

(2001) 07 AHC CK 0191
In the Allahabad High Court
Case No : Criminal Revision No. 1834 of 2001

Uma Nath and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116, 145(1), 146(1), 397(2)

Citation : (2001) 2 ACR 1585

Hon'ble Judges : J.C. Gupta, J

Bench : Single Bench

Advocate : Ali Hasan, for the Appellant; G.A., for the Respondent

Final Decision : Dismissed

Judgement

J.C. Gupta, J.—Heard Sri Ali Hasan, learned Counsel for the applicants in revision.

2. This revision is directed against the order dated 15.5.2001 passed by revisional court setting aside the order dated 5.10.2001 made u/s 145 (1), Cr. P.C. and the order dated 17.2.2001 made u/s 146(1), Cr. P.C. attaching the property in dispute.

3. The dispute relates to a few agricultural plots whose details are given in the police challani report dated 25.8.2000.

4. Parties to the proceedings are inter-related as per the following pedigree:

Ram Naresh

Ram Nihore Ram Murat (Opp. party No. 2) Uma Nath Kshma Nath Ram Asrey
Ram Sahai (Applicant (Applicant (Opp. party (Opp. party No. 1) No. 2) No. 3)
No. 4)

5. Ram Naresh was undisputedly the recorded tenure-holder of the disputed plots. After his death, dispute arose between the parties with regard to the holding left by Ram Naresh so much so that the dispute led to some murders and

other criminal incidents. On 25.8.2000 police submitted a report before Sub-Divisional Magistrate, Jaunpur, stating that there was a dispute between the parties in relation to the plots in question. After the first party (applicants in revision) succeeded in getting the ex parte order of mutation set aside, which was in favour of opposite parties, a few incidents including murders have occurred. The first party, i.e., applicants are history sheeters and hardened criminals and they could commit any serious crime. Therefore, a prayer was made that proceedings u/s 145, Cr. P.C. be drawn and property attached and given in custody of an independent person.

6. On 5.10.2000, the Magistrate passed preliminary order u/s 145(1), Cr. P.C. and thereafter on 17.2.2001 passed order of attachment u/s 146(1), Cr. P.C. The validity of these orders was challenged by opposite parties in Criminal Revision No. 182 of 2001 before Sessions Judge on the ground of their being without jurisdiction, null and void. The learned Sessions Judge by the impugned order has set aside both the orders of the Magistrate and quashed the proceedings.

7. Learned Counsel for the applicants in revision in a very emphatic manner submitted before this Court that the revision filed before the Sessions Judge was not maintainable on account of the statutory bar contained in Section 397(2), Cr. P.C. as both the orders of the Magistrate made under Sections 145(1) and 146(1), Cr. P.C. were interlocutory orders, therefore, the order of the Sessions Judge allowing the revision is liable to be set aside.

8. It is now well-neigh settled that in deciding the question whether an order is interlocutory or not, the sole test is not whether such order was passed during the interim stage of proceeding but the feasible test is whether by upholding the objection raised by a party, would it result in culminating the proceeding. If it has the effect of bringing the proceedings to an end, such an order would not be interlocutory in nature as envisaged in Section 397(2), Cr. P.C. Vide *Amar Nath and Others Vs. State of Haryana and Another*, ; *Kurukshetra University and Another Vs. State of Haryana and Another*, ; *V.C. Shukla Vs. State through C.B.I., and K. K. Patel v. State of Gujrat* (XLI) 2000 ACC 353.

9. Where an order is wholly without jurisdiction, it is a nullity and non-est with the result that any proceeding drawn subsequent thereto will become void ab initio and if such order is set aside, it has the effect of wiping out the whole proceedings. In relation to such an order, bar of Section 397(2), Cr. P.C. cannot be applied merely on the ground that the said order was passed at the initial or intermediate stage of the proceedings. It will not be correct to say that bar of Section 397(2) will apply to all orders excepting the final orders by which proceedings are culminated. The expression "interlocutory orders" has been used in Section 397(2), Cr. P.C. in a restricted sense only. To lay down that all orders other than "final orders" disposing of proceedings will fall within the sweep of the expression "interlocutory orders" will not be a correct proposition. "Interlocutory order" as envisaged in Section 397(2) denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or liabilities

of the parties and any order which substantially affects the rights of the parties even, if, made during the pendency of lis, is not an interlocutory order.

10. Therefore, where it is shown that on admitted facts, the Magistrate could not assume jurisdiction to initiate proceedings u/s 145, Cr. P.C., the bar of Section 397(2) cannot be pressed into service, as in such a situation, orders made under Sections 145(1) and 146, Cr. P.C. will be null and void having no sanctity in law and if they are set aside, they have the affect of culminating the proceedings as void ab initio.

