passed.

The facts in short, just for the decision of the present revision are that Petitioners/party No. 1 filed the application u/s 145 of the Code of Criminal Procedure 1973 to the effect that disputed agricultural lands comprising Survey No. 73 in area 0.610, and Survey No. 144 in area 1.517, situated in Village Akabarpur was owned by the father of Petitioner in family partition and he was in possession and was cultivating the land and was receiving the crops of that land. Petitioners' Abhay Singh was murdered in the year 1995 and by succession the

Petitioners became the owners of the disputed land and they were cultivating the land. The Respondents/party No. 2 had no right, title or interest in the disputed land but they are creating obstruction in peaceful possession of the Petitioners. It was also averred that on the land in dispute, there was strain full relations between the parties. Previously, the members of the Respondents/party No. 2 committed murder of Abhay Singh, father of Petitioners and they were convicted for offence u/s 302 I.P.C. There is every likelihood of disturbances in the locality. Therefore, it is requested that for peace and maintaining the law and order, some independent Receiver may be appointed and the possession of the land be handed over to him. Another application u/s 146(1) of Code of Criminal Procedure for taking immediate safety measurements like appointment of Receiver and handing over of the disputed land etc. was also filed with the petition u/s 145 Code of Criminal Procedure

The learned trial Magistrate being satisfied on preliminary inquiry, issued show-cause notice to the Respondents/party No. 2 and case was posted on 07th April, 10. On subsequent day on 27th March, 10, the trial court, after due consideration of the application u/s 146 of Code of Criminal Procedure, directed the local police authority that the disputed land with standing crops be attached and handed over to some independent person of the village. Against the order dated 27th September, 10, the revision petition before Additional Sessions Judge, Sironj was filed. The learned Additional Sessions Judge by allowing the revision petition, set aside the order of the trial Magistrate for handing over the possession along with standing crops to some independent person and directed the learned Sub Divisional Officer that after affording an opportunity of hearing to the parties, a fresh order on an application 146 Code of Criminal Procedure be passed.

The case of Respondents/party No. 2 was that the disputed land comprising Survey No. 144 in area 1.517 of Village Akbarpur was purchased through registered sale-deed dated 1st May 2004 by Smt. Shrifan bee from Keshav Singh s/o of Abay Singh and Smt. Geetabai w/o of Abhay Singh for sale consideration Rs. 1,12,800/- and rest land measuring 0.379 of Survey No. 144 was purchased by Smt. Sarifan Bee through registered sale deed 29th June 2005. The lands measuring 0.530 (North side) out of total lands measuring 1.036 hectare of Survey No. 073 was purchased through Registered Sale Deed dated 23rd December, 08 from Keshav Singh s/o Abhay Singh for sale consideration Rs. 1,05,600/-. After purchasing the lands, their names were mutated as owners and pursuant thereto they were sowing and threshing the crops. There is no law and order problem over the disputed land in the locality. Against the exparte order of attachment passed by the learned trial Magistrate, the revision petition was filed before the court of Additional Sessions Judge, Sironj.

The contention of the Petitioners is that the order passed by the revisional court is patently illegal and contrary to law. The learned revisional court erred to entertain the revision against the interlocutory order ignoring the provisions of Section 397(2) of the Code of Criminal Procedure, 1973. The learned Sub

Divisional Magistrate was empowered by law to pass an *ex parte* attachment order in an appropriate situation. So, the revisional court was wholly unjustified to entertain the petition and by setting aside the order and in remanding the matter back for fresh consideration to decide the petition u/s 146(1) of Code of Criminal Procedure

The learned counsel appearing for the Respondents in support of the impugned order passed by revisional court contended that the impugned order was passed behind their back. There was no emergency occurred. The order passed by the learned Magistrate was passed without applying his mind and the law. Under these circumstances, the revisional court did not commit any legal or factual error in remanding the case back for fresh consideration and in directing that after giving an opportunity to the parties a fresh order be passed. Therefore, it is prayed that by confirming the impugned order, the revision petition be dismissed.

