

GAHC010111992022



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Crl. Pet. No. 531 of 2022

1. NILMONI ROY AND ANR

S/O LATE MONINDRA ROY,
SUKANTA ROAD, LANKA TOWN,
WARD NO. 2, P.S. AND P.O. LANKA
DIST. HOJAI, ASSAM

2. SRIKRISHNA ROY,

S/O LATE MONINDRA ROY,
SUKANTA ROAD, LANKA TOWN
WARD NO. 2, P.S. AND P.O. LANKA
DIST. HOJAI, ASSAM

.....Petitioners.

VERSUS

1. THE STATE OF ASSAM AND ANR

TO BE REPRESENTED BY THE PP, ASSAM

2. SUDHANGSHU PURKAYASTHA

S/O LT. LATE SURENDRA PURKAYASTHA
VILL- ITAGAON, P.S. AND P.O. LANKA
DIST. HOJAI, ASSAM
PIN-782446

.....Respondents

Advocates for the appellant : Mr K K Mahanta, Sr.Adv
Ms N Begum.

Advocate for the respondent : Mr A R Shome.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 24.05.2023

Date of Order : 31.05.2023

ORDER

1. Heard Mr K K Mahanta, learned Senior Counsel, assisted by Ms N Begum, learned counsel appearing for the petitioner and Mr K K Parashar, learned Additional Public Prosecutor, appearing on behalf of the State of Assam/respondent No. 1. Also heard Mr A R Shome, learned counsel for the respondent No. 2.

Although the criminal petition is at the admission stage, as agreed to by all the parties, the same is taken up for final disposal.

2. The petitioners have preferred an application under Section 482 CrPC, for quashing the order dated 13.04.2022, passed by the learned Executive Magistrate, Hojai, Sankardevnagar, in connection MR Case No. 05/2022.

3. The factual matrix giving rise to the present petition is that the petitioner No. 2 purchased a plot of land in Lanka town under Hojai district by a registered sale deed in the year 1978. Out of the said land, he sold out 11 lechas of land to the petitioner No. 1 on 13.08.2021. The land was mutated by the competent authority and both the petitioners have

been possessing the land by constructing their houses thereon. After getting mutation of land, the petitioner No. 1 started construction of permanent building on his land, by obtaining due permission from the Municipal Board, Lanka, but the wife of respondent No. 2 falsely raised an objection before the Municipal Board, Lanka, against construction works claiming that she purchased the said land from the petitioner No. 2 by a registered sale deed in the year 1996. But she failed to establish her claim.

4. Having failed to establish her claim in the Municipal Board, Lanka, the respondent No. 2 filed an application under Sections 145/146 CrPC before the Deputy Commissioner, Hojai, Sankardevnagar on a false plea of purchasing the said land in the year 1996 by his wife and there was possibility of breach of peace and tranquility in the locality, for attempting construction work over the suit land. In fact, the petitioner No. 2 never executed any such sale deed in favour of the wife of respondent No. 2, in the year 1996. Subsequently, the respondent No. 2 also filed an application before the Executive Magistrate, Hojai, raising another false allegation stating that the present petitioners started construction works, which may lead to breach of peace and tranquility over the area. Believing the same, the learned Executive Magistrate passed an order under Section 146 (1) CrPC for attachment of the disputed land.

5. Thereafter, the petitioner No. 1 appeared before the learned Executive Magistrate with an application for recalling/modifying the impugned order dated 13.04.2022, because the said land is the only homestead land belonging to the petitioner No. 1, where he has been residing with his family members.

6. To execute the order passed by the Executive Magistrate dated 13.04.2022, the Lanka

Police visited the site on 09.05.2022 and found therein the physical possession of the petitioner No. 2. They most illegally executed attachment order restricting ingress and egress from the residential house of the petitioners. Although the petitioners filed an application on 13.05.2022, praying for cancellation/modification of the impugned order dated 13.04.2022, but till date, the learned Executive Magistrate neither accepted nor rejected the said application.

7. Being highly aggrieved and dissatisfied with the order of the learned Executive Magistrate, dated 13.04.2022, for attachment of the disputed land, under Section 146 (1) CrPC, the petitioners have preferred this application for setting aside the impugned order.

8. Against such application, the respondent No. 2 has filed an affidavit in opposition, stating that the petitioner No. 2 purchased a plot of land measuring 2 (two) kathas 7 (seven) lechas in Lanka town, District Hojai by a registered sale deed. But he has no knowledge in respect of selling of 11 lechas of land by the petitioner No. 2 to the petitioner No. 1. The respondent No. 2 has come to know about the alleged sale only on 24.12.2021, when the petitioners started construction over the disputed land.

9. According to the respondent No. 2, his wife purchased the land in question from the petitioner No. 2, vide registered sale deed No. 1897 dated 12.06.1996 and the petitioner No. 2 handed over possession of the said land to the wife of respondent No. 2. Since then, the respondent No. 2 was in continuous possession of the said land. But subsequently, the petitioners dispossessed the respondent No. 2 and his wife from the said land illegally. Thus, the respondent No. 2, having no other instant relief, filed an application before the Deputy Commissioner, Hojai, for restraining the petitioners from illegal construction, since there was

possibility of breach of peace and tranquility in the locality.

