
(1980) 09 BOM CK 0002

In the Bombay High Court

Case No : Criminal Application No. 965 of 1980

Sulochana Ravindrakumar Bhandari and Another

APPELLANT

Vs

K. Rama Rao and Another

RESPONDENT

Date of Decision : 30-09-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146, 146(1), 482

Citation : (1980) 09 BOM CK 0002

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : V.H. Gumaste, Kumar Mehta and J.D. Ved, for the Appellant; N.A. Modi and V.P. Vashi, S.S. Parkar, Public Prosecutor, for the Respondent

Judgement

V.S. Kotwal, J.—The proceeding which initially had only two parties gets an addition of a third party, namely, the society, and the controversy revolves round flat No. 5 located on the 2nd floor in Jayant Mahal Co-operative Housing Society Ltd. (shortly stated as "the society") situate at Churchgate. The first petitioner is a member owner of the said flat and in that capacity she has been in use and occupation thereof for quite some time and right from the inception. Petitioner No. 2 is the husband of the 1st petitioner, who had in his mind to achieve some better prospects in business by setting up a manufacturing plant at Wardha and, therefore, he was to leave Bombay for quite some time. This obviously injected a thought in the minds of the petitioners that they may well make some arrangements vis-a-vis the flat in question during their absence from the city. A negotiation, therefore, had been effected between the 1st petitioner and the 1st respondent who is the Administrative Officer of the Oil and Natural Gas Commission (shortly stated as "the Company") under which the Company expressed its desire to get the flat on a caretaker basis initially for a period of 3 years with a stipulation for extension of the said period and which came to be accepted by the petitioners.

2. This obviously took some time to materialise and translate into action and in

between there had been rounds of discussions and ensuing correspondence. When ultimately it was agreed that the flat be given to the 1st respondent-company on caretaker basis under an agreement which was to be executed between the parties, in response to which, in fact, an agreement was reduced to writing and was executed on May 23, 1980. There is, however, a controversy as to what was really agreed upon between the parties vis-a-vis the possession of the flat. The petitioners would take it that inspite of the said agreement possession was not parted, though a spare key of the flat was handed over to the Company Officials for the restricted purpose of making an inventory of the articles therein and that the petitioners continue to be in possession of the flat on the date of the agreement and even thereafter. As against this the Company wanted to have it that on the day of the agreement and under the terms of the agreement the possession of the flat was parted with by the petitioners and since that day the Company is in possession of the flat in question. It was then stipulated between the parties that the Company should give a deposit of Rs. 4,00,000/- to the 1st petitioner which was made refundable on the Company giving back vacant possession of the flat on the expiry of the period under agreement and the said deposit was not to carry any interest. It was further contemplated that if the 1st petitioner did not refund the deposit amount after the stipulated period then the Company was entitled to retain possession of the flat and a further clause was inserted in the agreement to the effect that in the event of non-delivery of vacant possession to the petitioners by the company on the expiry of the caretaker ship period, the Company would purchase the flat at the best ruling market price available which is to be assessed by one of the Government approved valuers. A list of articles, including fixtures, was catalogued, though it appears that it was not signed by either of the parties. In pursuance of the agreement the common ground is that the Company had paid the entire amount of rupees four lakhs and add, inclusive of the maintenance charges, to the 1st petitioner by cheque and it was accepted and actually encashed by the 1st petitioner thereafter. Upto this stage both the parties felt that there would be smooth sailing for everyone. However, the situation took an unexpected turn and each party started blaming the other for the creation thereof.

3. The 1st petitioner contends that she has been approaching the society for consent and permission to execute and implement the agreement in favour of the company so that the company officials would be inducted in the flat on caretaker basis. It is her case that the society somehow or the other took an unexpected stand and informed the petitioner that inducting a third person even on caretaker basis would amount to parting with the property of the society, which would violate the bye-laws and the rules of the society. We are not very much concerned with the validity of the said stand and contention raised by the society. Equipped with this denial of consent from the society, the petitioner claims to have approached the Company and placed her cards before them, expressing her inability to hand over possession and to implement the

agreement on account of an event which was undoubtedly beyond her control. The events thereafter indicate that a further negotiation was in progress between the parties when a further proposal was made that the Company should go in for an outright purchase of the flat so as avoid all these difficulties and complications and it appears that the company was inclined to consider this proposal and that is how the doors were left open on a second occasion for such a new proposal.