11. In the present case, the contention of the opposite parties before the lower revisional court was that even as per the own case of the applicants in revision, the Magistrate did not possess jurisdiction to initiate proceedings u/s 145, Cr. P.C. The case of applicants in revision was that after the death of original tenure holder Ram Naresh, they have acquired one half share in the disputed plot under law of succession, yet the opposite parties have taken actual possession of the entire property and were not allowing the applicants to make use of their half share. It is also pertinent to note that even before this Court in the affidavit filed along with memo of revision, applicant No. 2 Kshama Nath in paragraph 7 thereof has stated in clear words "It is made clear that the entire land of Ram Naresh (deceased) is in possession of opposite party Nos. 2 to 4 and for obtaining the half share, many a times incidents took place between the parties....."

12. Again in paragraph 11 of the affidavit, it has been stated "that, the entire property in dispute belongs to one Ram Naresh, grandfather of revisionists as well as father of opposite party No. 2 and grandfather of opposite party Nos. 3 and 4 and both the parties have half-half share in the property of Ram Naresh. It is further made clear that the entire property is in possession of opposite party Nos. 2 to 4..."

13. It is, thus, obvious that even as per their own case, the applicants, have acquired half share in the plots in question after the death of Ram Naresh, but they are out of possession as the entire land is in actual possession of opposite party Nos. 2 to 4 who are not allowing them to take possession of the land to the extent of their half share. It was nowhere alleged that at any point of time, they had come in exclusive possession of any part of the disputed plots. The police challani report dated 25.8.2000 also stated that after the ex parte mutation order made in favour of opposite parties had been set aside, the applicants in revision started laying their claim in the disputed property with the use of force, which has given rise to a dispute between the parties, as such there is imminent danger of breach of peace.

14. The moot question for consideration is whether on these facts and as per the own showing of the applicants, could the Magistrate exercise jurisdiction for initiating Section 145, Cr. P.C. proceedings in relation to the plots in question?

15. For initiating proceedings u/s 145, Cr. P.C., the Magistrate gets jurisdiction

only where there is a dispute between the parties in relation to possession of immovable property and not merely to their rights or title. So long as one person claims to be in actual possession to the exclusion of others and alleges that some other person by force seeks to interfere with his possession or alleges that he has been forcibly and wrongfully dispossessed within two months next before the date of preliminary order and on account of the said dispute, there is apprehension of breach of peace, then only the occasion for exercising powers u/s 145, Cr. P.C. can arise or, in other words, proceedings u/s 145, Cr. P.C. can be resorted to only when both the conditions laid down therein are shown to co-exist, i.e., that there is a dispute between the parties in relation to actual possession of some immovable property and that the said dispute is likely to lead to a breach of the peace. If there is merely a dispute with regard to possession without there being any likelihood of the breach of the peace, the Magistrate is not competent to take recourse to Section 145, Cr. P.C. and the dispute is to be resolved by a court of competent jurisdiction. Similarly, if there is only an apprehension of breach of peace without there being any dispute relating to actual possession and the dispute is only in relation to right or title of immovable property, then also Magistrate will have no power or jurisdiction to proceed u/s 145, Cr. P.C. and in such a situation, the proper course for him is to proceed u/s 107/116, Cr. P.C.

16. "Possession" contemplated u/s 145, Cr. P.C. is actual physical possession of the subject of dispute, i.e., possession in fact as distinguished from possession implied by law which is commonly known as "constructive possession". The Magistrate in a proceeding u/s 145, Cr. P.C. is concerned only with the question of actual possession and he has to address himself on this issue alone irrespective of any right or title to possession. He cannot proceed to decide rights or title of the parties without there being any dispute relating to actual physical possession of the property in question. It is not open to him to enable a party to by-pass civil or revenue proceedings. Sub-section (4) of Section 145, Cr. P.C. clearly states that inquiry as to possession is to be made without reference to merits or the claims of any of the parties to possess the subject of dispute. He does not possess jurisdiction to decide whether on the basis of his title or right, a party could be put in actual possession of the disputed property. Proceedings u/s 145, Cr. P.C. do not contemplate case of joint property or joint holding or joint possession. In relation to joint property, proceedings u/s 145, Cr. P.C. cannot be drawn on the basis of constructive joint possession, unless a co-owner claims his actual physical possession over a specified portion of joint property on account of some settlement or long user, etc.

17. In the present case, even according to the own case of the applicants, the entire disputed land is in actual possession of the opposite parties and they merely claimed half share therein being descendants of Ram Naresh. Their further admitted case is that though they are having half share in the property in question, yet the opposite parties are not allowing them to take possession to the extent of their share. It is not their case that they were in actual possession

of any specified portion of the joint-holding at any point of time and they were dispossessed therefrom. On these admitted facts, no proceedings u/s 145, Cr. P.C. could be legally initiated. The Magistrate thus lacked inherent jurisdiction in passing orders under Sections 145(1), Cr. P.C. and 146(1), Cr. P.C. These orders were certainly without jurisdiction and thus could not be characterized as "interlocutory orders". The learned Sessions Judge was, therefore, fully justified in allowing the revision of the opposite parties and in quashing the proceedings initiated u/s 145, Cr. P.C.

18. For the reasons stated above, this revision is dismissed. However, it is made clear that dismissal of this revision will not prevent the learned Magistrate from taking action u/s 107/116, Cr. P.C. if he deems such an action necessary.