
(1973) 06 MP CK 0001
In the Madhya Pradesh High Court

The State of Madhya Pradesh

APPELLANT

Vs

Badgaiya and Others

RESPONDENT

Date of Decision : 25-06-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 438, 45

Citation : (1974) CriLJ 1517 : (1976) ILR (MP) 562 : (1974) JLJ 449 : (1974) 19 MPLJ 471 : (1974) MPLJ 471

Hon'ble Judges : Shiv Dayal Shrivastava, J;S.M.N. Raina, J

Bench : Division Bench

Judgement

S.M.N. Raina, J.

This is a reference u/s 438 of the code of Criminal Procedure arising out of proceedings under" Section 145 of the Code of Criminal Procedure.

On 1.7.1963 Dukhni (Patty No. 1) filed an application before the Sub-Divisional Magistrate, Sohagpur, u/s 145 of the Code of Criminal Procedure. The case of party No. 1 is that lands in dispute belong to her and she was in possession thereof. Two days before the filing of the application party No. 2 dispossessed her. On receiving the application the Sub.-Divisional Magistrate sent it for police inquiry and report. On receipt of the police-report, the Sub-.Divisional Magistrate passed a preliminary order on 2-9-1968. After holding due enquiry into the dispute final order was passed on 3-4-1969 in favour of party No. 1 directing that party No. 1 be put in possession of the land in dispute. Party No. 2 was directed not to interfere with the possession of Party No. 1. Being aggrieved by this order party No. 2 filed a revision petition before the Additional Sessions Judge, Shahdol who has submitted this reference with recom-mendation that the final order dated 3-4-1969 be quashed. When the reference came before the learned Single Judge (K. K. Duby, J.) for hearing, he submitted the papers to the Chief Justice for consideration of the following question by a larger Bench. ""Whether a Magistrate loses jurisdiction to pass a preliminary order and is precluded from continuing the proceedings u/s 145, Code of Criminal Procedure, after the lapse

of two months of forcible dispossession from the land and could the Magistrate order restoration of the possession in such cases to the complainant ?" The case has, therefore, come up before us for considering the aforesaid question.

The learned Single Judge has observed in the opening paragraph of the order of reference that there is divergence of opinion as to the jurisdiction of Magistrate to pass a preliminary Section 145 of the Code of Criminal Procedure (hereinafter referred to as "the Code") two months after dispossession of the complainant from the disputed land. With great respect for the learned Judge it appears to us that there is not controversy whatsoever regarding jurisdiction of a Magistrate to pass a preliminary order 2 months after the dispossession of the complainant from the disputed land. The object of Section 145 of the Code is to prevent a breach of the peace on account of a dispute over land by bringing before the Court the disputing parties in order to ascertain who was in immediate possession and to protect his possession until the rights of the parties are effectively determined by a proper tribunal. Where a dispute exists concerning and land and such dispute is likely to cause breach of the peace, the Magistrate has jurisdiction to pass a preliminary order under Sub-section (I) of Section 145 of the Code and to proceed to hold a pro-per enquiry as required by Sub-section (4) thereof. The date on which a particular party was dispossessed may be material for the purpose of determining in whose favour the final order may be passed. But it is not at all material for the purpose of passing the preliminary order. The jurisdiction of the Magistrate to pass a preliminary order does not at all depend on the date on which a party was dispossessed and there is nothing in Section 145 of the code to take away the jurisdiction of a Magistrate to pass a preliminary order 2 months after dispossession of the complain-ant from the disputed land. None of the decisions to which the learned Single Judge has referred seems to lay down that the Magistrate loses jurisdiction to pass a preliminary order and is precluded from continuing the proceedings u/s 145 of the Code of Criminal Procedure after the lapse of two months from the date of forcible dispossession from the land.

The real controversy and the divergence of opinion is about the interpretation of the second proviso to Sub-section (4) of Section 145 of the Code which reads as under:

145....

(1) (2) (3)....

(4)

(i) Provided....

(ii) Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

According to the aforesaid proviso the Sub-Divisional Magistrate may treat a party who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order as if he had been in possession at the date of such order. It is clear from the language of the said proviso that the period of two months is to be computed from the date of the preliminary order and not from the date of the application u/s 145 of the Code. But there can be no doubt that the object of this proviso-is to give the party which has been recently dispossessed the protection of the Court under the aforesaid section. If the Magistrate passes a preliminary order on the date of the application itself or within a day or two there of no difficulty may arise but the object of this proviso can very well be defeated by delay, which may be wholly unjustified, or the part of the Sub-Divisional Magistrate in passing the preliminary order. In fact the proviso-can be rendered nugatory by a delay of two months on the part of the Magistrate in passing the preliminary order because even if the aggrieved party approaches the Court immediately after his dispossession he cannot be treated in possession on the date of the preliminary order if such order is passed two-months after the date of the application. This has given rise to divergence of opinion regarding construction of the aforesaid proviso in view of the cardinal rule of Administration of Justice that it is the duty of the Court to see that no injury is done by an act of the Court.