In the case of *Shanti Kumar Panda Vs. Shakuntala Devi*, , the Hon. Apex court held that:

There is a difference between a case where the subject-matter of dispute is not attached by the Executive Magistrate u/s 146(1) and the case where it is so attached. Under Sub-section (1) of S. 145, a preliminary order taking cognizance of the dispute having been passed, the Magistrate would under Sub-section (4) decide who was in possession of the disputed property on the date of the passing of the preliminary order. Consistently with such finding, a declaration by Magistrate in favour of such party would follow under Sub-section (6) entitling it to retain possession over such property until evicted there from in due course of law and until such eviction all disturbances in its possession shall be forbidden. If any party is found to have been forcibly or wrongfully dispossessed within two months next before the date on which the report of a police officer or other information setting the Magistrate in motion was received by him or between such date and the date of order under Sub-section (1), then the party dispossessed has to be fictionally treated as one in possession on the date of preliminary order under Sub-section (1). The declaration of entitlement to possession under proviso to Sub-section (4) read with Sub-section (6) shall be made in favour of such party and the party found to have been so dispossessed forcibly and wrongfully may also be restored into possession. The declaration having been made, it would be for the unsuccessful party to approach the competent Court and secure such order as would enable his entering into possession and evicting the party successful in proceedings u/s 145.

In a case where attachment has been made u/s 146(1) of the Code, it is not necessary for the unsuccessful party to seek the relief of possession from the Court; a mere adjudication of rights would suffice inasmuch as the attached property is held *custodia legis* by the Magistrate for and on behalf of the party who would be successful from the competent Court by establishing his right to possession over the property.

In the case of Bhinka and Others Vs. Charan Singh, this Court held that:

The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. His order is a temporary order irrespective of the rights of the parties, which will have to be agitated and adjudicated upon by a competent Forum and in the manner provided by law. The life of the said order is conterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. The orders u/s 145 of the Code are thus merely police orders and do not decide any question of title.

In the case of Keshavprasad Bhatt Vs. Rameschandra, , the Division Bench of this Court has further held that an order passed u/s 146(1), Code of Criminal Procedure attaching property and appointing receiver is not an "interlocutory order" within meaning of Section 397(2) and revision against the same is maintainable. It is further held that:

When the Magistrate passes an order u/s 146(1) that order deal finally with rights of parties with regard to the subject matter of the dispute in so far as immediate possession thereof is concerned although the order may be of such duration as is statutorily specified. Those who raise or are concerned with the dispute are debarred from dealing with the attached property in any manner; those claiming to be in possession or claiming to have been forcibly dispossessed on the relevant date are evidently affected seriously by that order. As a result of attachment, even for the specified duration, the nature of the property of subject of the disputer undergoes material change as the property custodia legis. The effect of the order, extends not only to existing possession of, but also to right of any of parties to the proceeding u/s 145 to possess, the disputed property. In that respect the scope of the order u/s 146(1) is wider and its effect is more pervasive. Because, Section 145 expressly debars in the enquiry there under any reference to the merits of claims as to rights of any parties to possess the subject of the dispute. The mere fact that the Magistrate may withdraw at any time the attachment order when there is no longer any likelihood of breach of the peace does not, make the order a "temporary" one and it cannot also be said that it does not affect substantive rights of any parties concerned in the dispute during the period when subject of the dispute remains attached. "Possession" is a substantive right and that right or claim to that right of the parties concerned is substantially affected by that order and further, the label "temporary" would be doing violence to the language of the proviso and of the main enactment and importantly, also, to the object of the Chapter itself. Emergency powers in the very nature of things can and do provide adhoc treatment and tinkering of civil rights of the parties can only be of "temporary" nature. That would not minimise the effect of an order passed to contain emergency situation as infraction, would still be there though that may be lost for specified duration. The order negatively settles rights of parties entitled to possession of the subject matter of the dispute by debarring them from interfering with Court's possession of that on

attachment. The unspecified duration of that order buttresses rather the severity of the infraction. It will indeed be wrong to presume that duration to be either long or short as facts of each case would be different. Similarly, it would also be wrong to assume that in every case the Magistrate will exercise the discretion vested in him under the proviso to Section 146(1). What is unimpeachable is that the moment he passes the order and attaches the property, the right of parties to possess the same are frozen and remain so "until a competent court has determined the rights," as a consequence of the order, there will arise occasion to decide many questions which await till such a decision is rendered. The power of revision contemplated u/s 397(1) is curtailed by Sub-section (2) with the object purely of ensuring that pending enquiries, trial and other proceedings do not suffer protraction. Denial of the right of revision against an order passed u/s 146(1) would not obviously fulfill that object. There can be no question of proceeding whether u/s 145 or u/s 146, suffering any delay in disposal on account of the order passed u/s 146(1). Hence revision against such order is not barred by Section 397(2).