4. The society itself was not lagging behind and unexpected to the parties the society moved the Co-operative Court raising a dispute u/s 91 of the Maharashtra Co-operative Societies Act (shortly stated as "the Act") contending that there existed a dispute over the alleged parting of possession of flat No. 5 by the 1st petitioner in favour of the company without the permission of the society which was in breach of the bye-laws. The society also prayed for an interim injunction against the present petitioner restraining her from parting with the possession of the said flat and from inducting any third party therein. The society impleaded the Company as co-respondent and also pleaded for an order of injunction against the Company restraining the officials from entering into the said flat. An ad interim injunction was also prayed for. It appears from the record that an ad interim injunction on both the Courts was granted by the Co-operative Court on June 14, 1980.

5. Thereafter both the respondents therein, namely, the petitioner and the Company, appeared in the said dispute proceedings and made their submissions and filed their written statements and it further is a matter of record that after hearing the parties the said Court by its order dated July 14, 1980 vacated the ad interim injunction presumably holding that the events indicated the company was in possession of the flat. A statement is made at the Bar that the society as well as the 1st petitioner have approached the Co-operative Appellate Court against the impugned order and the matter is pending therein.

6. It is alleged by the Company that the possession was parted by the 1st petitioner on May 23, 1980, and it is for the first time on July 14, 1980, on which day the order of injunction was vacated, that the 1st petitioner effected a forceful entry in the flat by breaking open the lock and that is how dispossessed the company from its rightful claim. This aspect is disputed by the petitioner.

7. Upto this stage we had a sort of verbal disputes between the parties and on the second phase the forum was shifted to Co-operative Court. Now in the third phase we have the third forum, namely, the Criminal Court and that is how the Company on July 17, 1980 moved the Court of the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay, by an application u/s 145 of the Code of Criminal Procedure (shortly stated as "the Code"). It may incidentally be observed that on July 14, 1980 itself the Company had approached the police with a complaint for house breaking and allied offences purported to have been committed by the 1st petitioner. On July 17, 1980 along with the application u/s 145 of the Code, a separate application u/s 146(1) of the Code was filed on behalf of the Company with a request that the flat should be

attached and sealed as it was a case of emergency. It appears that order were passed on both these applications at the same time by the learned trial Magistrate and the validity of these two orders is very much in dispute not only on the merits but even in the manner which the orders have been recorded and, therefore, it is desirable to quote the said orders verbatim. As regards the main petition u/s 145, the order is as :

"Issue preliminary order u/s 145(1) Cri.P.C. Returnable 25-7-1980".

8. In pursuance of this order a notice asking the petitioner to appear before the Court was transmitted and the record reveals that it was almost on a cyclostyled form. In the order on the other applications asking for attachment and sealing of the flat we have the most extra-ordinary orders which really forfeits its claim to be called a judicial order and runs into one word only as "granted".

9. It is again a matter of record that after passing such a cryptic order by judicial forum on July 17, a mandate was given to the police to attach and seal the property and it is again a matter of record that hardly within few hours and on the same night the police very promptly executed the said order under which the flat was attached and sealed.

10. These are the orders dated July 17, 1980, that are being impugned by the two petitioners in this proceedings under which a relief is claimed that both the orders should be quashed and not only that but even the main proceeding u/s 145 of the Code also be quashed.

11. Shri Gumaste, the learned Counsel for the petitioners, vehemently submitted that really speaking it is an apology for an order not expected of a judicial forum and is clearly indicative of the fact of an utter non-application of mind by the learned magistrate. The learned Counsel submitted that apart from the mechanical manner in which the orders are passed, there is also indication, in no uncertain terms, about the perfunctory nature of the said orders. Shri Gumaste, therefore, submitted that there is nothing in the order even to indicate that the learned magistrate was satisfied that a dispute really existed which was likely to create breach of peace entailing into the learned Magistrate to take an action u/s 145 of the Code. The learned Counsel further submitted that the order u/s 146 makes the position still worse. According to the learned Counsel, neither the order nor the application of the company makes out a case of emergency so as to attract the section 146 of the Code. The learned Counsel submitted ultimately that looking to the correspondence ensued between the parties, the proceedings pending in various Courts and the attitude adopted by the parties it is impossible even to conceive that there would be a breach of peace and, therefore, basically itself the provision of section 145 are not attracted.