In *Jai Barham v. Eedarnath* AIR 1922 P C 269 their Lordships observed as under act page 271:

It is inherent in the general jurisdiction of the Court to act lightly and fairly according to the circumstances towards all parties-involved.

Their Lordships further quoted with approval the following observations of Cairns, L. C. in *Rodger v. The code Paris* (1871) L R 3 P C 465.

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression "the act of the Court", is used, it does not mean merely the act of the primary Court or of any intermediate Court of appeal but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

Keeping in view of the aforesaid principle an attempt has been made by some of the Courts to put a construction on the proviso which appears to be more in consonance with justice.

In *Chunchu Narayana and Others Vs. Karrapati Kesappa*, it was emphasised that no appreciable time should elapse between the presentation of the complaint or the receipt of the police report and the passing of the preliminary order and the preliminary order should be deemed to have been made when the Magistrate takes cognizance of the matter and satisfies himself about the urgency. The learned Judges applied the legal maxim-which means that when the proceedings had been delayed by the action of the Court the Court may treat it as if it had

taken place on an earlier date in other words the party should not be prejudiced by delay on the part of the Court. The aforesaid decision was followed in Bhadramma and Another Vs. Kotam Raj, . It was held in that case that the ratio in enacting the proviso to Section 145(4) appears to give relief to persons dispossessed within two months from the date of the complaint.

In Gangadhar Singh and Others Vs. Shyam Sunder Singh, , it was held that although the language of a provision of a statute where it is clear and unambiguous, has to be strictly construed But the maxim "acta est" and "nunc pro tunc" would apply where the delay in taking action is entirely due to the Court.

From the language of Sub-section (4) of Section 145 of the Code, it is clear that the material date for the purposes of the said action is the date of the preliminary order and the Court has to decide and maintain the possession of the party who was in possession on the date of the preliminary order. The second proviso of the said subsection however lays down that a Magistrate may treat a party dispossessed within two months next before the date of the order as if he had been in possession on such date. It is difficult to understand why the Legislature treated the date of the preliminary order as the crucial date and not the date on which the party files a complaint. It is however clear that the date of the preliminary order may in many cases coincide with the date of the complaint if the Magistrate acts promptly.

In actions at law usually great importance is attached to the position obtaining on the date of the application or the date of the suit and a party is not permitted to derive any advantage by altering the status quo during the pendency of the application or the suit. The Legislature by treating the date of the preliminary order as the crucial date has ignored this vital principle and it may lead to gross injustice where a Magistrate fails to act promptly. This could be demonstrated by an illustration. If a party in lawful possession moves the Sub-Divisional Magistrate by an application u/s 145 of the Code of Criminal Procedure on 1st of January, on the ground that he apprehends wrongful dispossession by another party. He is ultimately dispossessed on the 10th of January and for some reason or the other the Sub-Divisional Magistrate passed the preliminary order on 14th of March. If we strictly construe the provisos of Sub-section (4) of Section 145 of the Code the Sub-Divisional Magistrate would be rendered helpless and unable to give any relief to the party who moved the application merely because there was delay in passing of the preliminary order and the final order will be in favour of the wrongdoer. But the question is whether it is permissible to construe the aforesaid proviso so as to treat the date of the complaint as the material date according to the accepted principles of construction of statutes.

Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. (Vide Maxwell on the Interpretation of Statutes at page 29/-). In the instant case the language seems to be quite plain and the expression "date of the order" in Sub-section (4) of Section 45 clearly

means the date of the preliminary order referred to in Sub-section (1) thereof. It is no doubt true that this construction may lead to hardship in some Cases but that by itself is no reason for construing it otherwise since the words are not susceptible of any other inter-c. In this connection the following observations in "Maxwell on the Interpretation of Statutes Twelfth Edition at page 29" are pertinent

The desirability or the undesirability of one conclusion as compared with another cannot furnish a guide in reaching a decision. Where by the use of clear and unequivocal language capable of only one meaning anything is enacted by the Legislature it must be enforced however harsh or absurd or contrary to common sense the result may be. The interpretation of a statute is not to be collected from any notions which may be entertained by the Court as to what is just and expedient words are not to be c, contrary to their meaning as embracing or excluding cases merely because no good reason appears why they should not be embraced or excluded. The duty of the Court is to expound the law as it stands, and to "leave the remedy (if one be resolved upon to others.

Thus it would appear that according to accepted cannot of construction of statutes the language of the proviso must be given effect to although it may lead to injustice in some cases leaving it to the Legislature to remedy the defect by suitably amending Sub-section (4) of Section 145 of the Code of Criminal Procedure.

The literal construction was adopted by the Nagpur High Court in a number of cases. In AIR 1926 371 (Nagpur) it was held that Sub-section (4) makes it incumbent on the Magistrate to decide which of the parties was in possession on the date of the preliminary order and the proviso only applies if any other party had been forcibly dispossessed within two months thereof.

