
(1984) 08 AHC CK 0072

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 3893 of 1975

Zahir Hasan

APPELLANT

Vs

Sub-Divisional Magistrate and Others

RESPONDENT

Date of Decision : 23-08-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146(1B), 147, 147(3)

Citation : (1984) 08 AHC CK 0072

Hon'ble Judges : R.M. Sahai, J;J.N. Dubey, J

Bench : Division Bench

Advocate : A.B. Saran, for the Appellant; V.K. Goel and S.C., for the Respondent

Final Decision : Allowed

Judgement

R.M. Sahai, J.—Could the Sub-Divisional Magistrate while disposing of proceedings u/s 145 Code of Criminal Procedure in conforming with decision of civil court under Sub-section (1-B) of Section 146 of Code of Criminal Procedure have prohibited both parties from interfering in peaceful possession as public in general had right to use land in dispute as graveyard is the short question that arises for consideration in this petition filed at the instance of first party.

2. In consolidation proceedings plot No. 1789 was earmarked for graveyard. According to the Petitioner it was allotted to him in lieu of his private graveyard which had been taken for chak road. On the contrary opposite party claims that it was allotted for use as public graveyard for the entire Sunni community. Due to this rival claim apprehension of breach of peace arose and on 14th March, 1973 preliminary order u/s 145 Code of Criminal Procedure was passed, attaching the land in dispute. As the Magistrate could not decide the question of possession he drew statement of case and made a reference u/s 146 Code of Criminal Procedure to competent civil court which was decided by the Munsif on 5th December, 1974. It was held that neither party was in exclusive possession and the land in dispute was graveyard for use of general public of Muslim community. Upon receipt of record the Magistrate disposed of the proceedings u/s 145 in

conforming with the decision of the civil court u/s 146(1-B).

3. The scope of enquiry u/s 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute. Emphasis is on possession. Right or title of a party have been excluded from it. The Magistrate therefore could not have travelled beyond it. Nor was the Munsif's jurisdiction widened because reference was made to him u/s 146. He could also decide about possession only. While doing so he could have looked into the documents and evidence but not to adjudicate upon title or parties. This is what precisely has been done in this case. The Munsif instead of examining evidence to find out which party was in possession attempted to determine right and title of the parties. The frame of controversy posed by him was as to whether the disputed land was left for "Qabirstan" of Sayyad Muslims or Sunni Muslims and again who was in exclusive possession may be constructive only indicates that he approached the dispute erroneously. The Munsif could not have adjudicated upon title or parties, namely, it was a private or public "Qabristan". In any case once it was found that neither party was in exclusive possession the scope of enquiry u/s 145 Code of Criminal Procedure came to an end.

4. Learned Counsel for the opposite party urged that the order of Magistrate was not liable to interference by this Court as the ultimate order passed by him should be construed as an order u/s 147 Code of Criminal Procedure. According to him it has been held by this Court and other courts that proceedings initiated u/s 145 Code of Criminal Procedure could be converted into 147 Code of Criminal Procedure and restraint order, as has been passed by the Magistrate, could have been passed by him u/s 145 Code of Criminal Procedure. Reliance has been placed on AIR 1949 275 (Nagpur); Chhuttan and Others Vs. Ali Husain, and Radha Raman v. Emperor 1936 AWR 125.

5. Proceedings admittedly were initiated before amendment of the Code in 1974. Therefore they had to be continued and disposed of in accordance with the provisions as it stood before enforcement of the amended code. The procedure adopted by the Magistrate therefore was proper. And under unamended code, and even the amended code except that provision of reference to competent civil court has been done away with, dimension of enquiry was and is the same, namely, possession and not the right to possession. While proceeding with enquiry the Magistrate could in an appropriate case take recourse to Section 147 but once reference was made u/s 146 the stage to proceed u/s 147 was over. Because after receipt of finding from civil court the Magistrate was left with no option except to pass order in conformity with it. In none of the decisions cited by the learned Counsel proceedings u/s 145 were converted u/s 147 after they were referred u/s 146. Moreover, the Magistrate never exercised this right. Amended Code now provides specifically for it. But before proceedings could be converted and restraint order could be passed, either under Sub-section (2) of Section 147 as it existed before or u/s 147(3) after amendment, circumstances

warranting exercise of that power have to be there. If right is exercisable at all times of the year then proviso puts complete embargo on the right of Magistrate to pass prohibiting order. And if the finding of Munsif is accepted that it was a public graveyard then obviously the right is exercisable at all time of year. Therefore from whatever aspect of it is considered the order passed by the Magistrate cannot be maintained.

6. In the result the petition succeeds and is allowed. The orders passed by the Munsif and Magistrate are quashed. It is left open to Magistrate to proceed in accordance with law. Parties shall bear their own costs.