12. Shri Modi, the learned Counsel appearing on behalf of the Company, with his usual customary case, has submitted quite strenuously that, in the first instance, a discretionary remedy is not deserved by the petitioners on account of their dishonest conduct of pocketing Rs. 4,00,000/- and thereafter sitting tight over

the situation. He further submitted that there is adequate material to justify that the provision of section 145 as also section 146 of the Code are attracted. According to him, even after the Co-operative Court vacated the injunction, on the same day the 1st petitioner broke open the lock and took forcible possession she should not be permitted to take advantage of her own wrong. The learned Counsel submitted that existence of dispute and an imminent breach of peace are implicit in the situation which is so explosive that even a day's time would make the whole difference and that is how an element of emergency was sought to be carved out of the situation.

13. As regards the validity of the first contention raised by Shri Gumaste, I am very firm in my opinion that he must succeed on that point itself, as both the orders of the learned Magistrate are not only unusual but are so perfunctory and are recorded in such a mechanical manner that both forfeit their claim to be called as judicial orders. On the first application it was ordered that a preliminary order be issued without assigning a single reason indicative of the fact that the learned Magistrate was satisfied that there did exist a dispute which was likely to result in breach of peace. Even the fact that the application was really read the learned Magistrate, in details, is not indicated in the order itself, much less the satisfaction of the learned Magistrate is reflected in the said order. As regards the second order, as rightly submitted, the position is still worse and I am really constrained to observe that, frankly speaking, I am almost shocked to find out that such a cryptic one word order is being recorded by a judicial forum in such a serious matter when a property is to be attached and sealed and the rights of the parties are to be materially affected. It hardly does any credit to the said judicial authority. It is the bare minimum requirement of the section 146 of the Code that the Magistrate must be satisfied as one of the alternatives, viz. that an emergency exists, which requires a passing of such a drastic order immediately without lapse of time. It is now well settled that sections 145 and 146 are blended together and if that be so, then it must follow that the requirement of section 146 would further be vis-a-vis the emergency that a dispute exists which is likely to entail into breach of peace and the situation is so explosive that if emergent order are not passed without delay then it would create complications resulting into a serious breach of peace. The nexus between all these features has got to be established. Unfortunately and surprisingly even the learned Magistrate's order does not contain any of these considerations, much less his satisfaction on either of these items. The most casual and perfunctory manner in which the impugned order are passed tempt me to observe that the learned Magistrate approached the matter as if he was granting an application for adjournment or an application for casual leave by his clerk. The impugned order on this premises itself is not only vulnerable, but it is unsustainable.

14. This would really seal the fate so far as the order u/s 146 of the Code is concerned. However, Shri Modi, the learned Counsel, submitted that an erroneous order of a Court should not be responsible for the suffering of the client and, therefore, notwithstanding the patently erroneous order, he can still

persuade this Court to hold the existence of emergency and the validity of the conclusion, though by different reasons. I would have straight way sent back the matter to the learned magistrate even to decide the question of the application u/s 146 of the Code. However, some of the features which are fully agitated by both the parties, dissuade me from following this course, as I have no reservation in my mind that even on facts this is not a case where an order u/s 146 of the Code is warranted and as such no useful would be served by remanding the matter.

15. To start with, it is rather surprising to note that even the application tendered on behalf of the company seeking for an order u/s 146 of the Code is blissfully vague and does not contain even the minimum requirement in that behalf. The concerned official of the Company in the said application has stated that the 1st petitioner herein had taken wrongful possession of the premises while the 2nd petitioner herein had threatened him when he and others visited the flat on July 14, 1980. Then comes to the material recital. It is stated that the Company apprehended that the respondents therein may put some third party into the flat and destroy the evidence of dispossession or they may continue to stay as trespassers. The next relevant recital is to the effect that there is likelihood of breach of peace due to the high handed acts of the respondents. After expressing these apprehensions the application concludes that this is a case of extreme emergency. The concluding portion reads as :---

"It is necessary in the interest of justice that the premises, viz. Flat No. 5, Jayant Mehal, 2nd Floor, D-Road, Churchgate, Bombay, 20 be sealed and attached under the orders of this Hon"ble Court".

