

(1981) 11 AP CK 0003

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No. 398 and Criminal Revision Petition No. 392 of 1981

Wajid Mirza

APPELLANT

Vs

Mohammed Ali Ahmed and Others

RESPONDENT

Date of Decision : 27-11-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 145(1), 145(5), 146, 246(1)

Citation : (1982) 1 APLJ 39

Hon'ble Judges : Chennakesav Reddy, J

Bench : Single Bench

Advocate : G. Padmanabha Reddy, for the Appellant; T.V. Sarma, for the Respondent

Judgement

1. This revision petition, which arises out of preventive action u/s 145 of Cr.P.C., raises two questions of law of somewhat general interest and importance.

1. Whether the Magistrate becomes functus officio the moment he makes an order dropping the proceedings under S. 145(5), Cr.P.C. and thereafter has no jurisdiction to pass any order relating to the disposal of the property ?

2. Whether a person who has unsuccessfully fought a criminal revision case before the Sessions Judge can maintain a revision petition before the High Court under Sections 397 and 399, Cr.P.C. ?

2. The facts and circumstances giving rise to this case are neither complicated nor long drawn out; On the information laid by the Sub-Inspector of Police, Abid Road Hyderabad, that a dispute likely to cause breach of peace exists concerning the house bearing Municipal No. 5.9.15, Chapel Road, Hyderabad, the Executive Magistrate, Hyderabad, was satisfied that the said dispute was likely to cause a breach of peace, passed a preliminary order under S. 145(1), Cr.P.C. on 10-12-1980 and issued notices to both the parties to make their appearance and put in the written statements of their defence in respect of their claim of actual

possession of the property in dispute. The Magistrate also made an order of attachment on the same day and directed the Deputy Tahsildar to take possession of the house bearing No. 5.9.85 (Now No. 5.9.85/A/2). Accordingly, the Deputy Tahsildar took possession of the house on 11-12-1980 under a Panchanama.

3. Both the parties filed their written statements stating that there neither existed nor exists any cause for the apprehension of the breach of peace and so the proceedings may be dropped. Thereupon, the Magistrate called for a report from the Inspector of Police, Abid Road, who inspected the premises in dispute and reported that there was no apprehension of breach of peace. So the Magistrate cancelled the preliminary order u/s 145(5), Cr.P.C. and directed the Deputy Tahsildar to hand over possession of the premises to the persons, M/s. Ashfaq Alam and Masood Alam, from whose possession the property had been taken into his custody under the preliminary order dated 11-12-1980. Against the said order, respondents of the B party filed a Revision Petition before the Metropolitan Sessions Judge, Hyderabad under S. 397(1), Cr.P.C. The Sessions Judge went into the question as to which party was entitled to possession of the property in dispute, set aside the order of the Magistrate and directed the Tahsildar to re-deliver the property to the B party respondents. Now the A party respondent has preferred this revision petition.

4. The learned counsel for the petitioner A party submits that the Sessions Judge was in error in going into the question as to who was entitled to the possession of the property in dispute after the proceedings were dropped u/s 145(5), Cr.P.C. He argues that on the dropping of the proceedings under S. 145(5), Cr.P.C. the position of the parties would be precisely the same as it were when the proceedings were started and the Magistrate has jurisdiction to restore to the parties status quo ante, and does not become functus officio.

5. Mr. T. V. Sarma, appearing for the B party respondent counters this argument and submits that this petition is barred u/s 399(3), Cr.P.C. and that in any case, according to him, the very foundation for any preventive action was absent in this case.

6. The first question is : on dropping the proceedings u/s 145(5), Cr.P.C. is the Magistrate functus officio and has no jurisdiction to pass any order relating to the disposal of the property attached by him u/s 146, Cr.P.C.

7. Judicial opinion on the question is divided. However, the preponderance of judicial authority appears to be in favour of the view that after the cancellation of the preliminary order passed u/s 145(1), Cr.P.C., by an order under S. 145(5), Cr.P.C. the Magistrate is not functus officio and he has jurisdiction to restore possession of the property to the parties from whom possession was taken at the time of attachment.

