

(2018) 05 GAU CK 0161
In the Gauhati High Court
Case No : Crl.Pet. 515 of 2016

Sri Ajit Baruah

APPELLANT

Vs

State Of Assam And 8 Ors

RESPONDENT

Date of Decision : 17-05-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 107, 145, 145(1), 145(2), 145(5), 146, 397, 482

Citation : (2018) 05 GAU CK 0161

Hon'ble Judges : HITESH KUMAR SARMA, J

Bench : Single Bench

Advocate : D. Das

Final Decision : Disposed Off

Judgement

[1] This is an application, filed under Section 482 of the Cr.PC, seeking quashment of the judgment and order, dated 20.06.2016, passed in Criminal Revision Case No. 31(2)/2016 by the learned Additional Sessions Judge (FTC), Dibrugarh.

[2] The revision petition, aforesaid, was filed before the said learned revisional Court aforesaid challenging the order, dated 26.04.2016, passed in Case

No. 228/2015 under Sections 107/145 of the Cr.PC by the learned Additional District Magistrate, Dibrugarh declaring possession of the disputed land

in favour of the present petitioner.

[3] On perusal of the order of the learned revisional court, aforesaid, as well as the order passed by the learned Additional District Magistrate,

referred to above, this Court proposes not to discuss the materials, on merit, and rather proposes to dispose of the matter dealing with the manner in

which the revision petition was disposed of by the learned Additional Sessions

Judge, FTC, Dibrugarh with a direction to be followed in the later part of this order.

[4] As stated above, the revision petition before the learned Additional Sessions Judge, FTC, Dibrugarh was challenging the order, dated 26.04.2016,

passed by the learned Additional District Magistrate, Dibrugarh. Annexure-14 of the petition is the aforesaid order which was put to challenge before

the learned revisional court. On perusal of the order, it transpires that after examining witnesses produced by both the sides, i.e., from the side of the

present petitioner as well as from the side of the respondent Nos. 2 to 9, the impugned final order was passed declaring possession of the disputed

land in favour of the present petitioner who was the 1st party in the proceeding before the learned Additional District Magistrate. The respondent Nos.

2 to 9 were the opposite parties in the aforesaid proceeding before the learned Additional District Magistrate.

[5] The proceeding in the aforesaid Case No. 228/2015 under Sections 107/145 of the Cr.PC was drawn up by the order, dated 10.07.2015 on the

basis of the satisfaction recorded by the learned Magistrate as regard the dispute over the land involved in the proceeding.

[6] As stated above, the order challenged before the learned revisional court was the order, dated 26.04.2016, which was the final order passed in the

aforesaid proceeding by the learned Additional District Magistrate, whereas on perusal of the judgment of the learned revisional court, referred to

above, it clearly appears that the learned revisional court dealt with the order, dated 10.07.2015, which was the initial order drawing up the proceeding

under Section 145 of the Cr.PC and not subjected to challenge. The learned revisional court held in the said judgment that the initial order by which the

learned Magistrate drew up the proceeding under Section 145 of the Cr.PC and attached the disputed land under Section 146 of the Cr.PC, did not

disclose the ground of his satisfaction and referred to the decision of this Court in the case of Kaushal Mishra & Ors. â"vs- Raj kumar Mishra,

reported in 2007

(4) GLT 889. So taking the ratio laid down in the said decision of this Court, the learned revisional court held that the preliminary order drawing the

proceeding itself was not valid being without jurisdiction, and therefore, illegal. Accordingly, it was held that when the foundation of the proceeding is

without jurisdiction, the question of making declaration of possession in favour of the parties to the proceeding or affirming such declaration by the

revisional court does not arise at all. So, it is clear from the judgment of the learned revisional Court that it did not deal with the final order, dated

26.04.2016, which was the subject matter of challenge before it.

[7] I have heard Mr. D Das, learned senior counsel for the petitioner as well as Mr. PJ Saikia, learned counsel appearing for the respondent Nos. 2 to

9. The State respondent No. 1, being a formal party, did not participate in the hearing.

[8] Mr. PJ Saikia, learned counsel for the respondent Nos. 2 to 9 has referred to the decisions of the Honâ??ble Supreme Court in the case of State

of Orissa & Anr. â??vs-Mamata Mohanty, reported in (2011) 3 SCC 436, specially paragraph 37 thereof. He has submitted that in the proceeding

before the learned Additional District Magistrate no ground for his satisfaction was recorded, and therefore, the proceeding itself is illegal in its

inception and the subsequent action/development cannot validate an action which was not lawful at its inception. This decision was rendered by the

Honâ??ble Supreme Court in a matter based altogether on different facts, in respect of a matter relating to service and does not appear to be

applicable in the facts of the present case.