16. It is rightly contended by Shri Gumaste, the learned Counsel for the petitioners, that these recitals can hardly be said to spell out, in reality, a situation of emergency and even the apprehensions levelled in the said application are extremely vague in nature and, in any event, are far away from the ingredients constituting an emergency. To say that the petitioners herein may put some third party or continue to stay in the flat with the sole object of destroying the evidence of dispossession would hardly carry the matter any further so as to come within the mischief of section 146 of the Code. The apprehension is in an extremely vague term and appears to be in the nebulous form. It is also interesting to note that though an allegation is made that one of the two petitioners herein threatened the said applicant when he along with other had gone to the flat on July 14, yet, as rightly contended by Shri Gumaste, no affidavit of any such person who had accompanied the applicant has been filed in support of that application. A grievance is also made that the said application is not supported by the affidavit of the applicant himself. This grievance cannot be said to be wholly unjustified though not conclusive, as no formal affidavit has been filed nor the said application has been filed after having solemnly affirmed it. However, some effort has been made to affirm the application before the concerned person. Nonetheless, the fact remains that the

affidavits of the material witnesses in support of the allegations are not filed and the more important feature is that even those allegations are not filed and the more important feature is that even those allegations by themselves are extremely vague. All said and done, those do not create, by any yardstick, a situation of emergency which is the minimum requirement of section 146 of the Code. Merely stating in vague terms that there is likelihood of breach of peace is again not the strict compliance of the requirement of the said provisions. Lastly, it is interesting to note that what the company really felt for asking an emergent order of attachment and sealing was really not about the emergency of the situation but it was necessary in the interest of justice as is emergency cannot thus be confused with the interest of justice, for the latter may be relevant for the main petition u/s 145.

17. In view of this state of affairs vis-a-vis the application on behalf of the company, this is the formidable difficulty in the way of the company to justify about the existence of an emergency. It is now well settled that section 145 and 146 are to be read together and it can be deducted therefrom that the emergency contemplated by section 146 would cover a case where there is not only a dispute but the likelihood of breach of peace is so imminent and the situation is so explosive that even a short delay would create complications and unless and until the premises are attached and sealed the prospective danger would not be averted.

18. Apart from this deficiency in the applications itself, there are certain glaring features which would go a long way to destroy the existence of emergency. For that purpose some of the features require at least a cursory reference. Though there is a controversy as to whether at the time of the agreement possession was given to the company, yet some of the subsequent events could be obviously beyond any controversy. Thus, the 1st petitioner soon after the alleged agreement had taken a plea that the society was not agreeable to allow her to part with the possession of the flat in favour of the company. She tried to impress upon the society that there is no impediment as such, in as much as inducting a person on caretaker basis does not amount to parting with the possession. However, inspite of that the society had admittedly taken a different stance holding a view that even such an agreement would amount to parting of the possession and, in any event, it would be in violation of the bye-laws and regulations of the society. The further event is, in my opinion, more eloquent. After having realised the firm attitude taken by the society, the 1st petitioner tried to accommodate herself as well as the company and with that object a proposal was mooted out to the effect that the company may go in for an outright purchase of the flat and the most significant feature is that the company was not allergic to that proposal but was in a mood to consider the same on its own merits. This would mean that the doors were left open for negotiations of the alternative proposal, only when the petitioners realised that the 1st proposal of inducting the company officials on caretaker basis could be frustrated only because of the adamant attitude of the society and such alternative proposal was

not discouraged by the company but was still under negotiation.

19. It is, in that respect, extremely relevant to refer to a couple of letters exchanged between the parties. Thus, on July 2, 1980, the 1st petitioner wrote to the company and some of the contents of the said letter deserves to be reproduced verbatim as :

"..... I have agreed to give you my above flat as a caretaker and to maintain the same during my stay away from the city. Subsequently, a photocopy of our agreement dated 23-5-1980 was forwarded to the society. The office secretary of the society have refused permission to you to occupy my flat as a caretaker and have also obtained Court injunction".

"I have approached the society and was informed that even caretaker means parting of possession and the flat is allotted to a member for the residence of the member and his family only".

