

(1995) 04 BOM CK 0005

In the Bombay High Court

Case No : Criminal Writ Petition No. 596 of 1994

Vishwanath Kashinath Virkar and Others

APPELLANT

Vs

Nitinchand Keshavji Gala and Others

RESPONDENT

Date of Decision : 18-04-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 399, 482

Citation : (1995) 3 BomCR 525 : (1995) 97 BOMLR 280 : (1995) 2 MhLj 664

Hon'ble Judges : G.R. Majithia, J

Bench : Single Bench

Advocate : Anil V. Anturkar, for the Appellant; Shidore, for respondent Nos. 1 and 2 and D.T. Palekar, Assistant Public Prosecutor, for the respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

G.R. Majithia, J.—Vishwanath Kashinath Virkar and 6 others (hereinafter referred to as "original party No. 2") have challenged the order passed in Criminal Revision Application No. 167 of 1993 by 4th Additional Sessions Judge, Satara, in this Criminal Writ Petition.

2. The factual matrix is as under :--

R.B. Mane, Assistant Police Inspector, submitted a report on March 20, 1993 to the Executive Magistrate, Koregaon, stating therein that property bearing No. C.T.S. 1933, comprising of a godown and a shop, is in the possession of Nitinchand Keshavji Gala and Narayan Keshav Virkar (hereinafter referred to as "original Party No. 1"); that on March 19, 1993, original Party No. 2 entered into the shop and godown by force and damaged and threw away the articles lying therein; that original Part No. 2 has also closed the door opening towards the godown by fixing a lock and wooden battens on the door; that original Party No. 1 lodged a complaint on the basis of which proceedings under sections 107 and 151 of the Criminal Procedure Code (hereinafter "the Code") were initiated

against the parties; that the parties could not arrive at a compromise and proceedings u/s 145 of the Code were instituted.

On receipt of the complaint, the Executive Magistrate issued notices to both the parties, viz. original Party No. 1 and original Party No. 2, on March 26, 1993, directing them to file their say about the report filed by the police. The parties filed their say and also placed documents on record.

On August 19, 1993, the Executive Magistrate passed the following order :--

"Both the parties have filed several other documents as evidence in support of their claim, but these documents need not be taken into consideration while deciding the case.

As per above stated grounds and reasoning I declare as per section 145(4) Cr.P.C. that prior to the two months from the date of the receipt of report party No. 2 have forcibly and illegally dispossessed party No. 1 from the property in this dispute. Hence the possession be given to party No. 1 by taking the same from the party No. 2 according to section 145(6) Cr.P.C. The notices be served to both the parties accordingly in writing."

Original party No. 2 challenged this order in revision in Criminal Revision Application No. 167 of 1993 before the Sessions Judge, Satara, which was entrusted to 4th Additional Sessions Judge, Satara, for disposal. The learned Additional Sessions Judge, after perusing the record, found that the learned Executive Magistrate did not pass a preliminary order as contemplated u/s 145(1) of the Code. He also found that the parties were not given proper opportunity to lead their oral evidence. In para 11 of the order, he stated thus :

"11. In view of the above circumstances, I think that it is not necessary to decide this revision petition on merits but I think it deserves to be remanded back to the learned Magistrate for fresh enquiry after passing necessary preliminary order and after giving proper opportunity to both parties to lead their oral evidence as well as documentary evidence. Taking into consideration the circumstances in this matter, I think there is no necessary to saddle the costs of this revision petition to either of the parties. Hence, the following order is passed.

ORDER

Revision Petition is partly allowed.

Judgment and order under this revision petition is set aside and the matter is remanded to the learned Taluka Executive Magistrate, Koregaon and he is directed to pass the necessary preliminary order after his due satisfaction and then allow both the parties to lead their evidence if they want to do so. Taking into consideration, the present circumstances, the learned Magistrate is also directed to expedite this matter and decide the same as early as possible, preferably within two months from the receipt of the R & P to that Court."

This order is under challenge in this writ petition.

3. Narayan Keshav Virkar (original party No. 1 in the proceedings u/s 145 of the Code) filed a suit with regard to the property in the Court of Civil Judge, Junior Division, Koregaon, which came to be registered R.C.S. No. 109/1992. He made the following prayers in the suit:--

"(a) the portions shown in the map as A.B.C.D. be out to the possession of the plaintiffs by removing the encroachment made by the defendant thereon;

(b) It is declared that the plaintiff is the owner of the property bearing C.T.S. No. 1939;

(c) costs of this suit be recovered from the defendants and be given to the plaintiffs. Along with the suit, he also filed an application under Order 39, Rules 1 and 2 of the Civil Procedure Code, which was declined.

4. Learned Counsel for the petitioners submitted that the learned Additional Sessions Judge having found as a matter of fact that the learned Executive Magistrate did not pass a preliminary order u/s 145(1) of the Code, the entire proceedings stood vitiated and the learned Judge was in error in remanding the case for passing a fresh preliminary order and thereafter permitting the parties to lead oral evidence. Section 145(1) of the Code reads thus :--

"Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute."

The object of section 145 is to prevent breach of peace, to provide a speedy remedy by bringing the parties before the Court, and ascertain who of them was in actual possession and to maintain status quo until their rights are determined by a competent Court. The proceedings u/s 145 are primarily concerned with the prevention of breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted therefrom in due course of law and are not meant for the purpose of evicting any person from any land.