[9] To face the challenge posed by the decision of this Court in the case of Kaushal Mishra (supra), the learned senior counsel for the petitioner has

referred to the decision of the Honâ??ble Supreme Court in the case of Paul George â??vs- State, reported in (2002) 2 SCC 406, and particularly

para 7 thereof, which has discussed about the jurisdiction to be exercised by the revisional court under Section 397 of the Cr.PC. Para 7 of the said

judgment reads as follows:-

â??It is submitted that the language of Section 397 Cr.PC is different and it does not speak of jurisdictional error which it is there all pervading under

Section 115 CPC . The submission further is that the scope of the two provisions is different It is narrower under Section 115 C.P.C. Suffice it to

observe that question of error in exercise of jurisdiction may arise sometimes in criminal revisions as well. Be that as it may, the submissions made on

behalf of the appellant could not be negated without examining them on merit The order impugned however does not indicate any trace of application

of mind on the facts or the pleas raised before the Court. We would like to point out that we come across with such orders quite frequently as of now.

There is no need to emphasize that the reasons, howsoever brief they may be, are to be indicated in an order disposing of any matter, more so when

such orders are subject to appeal or review before the higher forum. In many decisions of this Court, no doubt while dealing with orders passed in

exercise of administrative or quasi-judicial power in those cases, it has been observed that so as to indicate application of mind, the orders should

contain some reasons which also helps to the appellate or revisional authority to appreciate the merit of the orders passed and the way the decision

has been arrived at.

[10] The learned counsel for the respondent Nos. 2 to 9 has also referred to the decision of the Honâ??ble Supreme Court in the case of Mathuralal

â??vs- Bhanwarlal & Anr., reported in (1979) 4 SCC 665, particularly paragraph 4 thereof, which reads as follows:-

â??Quite obviously, Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is

a likelihood of a breach of the peace because of a dispute concerning any land or water or their boundaries. If Section 146 is torn out of its setting and

read independently of Section 145, it is capable of being construed to mean that once an attachment is effected in any of the three situations

mentioned therein, the dispute can only be resolved by a competent Court and not by the Magistrate effecting the attachment. But Section 146 cannot

be so separated from Section 145. It can only be read in the context of Section 145. Contextual construction must surely prevail over isolationist

construction. Otherwise, it may mislead. That is one of the first principles of construction. Let us therefore look at Section 145 and consider Section

146 in that context. Section 145 contemplates, first, the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists

concerning any land or water or their boundaries, and, next, the issuance of an order, known to lawyers practising in the Criminal Courts as a

preliminary order, stating the grounds of his satisfaction and requiring the parties concerned to attend his Court and to put in written statements of their

respective claims as regards the fact of actual possession of the subject of dispute. A preliminary order is considered so basic to a proceeding under

Section 145 that a failure to draw up a preliminary order has been held by several High Courts to vitiate all the subsequent proceedings. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Sections 145 and 146.

In fact, the first of the situations in which an attachment may be effected under Section 146 of the 1973 Code has to be "at any time after making the order under sub-section (1) of Section 145" while the other two situations have, necessarily, to be at the final stage of the proceeding initiated by the

preliminary order. Now, the preliminary order is required to enjoin the parties not only to appear before the Magistrate on a specified date but also to

put in their written statements. Sub-section (3) of Section 145 prescribes the mode of service of the preliminary order on the parties. Sub-section (4)

casts a duty on the Magistrate to peruse the written statements of the parties, to receive the evidence adduced by them, to take further evidence if

necessary and, if possible, to decide which of the parties was in possession on the date of the preliminary order. If the Magistrate decides that one of

the parties was in possession he is to make a final order in the manner provided by sub-section (6). Provision for the two situations where the

Magistrate is unable to decide which of the parties was in possession or where he is of the view that neither of them was in possession is made in

Section 146 under which he may attach the subject of dispute until the determination of the rights of parties by a competent Court. The scheme of

Sections 145 and 146 is that the Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a

preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements.

Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the

preliminary order. On the other hand if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such

possession he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations

he attaches the property. Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in

one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties

to go to the Civil Court. Proceeding may however be stopped at any time if one or other of the parties satisfies the magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the magistrate disappears. The magistrate then cancels the preliminary order. This is provided by Section 145 sub-section (5).

Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course. Now, in a case of emergency, a magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected.

There is no express stipulation in Section 146 that the jurisdiction of the magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145 sub-section 4 is against any such implication. Suppose a magistrate draws up a preliminary order under section 145(1) and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, no one can say that there is no dispute likely to cause a breach of the peace.

[11] I have considered the rival submissions made by the respective learned counsel, with reference to the decisions, they have referred to.

[12] The illegality of the order, dated 10.07.2015, was not the subject matter before the learned trial court although in view of the decision of this

Court, referred in Kaushal Mishra (supra), that order, being initial order, could be taken into consideration by the learned revisional court although

there is no instance in the said decision to say that when the matter in the proceeding under Section 145 of the Cr.PC, reached its finality, declaring

possession or otherwise of any of the parties, could be avoided. That apart, the decision, as stated above, is in respect of the particular fact of that

case. Here, in the instant case, there is a police report which was also in the record of the learned trial court and it was said in the report that there is

likelihood of breach of peace between the parties. But, it does not appear that this aspect of the matter has been taken into consideration by the

learned revisional court, at any point of time, in the judgment under challenge.

[13] The learned revisional court is found to have based its decision on the jurisdictional error of the learned Additional District Magistrate in passing

the initial order, dated 10.07.2015. Although the respondent has a right to raise the issue of jurisdictional error before the learned revisional court yet

he could not have disposed of the revision petition by the said judgment, without examining the merit of the materials before it. This is as viewed by the

Honâ??ble Supreme Court in the case of Paul (supra).

[14] Therefore, on consideration of the matter in its entirety, this Court is of the view that while there was no bar for the respondents, as petitioner

before the learned revisional court, to raise the issue of jurisdiction, at the same time, the revisional court ought not to have limited itself to the issue

which was, in fact, not challenged before him. Even, if he has taken cognizance of the initial order, dated 10.7.2015, drawing up the proceeding, he

could have also decided on the merit of the matter as a whole including consideration of the final order which was, in fact, the subject matter in the

revision petition before him, particularly when the final order subjected to challenge in the revision petition was passed after a full trial which included

the evidence of both the parties. The provision of law contained in Section 145(5) of the Cr.PC has not been discussed and decided in Kaushal Mishra

(supra), or in State of Orissa & Anr. (supra). Section 145(5) of the Cr.PC, reads as follows:-

â??Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as

aforsaid exists or has existed; and in such case the Magistrate shall cancel his

said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be finalâ??.

But, in the instant case, the present respondent Nos. 2 to 9, as opposite party in the proceeding under Section 145 of the Cr.PC before the learned

Additional District Magistrate, did not make any effort to show that no such dispute existed, in which case the learned Additional District Magistrate

has the power to cancel the order, dated 10.07.2015. Otherwise, as provided in the above quoted provisions, the order of the Magistrate under Section

145(1) of the Cr.PC is final. Therefore, in the considered view of this court, the initial order, dated 10.07.2015 attained its finality as the present

respondents did not resort to the provisions of Section 145(2) of the Cr.PC, after attending the court, rather, they allowed the proceeding to be

completed in all respect culminating in the final order dated 26.04.2016.

[15] Accordingly, in the considered view of this Court, this is a fit case to remand back to the learned revisional court to hear both the parties afresh

and to deliver a judgment on the basis of law relevant, as indicated above, taking into consideration the materials available in the record of the learned

trial court including the police report and even if he takes cognizance of the initial order, yet the final order, the subject matter of revision petition, shall

be disposed of on merit.

[16] Therefore, the order, dated 20.06.2016, passed in Criminal Revision Case No. 31(2)/2016 by the learned Additional Sessions Judge (FTC),

Dibrugarh is quashed.

[17] It is made clear here that the learned revisional court will dispose of the matter on merit without being influenced by any of the observations made

in this judgment which are made for the purpose of the instant petition only with a view to secure ends of justice mandated by Section 482 of the

Cr.PC.

[18] Send down the LCR along with a copy of this judgment for taking further follow-up action by the learned revisional court.