In the case of Jhummal alias Devandas Vs. State of Madhya Pradesh and Others, this Court has held that:

A concluded order u/s 145 Code of Criminal Procedure, made by the Magistrate of competent jurisdiction should not be set at naught merely because the unsuccessful party has approached the Civil Court. An order made u/s 145, Cr. P.C., deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to decision of the Civil Court. The unsuccessful party, therefore, must get relief only in the Civil Court. He may move the Civil Court with a properly constituted suit. He may file a suit for declaration and prove a better right to possession. The Civil Court has jurisdiction to give a finding different from that which the Magistrate has reached. Here again we may hasten to add that the expression "Civil Court" used by this Court in Jhummal's case (supra) means competent Court and not necessarily a Civil Court as commonly understood.

In the case of Jaineesuddin v. Jabesuddin 2006 MPLJ 342 this Court held:

It was mandatory part of the SDM to issue notice to the opposite party and to hear him before passing the order of attachment. If he was of the view that there was some emergency and it was necessary to pass attachment order ex parte, then he could have issued notice to the other side and he should have invited reply and objection thereon but from the order sheet dated 16-07-2001 it is not clear that he has followed the procedure laid down u/s 145 and 146 Criminal Procedure Code. In revision it was also duty of the Additional Sessions Judge to examine the aforesaid question of the legality of the order dated 16-07-2001 but the Additional Sessions Judge who is basically a Judicial Officer that he will consider the matter judicially but it appears that the approach of the Additional Sessions Judge was also not a judicial approach. He has neither considered the provisions of Sections 145 and 146 Code of Criminal Procedure

nor the correct procedure which was required to be followed by the SDM who was Executive Magistrate. There is no whisper in the said order dated 16-07-2001 about any emergency or any danger of peace existed on spot and without considering the requirement of law the Additional Sessions Judge has recorded the findings which are also contrary to the record, pleadings and law. Thus the orders passed by the Courts below cannot be said to be legal.

In number of cases, it has been observed that the Magistrate passing the order of attachment of subject matter of the dispute, on the ground of emergency without drawing up preliminary order u/s 145(1) Code of Criminal Procedure , the order was not held sustainable. Needless to say that when an Executive Magistrate wants to take preventive action u/s 145 of Code of Criminal Procedure he should draw an order under Sub-section (1) which is commonly known as preliminary order. Such a preliminary order should contain the particulars that he was satisfied as to the existence of a dispute likely to cause a breach of peace, the grounds of his satisfaction and a direction requiring the parties concerned to attend his Court on a date fixed by him and put in evidence the written statement of their claims in respect of the facts of actual possession of the subject matter. The law does not prescribe that such a preliminary order should be in any particular form. It is the substance of the order which matters and not the language in which it has been drawn up. Where there is a preliminary order fulfilling these requirements, it does not become bad in law simply because it has not been happily worded. The importance of the preliminary order need not be stressed. Hence, a Magistrate can proceed to decide the dispute u/s 145 of Code of Criminal Procedure only when he has drawn up the preliminary order under Sub-section (1). In the absence of the preliminary order, the subsequent proceedings, e.g., the attachment of the subject of dispute on the ground of emergency are without jurisdiction and erroneous in law. In case where no preliminary order in the manner laid down u/s 145 Code of Criminal Procedure has been passed, the order passed u/s 146 Code of Criminal Procedure is invalid.

The order in the present case passed by the learned Sub Divisional Magistrate cannot be considered fulfilling the requirement of Section 146(1) that he was satisfied that the emergency was of such kind that it was necessary to attach the land and appoint a receiver. This is necessary because if the property is attached and a receiver is appointed, then the person who is in actual possession of such property is removed from such possession and it goes in the hands of the receiver. The learned Sub Divisional Magistrate has not pointed out any circumstances which were considered necessary by him to resort to an action u/s 146(1) of Code of Criminal Procedure

As already observed above, such an order should not be passed as a matter of routine and it must be indicated in the order by the Magistrate that he was considering the matter of such emergency that even the notice of short duration was not possible in a given case and in his view the land was required to be attached. This not the intention of the legislature in making separate provision u/

s 146(1) of Code of Criminal Procedure The Magistrate was required to apply his mind separately with regard to existence of emergency and should pass an order with great circumspection u/s 146(1) of Code of Criminal Procedure It must be clearly borne out from his order that such emergency exists in the facts and circumstances of the given case.

Thus, considering the submissions made by both the parties and after perusing the principles laid down in the aforesaid judgments, this Court does not find any irregularity or illegality in the order of the revisional court. In the result, the order remanding the case to the Sub Divisional Magistrate by the learned Sessions Judge is hereby maintained. The present revision petition is accordingly dismissed.