20. It would thus be clear that the 1st petitioner made it known to the Company of her endeavours in the matter and it is further manifest that an attempt to satisfy the society was also frustrated as the society took a different view of the matter. The bona fides of the 1st petitioner, therefore, are apparently reflected in this very important letter and this, in my opinion, is practically the pivot of the proceedings around which revolves the controversy. The said letter recites thereafter as :

"Yesterday the problem was discussed in detail with you and both of us have agreed that your entry into the premises will not be conducive as per our agreement as the society will ultimately obtain suitable orders to remove you from the premises. This will greatly hamper my interest.

A proposal was discussed and we both agreed principally to sale and purchase of membership flat for which society's permission is necessary.

I have subsequently approached the society. Some rethinking have taken place and they have asked us to submit the proposal together with your proposal to buy membership. They have agreed to discuss the same and to give us their word in reasonable time.

We have prepared our application to the society a copy of which is enclosed with this for your perusal. We request you to give us your letter of proposal to buy the above flat/membership so that we may be able to submit our enclosed proposal to the co-operative society and obtain an approval for the same.

We request you to do it immediately so that we may be able to obtain a quick result which may safe guard the interest of both of us".

21. This latter part of the letter would at least prima facie indicate that the proposal for the outright purchase of the flat was under the negotiation between the parties and not only that but the 1st petitioner has intimated it to the society which, in turn, was inclined to consider that proposal sympathetically and

because of that the 1st petitioner forwarded to the Company a copy of her application which she wanted to submit to the society for this alternative purpose. This action, in my opinion, is quite relevant. It is true that in the letter of even date from the company to the 1st petitioner it was made clear by the Company that physical possession of the flat was taken by the Company on May 23 itself. However, the other relevant portion in the said letter reads as :

"ONGC is willing to consider the outright purchase of the above flat on a price to be mutually settled in case you are interested in disposing it of".

This, in my opinion, has also its own impact, though to a limited extent. Then we have another letter, which is of some relevance, of even date written by the 1st petitioner to the Chairman of the society which reads as :

"With reference to our earlier submission to give our flat on care taker basis to Messrs Oil & Natural Gas Commission, Bombay for which you have subsequently refused permission and obtained Court injunction. We have further discussed with the officials of Messrs Oil & Natural Gas Commission, Bombay and they have proposed to take or buy membership/flat on mutually settled terms for which we now apply for your consent."

"We are enclosing herewith the letter of proposal from Messrs Oil & Natural Gas Commission, Bombay".

22. A combined reading of these recitals would at least create a prima facie impression, in no uncertain terms, that the 1st petitioner had contacted the society at the inception to allow her to induct the Company in the flat on caretaker basis. The society for some reasons declined the said permission. This was intimated by the 1st petitioner to the Company. Thereafter an alternative proposal for the outright purchase of the flat came into existence, and it was not discouraged by the Company who had kept the doors open and negotiations were in progress. The society was also intimated by the 1st petitioner of this course of events and asked for permission for the said proposed sale and the matter was under consideration of the society which was in a mood to sympathetically consider the same. Now, admittedly these features came into existence prior to filing of the application u/s 145 and, for that matter, even the application u/s 146 of the Code and this, in my opinion, must have some impact at least so far as the application u/s 146 is concerned.

23. Parallel to this, one has to consider the attitude adopted by the society in not only declining consent for inducting the Company in the flat, but making it very manifest to the parties about their intention and for that purpose the society did not lag behind and approached the Co-operative Court, raising a dispute u/s 91 of the said Act. The object was made further clear when an interim relief was sought for to the effect that the 1st petitioner herein be restrained from taking possession of the said premises and it was alternatively pleaded that if possession was already parted in favour of the Company, then the latter should be dispossessed. Not only such a dispute was raised but it was entertained by

the Co-operative Court, and above all at least an ad interim injunction on both the counts was granted the Co-operative Court, it is true, that, on hearing the parties, the same came to be vacated one month thereafter, i.e. on July 14, 1980. This again would be a very relevant factor to indicate as to how the things were moving at three different ends. After vacating the stay, the society as well as the 1st petitioner have moved the Co-operative Appellate Court by way of an appeal. As grievance was made by Shri Modi that no injunction was sought for from the Appellate Court either by the society or by the 1st petitioner which is effectively answered by Shri Gumaste, the learned Counsel for the petitioners, by submitting that it could not be feasible for the obvious reason that in between, the subject matter, namely, the flat, has been attached and sealed under the orders of the Court.