In Emperor v. Parashram (1930) 26 Nag L R 377 : 1931 Cri L J 222 a similar view was expressed. In Emperor v. Sunder-Lal ILR (1937) Nag 174 : A. I R 1936 Nag 271 it was held that the period of two months laid down in the proviso to Section 145(1) of the Code of Criminal Procedure cannot be extended whatever may be the cause of delay in passing the preliminary order under the section. In Moolchand Patni v. The State of M. P. 1968 MPL J 241, Nalk J. held that where the complaint was filed on 30th May. 1964. the passing of the preliminary order on 9-7-1964 cannot be said to be without jurisdiction if on that date the Magistrate was satisfied that a dispute likely to cause breach of the peace existed. He left the question open whether a just cause can be defeated by laches on the part of the Magistrate. The following observations in paragraph 7 in this connection are pertinent.

I am not deciding the question whether, in conceivable cases, by importing the proviso or otherwise, a person who has been forcibly and wrongfully who has come to Court well within time is entitled him to relief under the second proviso to Sub-section (4) of Section 145 of the Code and who has become disentitled to

rash relief because of the laches on the part of the Court may or may not be given such relief as the his case may require.

While enacting Section 145 of the Code it was contemplated by the Legislature that the Magistrate shall act promptly and would pass the preliminary order on the very date on which the complaint is presented to him whether by a party or by the police, If the Magistrate acts promptly the anomaly and the injustice would not arise. But if the Magistrate fails to act promptly he is found to feel helpless at the time of passing of the final order because he cannot depart from the language of Section 145 of the Code of Criminal Procedure, in dealing with the to. However even though the Magistrate is bound to decide the case on the basis of possession on the date of the preliminary order in accordance with the plain language of section in our view, the position would be somewhat different if the matter comes up before the High Court in revision by the aggrieved party. While dealing with the revision, the High Court can take notice of the laches on the part of the Magistrate and treating that as done which ought to have been done can proceed to decide the case assuming the date of the preliminary order to be the date of the complaint itself. Thus the High Court would be in a position to do justice according to true intention of the Legislature by the preliminary order to have been passed on the date on which it ought to have been passed.

In adopting the aforesaid court the High Court would be giving effect to the salutary rule of Administration of Justice that no one should be injured by an act of the court which is fully supported by the legal maxims referred to above. Thus where the delay in passing the preliminary order is attributable entirely to the fault on the part of the Sub-Divisional Magistrate, the High Court can proceed as if the preliminary order was passed promptly. We therefore answer the question referred to us as under :

The Magistrate does not lose jurisdiction to pass a preliminary order and is not precluded from continuing the proceedings u/s 145 of the Code of Criminal Procedure after the lapse of two months of forcible dispossession from the land. Under the section as it stands the Magistrate can order restoration of possession, only where the complainant has been dispossessed within two months of the preliminary order.

Shiy Dayal, J.

I agree with my learned brother in the answer proposed by him. I would only sum up my reasons for that answer.

(1) The requirement of Section 145 Criminal P.C. is that the Magistrate must decide the question whether any, and which, of the parties was in possession of the subject matter in dispute at the date of the preliminary order. The crucial date is the date of the preliminary order (vide Sub-section (4) of that section).

(2) The second proviso to Section 145(4) embodies a legal fiction, by virtue of which if it appears to the Magistrate that any party was forcibly and wrongfully

dispossessed within two months immediately preceding the date of the preliminary order, he may treat the party so dispossessed as if he had been in possession at the date of the preliminary order within the meaning of Sub-section (4).

(3) On the true and plain construction of the above said second proviso, it must be said that where the preliminary order is passed after two months of the date of dispossession, the said proviso has no application. The legal fiction cannot be stretched beyond the scope permitted by its language. When the words of the statute are clear, they must be given effect to and there is no room left for interpreting it so as to enlarge its scope. In such a case, the doctrine of *nun pro tunc* or the maxim *acta curiae neminem gravabit* (the act of the Court shall no man is not attracted. There is no ambiguity, absurdity or hardship. It must always be recalled that the primary object of Section 145, Criminal P.C. is prevention of breach of the public peace, arising in respect of a dispute relating to immovable property, and to settle the matter temporarily by maintaining status quo-until the rights of the parties are decided by a competent Court. The Magistrate under that section does not extend to a determination of the rights of the parties. He merely enquires into the fact of actual physical possession and not the nature thereof. (4) Where the deeming provision is not applicable, the Court has to concentrate on the requirements of Sub-section (4) only; and the fiction contained in the second proviso to that sub-section is not available there fore .in a case where the preliminary order was passed after two months of the date of application complaining wrongful dispossession of the complainant the Court cannot restore possession to him obviously because on his own showing the complainant was not in possession within two months immediately preceding the preliminary order.

(5) For the same reasons even the High Court cannot assume the date of the complaint to be the date of the preliminary order as it is equally bound by the provisions of sub- section (4) and its second proviso as construed above.

BY THE COURT

We answer the question referred to us as under:

The Magistrate does not lose jurisdiction to case a preliminary order and is not precluded from continuing the proceedings u/s 145 of the Code of Criminal procedure after the lapse of two months of forcible dispossession from the land.

Under the section, as it stands, the Magistrate can order restoration of possession, only Where the complainant has been dispossessed within two months of the date of the preliminary order.