10. It is also stated in the objection that the land in question could not be mutated in the name of his wife, because of the non-cooperation of petitioner No. 2. Accordingly, the petitioner No. 2 got the entire land mutated in his name measuring 2 kathas 7 lechas.

11. Learned counsel for the petitioner has submitted that the learned Executive Magistrate has committed grave error in passing an order under Section 146(1) CrPC, attaching the property in question since the possession of the property by the petitioners is not disputed by the respondents, when the civil suit was filed for injunction and recovery of possession, so, also when an application under Section 145 CrPC was preferred. It is also submitted that the learned Executive Magistrate had exceeded his/her jurisdiction in passing the order dated 13.04.2022, when the same issue is pending for consideration in a civil Court.

12. The learned counsel also pointed out that the respondent No. 2 could not get an order of injunction from the civil Court. Hence, he invoked the jurisdiction of the Executive Magistrate under Section 146 (1) of CrPC and got an order of attachment of the property. The learned counsel for the petitioners also contended that the learned Executive Magistrate has committed gross illegality in passing the order, when possession of the property by the petitioners has not been disputed.

13. On the other hand, learned counsel for the respondent No. 2 has argued that there is no illegality in the order passed by the learned Executive Magistrate, Hojai, Sankardevnagar, attaching the property under Section 146 (1) CrPC, since there is dispute regarding the possession of the property in question and tension is existing and peace can be breached at any time.

14. I have considered the submissions of the learned counsel for the parties. Also perused the order dated 13.04.2022, passed by the learned Executive Magistrate.

15. Section 145 CrPC deals with the procedure where dispute concerning land or water is likely to cause breach of peace. Section 145 (1) says that-

“(1) 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.”

16. Section 146 (1) CrPC deals with power to attach subject of dispute which is reproduced as follows-

“146. (1) If the Magistrate at any time after making the order under sub-section (1) of section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof.”

17. Sections 145 and 146 CrPC together constitute a scheme for the resolution of a

situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145 CrPC. It can only be read in the context of Section 145 CrPC.

18. The object of Section 145, Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 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. If after the enquiry under Section 145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

19. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146 CrPC a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

20. In the case in hand, admittedly, the respondent No. 2 has filed a petition for

attachment of property on 13.04.2023 and the Executive Magistrate also passed the order on the same day by attaching the property in question. No Police Report was called for whether there is any apprehension of breach of peace regarding the land in question. The order of the learned Magistrate dated 13.04.2022, is reproduced as below:-

“CR put up today. Both parties present with steps. Seen the petition filed by the first party in connection with forceful entry and construction of permanent structure of the D/L by the second party during pendency of the case and which may lead to breach of peace and tranquility in the area. After careful consideration and seeing the emergent nature, I do hereby order of attachment of the D/L under Section 146(1) CrPC and prohibit both the parties to enter in the D/L till disposal of this case. By any competent Court.

O/C Lanka will execute this order with the help of LR staff of Lanka Rev. Circle and report compliance. Inform all concerned accordingly.

Both parties asked to appear before the Court on 13.05.2022. First party asked to produce evidence with witness.”

21. The order of the learned Magistrate indicates that no report was called for from the Police. The learned Executive Magistrate wrongly invoked the powers under Section 146 (1) CrPC. As per Section 146 (1), a Magistrate can pass an order of attachment of the subject of dispute, if it be a case of emergency or if he decides that none of the parties was in such possession or he cannot decide as to which of them was in possession.

22. Hon’ble Supreme Court has observed in the case of **Ashok Kumar Vs. State of Uttarakhand**, reported in **(2013) 3 SCC 366**, that-

“Mere apprehension of breach of peace does not constitute a case of emergency. If one of the parties is in possession, rightly or wrongly, Magistrate cannot pass an order of attachment on the ground of emergency”

22. In this case, the admitted position is that the respondent No. 2 has filed a civil suit for injunction and recovery of possession against the present petitioners, which is pending in the Court of learned Civil Judge, Hojai. As the civil suit is pending in the Civil Court, it is for the Civil Court to decide, as to who was in possession on the date of filing of the suit. In any view, there is nothing to show that there was an emergency so as to invoke the powers under Section 146 (1) CrPC to attach the property specially when the matter is under the jurisdiction of Civil Court. It reveals that no ground exists to attach the property under Section 146 (1) CrPC, by the learned Executive Magistrate in the order dated 13.04.2022.

23. Under such backdrop, this Court is inclined to set aside the order of the Executive Magistrate dated 13.04.2022, in connection with MR Case No. 05/2022. However, it is made clear that this Court has not expressed any final opinions on the contentions raised by the learned counsel for the parties, regarding possession or ownership over the land in question.

24. In the result, the criminal petition is allowed and disposed of accordingly.

JUDGE

Comparing Assistant