24. On a combined reading of all these features in proper perspective, some of the aspects would be manifest. Thus, matter was moving initially at two ends, namely, between the 1st petitioner and the Company. The agreement was executed on May 23, 1980. The 1st petitioner desired to induct the Company in the flat and, therefore, sought for the permission from the society. The society for some reasons felt that even that would amount to parting with the possession of the society's flat in violation of the bye-laws and regulations, and, therefore, refused permission. The net result was that the Company could not be inducted in the flat on account of the intervention of the society and in that sense the matter did not rest within the control of the 1st petitioner only. Thereafter, the society itself raised the dispute before the Co-operative Court and sought for injunction against the 1st petitioner and the Company and ad interim injunction was granted on both the counts which was in force for one month, i.e., from June 14, 1980, to July 14, 1980 under which the 1st petitioner was restrained from inducting the Company in the flat. Thereafter a fresh proposal was mooted out for the outright purchase of the flat by the Company of which the 1st petitioner made no secret and even the Company also encouraged the said proposal which was under consideration and even the society was informed of the said proposal by the 1st petitioner, when she frantically applied to the society for permission for the sale of the said flat. The society sympathetically considered the said proposal which was still under its considerations and the chapter was not closed. It is thereafter that the ad interim injunction was vacated and ultimately on July 17, 1980, that the company knocked the doors of the Criminal Court by filing an application u/s 145 of the Code.

25. In view of all these feature, Shri Gumaste, the learned Counsel for the petitioners, has rightly posed a relevant query as to whether these features can be said to ultimately entail into a situation of emergency so much so that an emergent process of law is necessary to avert the prospective danger. It is rightly, submitted that the parties are not only conscious of the fact that the society's attitude has frustrated the agreement. The parties also appeared to be conscious of the fact that the alternative proposal is under consideration by all the three terminals. The parties are further not only conscious but are fully

aware that at one stage the matter had reached the Co-operative Court at the instance of the society when the 1st petitioner and the Company are made co-respondents. Parties are fully aware that at least for one month the ad interim was in force and the dispute was entertained by the Court and the parties are mostly aware of the fact that the society as well as the 1st petitioner have preferred an appeal in the Co-operative Appellate Court against the impugned order vacating the injunction. It is against this canvas that the entire picture projected by these events will have to be examined and when thus examined I have no reservation in my mind to record a firm finding that this can never be a case of emergency as contemplated by section 146 of the Code. At the cost of the repetition, I can reiterate that the vagueness and the inadequacy of material, as reflected in the application of the Company seeking emergent orders, are also eloquent features and those add to these formidable infirmities. The affidavits of material witnesses are not produced before the learned trial magistrate. It is, therefore, really difficult to visualise the situation as to whether the situation is really explosive as contended by the complainant. On the contrary, the so called explosiveness has retreated itself and had practically gone in the oblivion on account of the existence of the Court proceedings and the proposals and counter proposals. It is true that actual breach of peace is not the requirement of law or otherwise it would lead to an irrational result that unless there is a regular quarrel or assault resulting in a breach of peace, a proceeding u/s 145 would not be tenable. However, in view of the peculiar features which are catalogued above, this can hardly be said to be a case where, under the circumstances and being fully conscious of all these features, the parties would ever try to conduct themselves in a manner which is likely to result in a breach of peace.

26. In this view of the matter, I have absolutely no reservation to hold that, in so far as the application u/s 146 of the Code and the relief sought for thereunder, are both untenable on the facts of the instant case and consequently the impugned order passed by the learned magistrate is not justified even on merits.

27. Shri Modi, the learned Counsel for respondent No. 1, then submitted some other aspects which are being referred to only in difference to the learned Counsel. The learned Counsel submitted that this is an interlocutory order and it has its own limitations. I need not go deeper into this aspect in as much as in a similar situation in Criminal Revision Application No. 667 of 1979, Hasmukh J. Jhaveri v. Sheela Dadlani and another, this Court has taken the view that the order of attachment and sealing u/s 146 of the Code of Criminal Procedure is not an interlocutory order. It is, therefore, not necessary to re-enunciate the said proposition. The learned Counsel, Shri Modi, thereafter submitted that this Court should be extremely slow in exercising the discretion under the relevant powers in favour of the 1st petitioner who has not come with clean hands as she has pocketed Rs. 4,00,000/- and she is sitting tight over the situation taking advantage of the course of events and attitude of the society. In so far as the latter part is concerned, I am not prepared to endorse the finding on the lines suggested by the learned Counsel in as much as the course of events do justify