8. A Division Bench of the Allahabad High Court in Smt. Kaniz Fatima Bibi Vs. State of Uttar Pradesh and Others, ruled :

"..... after passing an order dropping the proceedings u/s 145, Cr.P.C. the Magistrate has no further jurisdiction to take any proceedings under the provisions of S. 145 of Cr.P.C.

But it is not the same thing to say that he would have no right to pass an incidental order. Certain action was taken by him under the belief that he had jurisdiction to proceed u/s 145, Cr.P.C. and it is only right that he should have inherent powers to restore the conditions that existed before he took action or in other words to wind up the proceedings by restoring the status quo ante. Again the proceedings u/s 145, Cr.P.C. having been dropped, the attachment could not be continued Under the provisions of S. 145, Cr.P.C. the Magistrate could not, after dropping the proceedings, enquire into the fact as to who was in possession on the date of the preliminary order. Ordinarily, whenever an attachment order is passed, the attachment is made very soon after the preliminary order. An enquiry as to the person from whose possession the property was attached on the date of the attachment may, therefore, in most cases be tantamount to making an enquiry as to who was actually in possession on the date of the preliminary order, something which the Magistrate is not entitled to do That however, does not mean that the Magistrate must not pass incidental orders as regards the delivery of possession of the property in his possession. He has still the advantage of the material already on the record. Use of these materials does not flout any of the provisions as regards the restraint of further action. He may, therefore, utilise the evidence already on the record, evidence which may be contained either in the memorandum of attachment (Fard quirqi) or in the evidence already recorded and exercise his judicial discretion as to the person to whom the property is to be delivered. He may, if he is satisfied by the evidence already on the record that any particular person was in possession at the time the attachment was made, hand over the property to him. If he is not so satisfied, the obvious thing for him is to pass no orders."

9. In Ram Lal Vs. Mangu, the learned Judge, after a careful review of a number of precedents, held :

"Whenever it is made to appear to a Magistrate, or he comes to that conclusion suo motu that there never was any likelihood or there is no further likelihood of a breach of the peace relating to a dispute as respects land or other immovable property within the meaning of sub-Section (1) of S. 145, Cr.P.C., the Magistrate cannot but drop the proceedings under sub-Section (5) of that section. He must of necessity remove the order of attachment in such a case which may have been passed by him earlier under sub-Section (4). The overwhelming trend of authority in the various High Courts seems to be that it is open to the Magistrate while dropping the proceedings and removing the attachment in such to make an incidental order to restore possession to the party or parties from whom it had been taken at the time of attachment, and the Magistrate cannot possibly be said to be functus officio when he passes any such orders having passed the order under sub-Section (5) becomes functus officio is correct in the sense that

thereafter he can have no authority to decide the question of actual possession on the merits and after having gone minutely into the evidence produced by either of the parties to the case, the simple reason being that if he is permitted to do, so, he would thereby be exercising jurisdiction under sub-Section (1) of which by his own order he has divested himself

But it would be a mistake in my humble judgment to think (as there is authority for that proposition as already stated above) that he is functus officio even to make such incidental orders as he is in the very nature of things require to pass so that no party might be put to any prejudice on account of the order of the court itself. In other words, the Magistrate can restore the party to possession from whom possession was taken at the time of attachment provided there is clear material on the record to show that. Where, however, there is no such material the Magistrate must rest content with the passing of an order removing the attachment and leave the parties to seek their remedy in a proper court of law."

10. A Division Bench of the Nagpur High Court consisting of Hidayatullah and R. Kaushalendra Rao, JJ., in *State v. Sheoratan Singh* AIR 1951 Nag 201 : (52 Cri LJ 1) held :-

"Where the Magistrate acts under sub-Section (5) and cancels the preliminary order passed under sub-Section (1) there would be nothing wrong if he passes an incidental order cancelling the order of attachment as well. It is but right that when the jurisdiction to act under the section is found wanting the Magistrate should restore the status quo ante. When it is not possible to determine the status quo ante because of the difficulty in determining from whom the property was attached the appropriate order to pass is to retain the property in the custody of the Court and direct the parties to have recourse to a Civil Court to obtain possession of the property."