5. It is essential for the assumption of jurisdiction by the Magistrate that he should be "satisfied" from a report of a police officer or from other information, which would include an application by the party dispossessed, that there is likelihood of breach of the peace. The question whether on the material before the Magistrate, he should initiate proceedings u/s 145 or not is within his discretion. No hard and fast rule can be laid down as to the sufficiency of the material for his satisfaction. Where the Magistrate fails to record in his preliminary order the reasons for his satisfaction, or the grounds for his satisfaction, the order cannot be sustained. Failure to record a finding by the

Magistrate vitiates the proceedings. If the Magistrate did not record reasons for passing the preliminary order, the order is patently illegal. In *Anadi Lal Mukherjee and Others Vs. Sukh Chand Mandal and Others*, , it was held thus :--

"...It is necessary for making an order of this description that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question."

The ratio of that judgment was followed in *Peria Mannadha Goundar and Others Vs. Marappa Goundar*, , where it was observed thus :--

"13. Section 145(1), Criminal P.C. makes it also clear that the Magistrate passing a preliminary order must be satisfied that the likelihood of the breach of the peace exists on the date of the preliminary order. If the preliminary order is based upon an earlier report, long before the preliminary order was passed and without any further fresh information received in respect of the dispute, it cannot be said that the Magistrate is satisfied that the likelihood of the breach of peace existed on the date of the preliminary order.

6. This Court had an occasion to examine the mandatory provisions of section 145(1) of the Code in *Laxman Bhikaji Pawar and Others Vs. Bahimkhan Balekhan Dalwai and Others*, . The learned Judge, after comparing the provisions of section 145(1) and section 146, observed thus :--

"17. A comparative reading of these two sections, either old or new, the new going a step ahead in taking out the proviso of emergency and adding it in section 146, would make it clear that in the first instance the Magistrate is required to make an order in writing stating the grounds of his being so satisfied. The Legislature has put in the fore-front the satisfaction of the Magistrate as to the likelihood of the existence of a breach of peace. These provisions, to my mind, are mandatory. The omission to observe them vitiates the entire proceedings as they are the prerequisites or sine qua non for instituting proceedings u/s 145 of the Cr.P.C.

18. The next stage is the service and publication of the preliminary order contemplated by sub-sections (1) and (3). If there is no preliminary order, one fails to understand what is required to be served on the parties or at the property. Obviously, if there is no preliminary order within the contemplation of sub-section (1) of section 145, then the requirements of sub-section (3) cannot be satisfied or complied with. Sub-section (3) as noted above, deals with the publication of the order made in writing stating the grounds. If in a given case no such order is made and served in accordance with the provisions of sub-section (3) then I am afraid, the very proceedings would be without jurisdiction. I am in respectful agreement with the view taken in *Laxman's* case. In the instant case, the learned Magistrate omitted to observe the mandatory provisions of section 145 of the Code and did not draw a preliminary order. Drawing of a preliminary order was sine qua non for initiating action u/s 145 of the Code. Since the order

was not drawn, the institution of the proceedings stands vitiated. The learned Additional Sessions Judge was ill-advised not to draw his attention to the mandatory provisions of section 145(1) of the Code. He was in error in remanding the case and directing the Magistrate to pass a fresh preliminary order. Whether there was a likelihood of breach of the peace or not has to be seen as on the date when the police report is filed before the Magistrate. If on that date there was no likelihood of breach of the peace, the Magistrate could not assume jurisdiction under this section.

7. Apart from this, the Civil Court is already seized of the matter. If any of the parties to the lis fears that his or her right is likely to be threatened, he or she can move the Civil Court from redressal of the wrong.

8. I am not inclined to deal with the other submissions made by the learned Counsel for the petitioners as I am unable to sustain the order of the learned Additional Sessions Judge on the ground that the proceedings before the Magistrate stood vitiated as he had not served the order under sub-section (3) of section 145 of the Code which was to be prepared u/s 145(1) of the Code.

9. Learned Counsel for respondent Nos. 1 and 2 raised a preliminary objection that the writ petition is not maintainable in view of the bar created u/s 397(3) of the Code. He further submitted that the petition under Article 227 of the Constitution at the instance of the petitioners is not maintainable. I had the occasion to deal with this aspect of the matter in *Mrs. Kumudesh Bhandari v. Ms. Gopika Tapuriah*, Criminal Application No. 1614 of 1994, decided on April 7, 1995, where I have held that there is no bar to the maintainability of a petition u/s 482 of the Code and I could exercise jurisdiction u/s 482. For the same reasonings, I can interfere with the order of the learned Additional Sessions Judge which I find is patently illegal, in exercise of powers under Article 227 of the Constitution.

10. For the reasons stated above, the writ petition succeeds and is allowed and the following order is passed :--

(i) The order of the Additional Sessions Judge passed in Criminal Revision Application No. 167 of 1993 dated March 25, 1994 to the extent it has remitted the case for passing of a fresh preliminary order and permitting the parties to lead oral evidence is set aside.

(ii) Resultantly, the order of the Magistrate passed in Chapter Case No. 1/1993 dated August 19, 1993 is set aside. As he did not proceed in accordance with the provisions of section 145(1) of the Criminal Procedure Code, the entire proceedings u/s 145 stand vitiated.

(iii) The police or the parties are at liberty to move a fresh application u/s 145 of the Criminal Procedure Code if an eventuality mentioned therein arises.

(iv) Rule is made absolute in the above terms.

Certified copy expedited.