the submission on behalf of the 1st petitioner that she may not be necessarily at fault at all times and the circumstances do indicate that inspite of her genuine desire she is unable to part with the possession of the flat on account of an intervening circumstance which is of the creation of the society which is obviously beyond her control and she is still willing to go ahead with the alternative proposal of selling the flat in favour of the Company. It is in that context that one cannot record a finding against the 1st petitioner that she has not come to the Court with clean hands. This is despite the fact that admittedly she has pocketed a large amount of Rs. 4,00,000/- which she is enjoined to refund and for which there is no escape for her. As regards, the other part of the submission relating to the limitations on the inherent powers of this Court u/s 482 of the Code, it is now well settled and the law is practically crystalised. Such powers, no doubt, must be sparingly utilised and in a proper case even if the order is nullity or even if a manifest illegality has been committed in recording the impugned order, yet this Court is not bound to interfere in the discretionary jurisdiction. The other side of the coin, however, cannot be overlooked, when one finds that the impugned order is manifestly unsustainable and is against the interest of justice and its continuation would amount to nothing but the abuse of process of law, then this Court cannot enact the role of a silent spectator and should intervene and upset the order.

28. Shri Modi, the learned Counsel, relied on the ratio in P. Vijayapal Reddy and Others Vs. The State, , wherein it is observed as :

"The High Court does not ordinarily interfere at an interlocutory stage of a criminal proceedings pending in a subordinate Court. The inherent powers possessed by it u/s 482 of Cri.P.C. can be invoked and exercised only when the facts alleged in the complaint if they are accepted to be correct at their face value, do not make out an offence with which the accused is charged".

29. There can hardly be any quarrel with this proposition. However, in the said proposition itself is implicit another guideline that this Court can exercise its discretion if the facts alleged in the complaint do not make out an offence. Applying the said test it is clear that the plain reading of the application, the admitted correspondence between the parties and the events of Court proceedings would leave no manner of doubt that no case has been made out justifying an order u/s 146 of the Code and this conclusion can be arrived at even without embarking on a full dressed inquiry. As against this, with advantage, I can refer to the ratio in State of Karnataka Vs. L. Muniswamy and Others, wherein it is observed as : "In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed."

"..... The three instances cited in the judgment as to when the High Court would be justified in exercising its inherent jurisdiction are only illustrative and

can in the very nature of things not be regarded as exhaustive. Considerations justifying the exercise of inherent powers for securing the ends of justice naturally vary from case to case and a jurisdiction as wholesome as the one conferred by section 482 ought not to be encased within the strait jacket of a rigid formula".

Applying this ratio, in my opinion, this a fit case for exercising the discretionary powers in favour of quashing the impugned order.

30. Shri Modi lastly submitted that the facts do indicate that the Company was actually put in possession on the date of the agreement, namely, May 23, 1980. He relied for that purpose on some clauses of the agreement and company's assertion in the letter dated July 2, 1980. The learned Counsel submitted that it becomes clear from the events that the 1st petitioner took forcible possession of the flat in question only after the injunction was vacated by the Co-operative Court which becomes clear from the copy of the judgment filed. As against this, Shri Gumaste, the learned Counsel, submitted that the impugned agreement contains the normal and formal clauses and inspite of that it does not necessarily mean that the Company was given possession at the same time. The 1st petitioner has asserted her possession in her letter also. She was out of the city for some time and that is why she was not in occupation of the premises though it does not mean that she was dispossessed of the flat. According to Shri Gumaste, possession was never parted with and even the ad interim injunction did not prohibit her from continuing to be in the flat. According to the learned Counsel one set of keys was given to the company not for the occupation of its officials, but only for the limited purpose of making inventory. It is also submitted that the inventory or the list of articles which was annexed to the agreement is not signed by the parties which is, more or less, apparent to the agreement is not signed by the parties which is, more or less, apparent on the record. It is also borne out by the record that the receiver appointed by the Co-operative Court had visited the flat on two occasions and made inventory when on both the occasions no article belonging to the company or its officials was found therein, and this also appears to be undisputed though the company comes out with a case that the official to whom the flat was allotted had gone to Bangalore to fetch his family and luggage. In my opinion, it is not necessary to go into the merits or demerits of this controversy, as it is more germane to the main application u/s 145 of the Code and since I am inclined to send back that matter, it would be an improper exercise of discretion to express any opinion in that behalf or otherwise the discretion vested in the learned magistrate would be fettered.