11. M. S. Nesargi, J., of the Karnataka High Court in *Chowdaiah v. Venkataramanappa* (1979) Mad LJ (Cri) 584 : (1978 Cri LJ NOC 295) agreeing with the view expressed in *Smt. Kaniz Fatima Bibi's case* (1963) (1) Cri LJ 399 (supra) held; that the Magistrate has inherent powers to pass orders as regards the delivery of property under attachment after cancellation of proceedings under S. 145(5), Cr.P.C. The learned Judge, further held that the court was entitled to ascertain from whose possession the property was in fact taken over at the time the attachment was made, although the Court cannot make any enquiry to find out the person who was in possession on the date of the preliminary order, because, the Magistrate could not, after dropping the proceedings, enquire into the fact as to who was in possession on the date of the preliminary order.

12. The opinion of the Madras High Court on this point is divided. The Madras High Court in *Velur Devasthanam Vs. A. Sambandamurthi Nainar*, held that "a Magistrate dropping proceedings does not become functus officio, but has jurisdiction to pass further orders for winding up the proceedings started u/s

145, Cr.P.C."

13. In Donepudi Narasayya and Another Vs. Chiguluri Venkiah and Others, Krishan, J. held :

"... if the Magistrate is not going to make an enquiry to find out who was in such possession on the ground that there is no further likelihood of the breach of the peace and drops proceedings, it seems to me to be hardly correct for him to say that the sale proceeds of the crops should be handed over to the person who raised the crops. That means the Magistrate has to come to a conclusion as regards the very question that he is not going to consider. I am inclined to follow the rules in Chenga Reddi v. Ramaswami Gounden (1915) 1 Mad LW 1032 : (16 Cri LJ 104) and Natesa Naicken v. Raghavachari (AIR 1925 Mad 327) : (26 Cri LJ 512); in preference to that in Mahalakshmi v. Subbarayudya AIR 1923 Mad 472 (1) : (24 Cri LJ 783)."

14. So far as this High Court is concerned, there is no direct decision on this question. In Lingamneni Krishnamurthi v. C. Jaganmohan Rao (1956-2 Andh WR 1002) N. D. Krishna Rao, J., after referring to some of the authorities on the subject observed :

"The principle laid down in these cases is that even after dropping the proceedings u/s 145(5), Cr.P.C., the Magistrate, has jurisdiction to pass incidental orders for the winding up of the proceedings and that he should restore the status quo ante as far as possible. But he should not ordinarily deliver the attached property or its income to one of the parties, because that would imply a decision in favour of that party as regards the, dispute of possession, without any enquiry."

15. The learned counsel for the B party respondents placing reliance on the decision of the Supreme Court in Mathuralal Vs. Bhanwarlal and Another, submits that the Magistrate has no right after dropping the proceedings u/s 145(5), Cr.P.C. to make any further orders since the very foundation for the jurisdiction of the Magistrate, disappeared with the dropping of the proceedings u/s 145(5), Cr.P.C.

16. In Mathuralal's case (supra) the Supreme Court dealing with the scope of S. 145, Cr.P.C. held :

"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 S. 145, sub-Section (5)."

17. In that case, the Supreme Court was not concerned with the question whether the Magistrate has jurisdiction to pass any order by way of winding up of the proceedings after the proceedings are dropped u/s 145(5), Cr.P.C.

18. From the aforesaid review of the authorities on the question, the rule may be summed up somewhat as follows :

On dropping the proceedings under S. 145(5), Cr.P.C. the Magistrate does not become functus officio. He has the jurisdiction to make any incidental or consequential orders by way of winding up to the proceedings and restore possession of the attached property to the party or person from whom the possession had been taken over at the time of attachment. But, the question as to who was in possession at the time of attachment of the property cannot form the subject matter of enquiry as the jurisdiction to make any enquiry as to who was in possession disappears the moment the proceedings are dropped u/s 145(5), Cr.P.C. by the Magistrate. He can, however, ascertain from the material already on record as to the person or persons from whom the possession was taken at the time attachment was ordered u/s 246(1), Cr.P.C. If he is satisfied by the material on record, such as panchanama for attachment, that any particular person or party was in possession at the time of attachment of the property, he should make an order directing restoration of the property to the person from whom the property was attached and taken over. In case it is not possible to restore status quo ante, the appropriate order for the Magistrate to pass is to retain the property in the custody of the Court and direct the parties to have recourse to a Civil Court to obtain possession of the property.

19. Now let me focus my attention to the facts of this, case : The preliminary order u/s 145(1), Cr.P.C. was passed by the Executive Magistrate on 10-12-1980. The property in dispute was attached on 11-12-1980. The Panchanama recorded by the Deputy Tahsildar on 11-12-1980 for the attachment discloses that the property was taken into his custody from the possession of Ashfaq Alam and Masood Alam. Therefore, the proper thing for the Magistrate is to order restoration of the possession of the property to them since they were found in possession of the property at the time of attachment. In the circumstances, the Magistrate rightly ordered, restoration of the possession to Ashfaq Alam and Masood Alam. He made no enquiry for doing so. On the other hand, the learned Sessions Judge made an enquiry u/s 145, Cr.P.C. as to who was entitled to possession of the property which he was not entitled to do, after dropping the proceedings u/s 145(5), Cr.P.C. and set aside the order of the Magistrate and directed delivery of possession to B party respondents. Therefore, the order of the Sessions Judge is wholly illegal and improper and ought to be set aside.

20. Then there remains the question relating to the maintainability of the criminal revision petitions. The learned counsel for the B party respondents submits that since already & revision has been filed before the Sessions Judge invoking the jurisdiction u/s 397(1), Cr.P.C a second revision in respect of the same subject matter is barred under S. 397(3), Cr.P.C. He submits that what the determinant of the bar is as to what was decided in the case and not as to at whose instance the decision was rendered. He pleads that whoever may be the person that invoked the jurisdiction of the Sessions Judge, the decision of the Sessions Judge is final and none of the parties can go against the said decision and again invoke the jurisdiction of the High Court u/s 397(3), Cr.P.C. According to him, the intention of the Legislature was to bind both the parties to the

decision and bar a second revision in respect of any case of the instance of any party. Let me, therefore, have a close look at these provisions.

Section 397 : Calling for records to exercise powers of revision :

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation : All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of S. 398.

(2) The powers of revision conferred by sub-Section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Section 399 : Sessions Judge's powers of revision :

(1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-Section (1) of S. 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1) the provisions of sub-sections (2), (3), (4) and (5) of S. 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as reference to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, decision of the Sessions Judge thereon in relation to such person shall be final and no, further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court."

21. Under S. 435 of Cr.P.C., 1898, the Sessions Judge and the High Court had concurrent jurisdiction to call for the records of inferior Criminal Courts. But, however, a practice had developed (though not it is an inflexible rule) and firmly established that the High Court would not entertain a revision application unless the applicant had approached the Sessions Judge in the first instance. The object of the practice was firstly to prevent the time of the High Court from being