31. Now, this takes us the last question about the application u/s 145 of the Code. I have already reproduced the most vulnerable order passed by the learned Magistrate in that behalf also and by any yardstick that order cannot be made to stand and in that behalf also it can hardly be styled as a judicial order. In the fitness of things, therefore, it would be proper to set aside that order and

send back the matter to the learned Magistrate to apply his mind afresh on hearing the Company and perusing the documents, if any, produced by the Company and thereafter he would be required to pass a fresh order in a judicial manner expressing his satisfaction about the fulfilment of the requirement of section 145 of the Code. Both the parties have agreed to this course and this is also proper in the interest of justice.

32. However, to some extent, the interest of the Company will have to be protected, primarily because they have parted with a large sum of Rs. 4,00,000/- with no fault on their side. This can be achieved under the circumstances only by adopting one course, namely, that the learned Magistrate will be directed to apply his mind afresh and decide the main application, even for the purpose of deciding whether any preliminary order is required to be passed or to and that should be done as early as possible and in case of his passing a preliminary order which would be supplemented by an application of judicial mind, then in that event it would be in the fitness of things that the main proceeding be disposed of expeditiously. It is made clear that whatever has been expressed hereinabove is restricted only while deciding the application u/s 146 of the Code and the main application u/s 145 is kept open on all counts so that the discretion vested in the learned Magistrate remains intact and unfettered.

33. Shri Gumaste, the learned Counsel for the petitioners assures the Court, on behalf of his clients and on the instructions of the 2nd petitioner who is present in Court, that during the pendency of the proceeding u/s 145 of the Code before the learned magistrate, his clients shall not part with the flat in question nor shall they induct any third party therein, except in the eventuality of the petitioners selling the said flat in question which would obviously be with the consent of the respondent-Company.

34. In the result, the rule is made absolute.

35. The impugned order dated 17th July, 1980 under which the learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Bombay had directed the attachment and sealing of the flat in question is set aside and vacated, with the resultant consequence that the flat shall be restored to the possession of the 1st petitioner herein till the disposal of the main application u/s 145 of the Code pending before the learned Magistrate and the parties would be governed thereafter by the order which would be finally passed in the said proceeding. The concerned Police Officer attached to Azad Maidan Police Station is hereby directed to comply with this order under which the flat should be unsealed and possession thereof be handed over to the 1st petitioner.

36. The impugned order dated 17th July, 1980 passed by the learned Additional Chief Metropolitan Magistrate directing issuance of preliminary order u/s 145(1) of the Code of Criminal Procedure is also set aside and vacated.

37. The proceeding, which is the subject matter of application No. 213/N of 1980 pending on the file of the learned Additional Chief Metropolitan Magistrate, 19th

Court Esplanade, Bombay, is sent back to the learned Magistrate with the following directions :

- i) That the learned Magistrate shall given on opportunity to the application therein namely, the Oil and Natural Gas Commissioner, in support of the said application with liberty to produce any documents they so desire to produce, including the affidavits.
- ii) That thereafter the learned Magistrate shall apply his mind to the said aspect about recording a preliminary order u/s 145(1) of the Code and would pass an appropriate order in accordance with law on the said application;
- iii) That the said order be passed preferably within two weeks after the appearance on behalf of the applicants therein; and
- iv) That in the event of the learned Magistrate passing a preliminary order on merits of the application u/s 145(1) of the Code of Criminal Procedure, then he shall dispose of the entire proceeding to its termination and finality expeditiously and preferably within 3 months thereafter.

38. At this juncture, Shri Vashi, the learned Counsel for the respondents company, makes an oral motion for certificate of fitness to appeal to the Supreme Court and makes an incidental prayer for stay of the execution of this order. In my opinion, there is absolutely no ground made at in support of the oral motion and there is no propriety even in granting the stay as prayed for. The facts are quite clear and the law is well settled and the motion is, therefore, rejected.