wasted, and secondly, to have an advantage of the opinion of the Sessions Judge in case the matter should come up eventually before the High Court. Under the present Section (S. 397) also, the Sessions Judge exercises concurrent jurisdiction with the High Court to call for the records and exercises the powers of revision. Sub-section (3) of Section 397, however, provides that if an application is made under the section either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. u/s 399(1), the Sessions Judge is empowered to exercise all or any of the powers of the High Court which may be exercised by the High Court under sub-section (1) of Section 401, Cr.P.C. Under sub-Section (3), the decision of the Sessions Judge is final and no further proceeding by way of revision can be entertained by the High Court. Thus, u/s 399, the Sessions Judges have been given the power to finally dispose of revision cases, the records of which have been called, for by them. The motivation of the provisions appears to be to provide an easy remedy and secure expedition in the disposal of cases. So sub-section (3) of Section 399 provides that no further application by way of revision in relation to such person who has approached the Sessions Judge to obtain decision, shall be entertained by the High Court, It is obvious that since sub-section (3) of Section 399 makes the decision of the Sessions Judge in relation to case final, a further revision to the High Court at the instance of the person who moved the Sessions Judge is barred. But when the person who has approached the High Court is not the same person who applied to the Sessions Judge by way of revision, the High Court can entertain revision application by such person. The words used in sub-section (3) of Section 397 are, "no further application by the same person" i.e. the person who has already approached the Sessions Judge "shall be entertained." It is true that Section 399. (3) renders the decision final, but in view of the further clause that "no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court", the finality attached is only in respect of the person at whose instance the decision in the revision application was rendered. It is not final in so far as the person or the party who has not moved the Sessions Judge, and the High Court is not barred from entertaining a revision application at the instance of the said person or the party. A combined reading of Section 397(3) and S. 399(3) leaves no doubt that the intention of the Legislature could not have been to bar a revision application to the High Court even at the instance of the person who unsuccessfully fought a revision application against the person who has moved the Sessions Judge by way of revision. u/s 397(1), Cr.P.C. he cannot be said to be the same person. What is positively prohibited by Section 397(3) is a revision application by the same person who moved the Sessions Judge and not by a person who unsuccessfully contested the revision application before the Sessions Judge. Therefore, the revision application by the A party respondent, who unsuccessfully contested the revision application filed by the B party respondents is maintainable.

22. This view of mine gains support from a Division Bench decision of the Kerala

High Court in Joseph Abraham v. Thankamma 1975 Ker LT 451 wherein it was held :

"This section lays down that the order of the Sessions Judge in revision is final and no further revision lies to the High Court. But the bar is a qualified bar. The most important words in this section are that "the decision of the Sessions Judge thereon in relation to such person shall be final." Which means that the finality of the orders of the Sessions Judge is confined to the person at whose instance the petition is moved When an order is passed in revision by this Court (High Court) and that matter is in reversal of the order passed by the Magistrate the said order becomes final and the aggrieved party cannot thereafter move this Court either in revision or by other proceedings. His remedy then is only to move the Supreme Court. On the other hand, if the party had moved the Sessions Judge and had succeeded there, the opposite party who lost before the Sessions Judge could move the High Court in revision again, since as indicated above, the finality of the order of the Sessions Judge attaches itself only in relation to the person by whom or on whose behalf the Sessions Judge was moved.

23. This Court In Re: Puritipatti Jega Reddy, held :

"The language of sub-section (3) of Section 397 contains no ambiguity. If any person had already chosen to file a revision before the High Court or to the Sessions Court under sub-section (1), the same person cannot prefer a further application to the other Court. To put it in other words, sub-sections (1) and (3) make it clear that a person aggrieved by any order or proceeding can seek remedy by way of revision either before the High Court or the Sessions Court. Once he has availed himself of that remedy, he is precluded from approaching the other forum. It is equally manifest from the provisions of sub-section (3) that this bar is limited to the same person who has already chosen to go either to the High Court or to the Sessions Court seeking a remedy and that it does not apply to the other parties or persons."

24. The learned counsel for the B party respondents, finally submits relying upon the decision of the Supreme Court in Bhinka and Others Vs. Charan Singh, that there was already a decision of the Civil Court in respect of the subject matter of the dispute and therefore the proceedings u/s 145(5), Cr.P.C. were without jurisdiction. But it is clear from the record that the proceedings u/s 145(5), Cr.P.C. are in respect of the property bearing Municipal No. 9-5-85/A/2, whereas the decree obtained by the B party respondents in O.S. No. 1039 of 1980 on the file of the IV Addl. Judge, City Civil Court, Hyderabad, is in respect of the property bearing Municipal No. 5.9.85. In the circumstances, the contention of the learned counsel is devoid of any foundation.

25. In the result, the revision petition is allowed and the order of the Additional Metropolitan Sessions Judge, Hyderabad, is set aside and that of the Special Executive Magistrate, Hyderabad, is restored.

26. Revision allowed.