



Crl.O.P.(MD).No.4819 of 2015 :

- 1.Manivannan
- 2.Ellamaran
- 3.Chinnadurai
- 4.Palani
- 5.Selvam
- 6.Selvarasu
- 7.Kumar

...Petitioners

Vs

1.The Revenue Divisional Magistrate/
Revenue Divisional Officer,
Pattukottai, Thanjavur District.

2.The Inspector Police, Thiruchittrambalam
Police Station, Thanjavur District. ...Respondents

REVISION CASE under Section 397 read with Section 401 of the Criminal Procedure Code against the order dated 3.10.2011 made in A1-2228-11 on the file of the second respondent (Crl.R.C.(MD). No.863 of 2011) which is passed without any preliminary orders and without adhering to section 145 (4) of Cr.P.C.

REVISION CASE under Section 397 read with Section 401 of the Criminal Procedure Code against the order dated 8.6.2015 made in Na.Ka.A4/ 10773/2014 on the file of the first respondent (Crl.R.C.(MD).No.315 of 2015)

ORIGINAL PETITION under Section 482 of the Criminal Procedure Code to call for the records in Mu.Mu.5025/2014/A3 dated 31.12.2014 on the file of the Revenue Divisional Magistrate, Pattukottai and quash the same in so far as the petitioners are concerned. (Crl.O.P.(MD)No.4819 of 2015)

Appearance in Crl.R.C.(MD) No.863 of 2011 :

For Petitioner : Mr.T.Lajapathi Roy

For Respondents 1 to 3 : Mr.Mayil Vahana Rajendran
Additional Public Prosecutor

For Respondents 4 & 5 : Mr.Isaac Mohanlal

Appearance in Crl.O.P.(MD) No.4819 of 2015 :

For Petitioners : Mr.K.K.Ramakrishnan

For Respondents : Mr.Mayil Vahana Rajendran
Additional Public Prosecutor

Appearance in Crl.R.C.(MD) No.315 of 2015 :

<https://hcservices.ecourts.gov.in/hcservices/>

For Petitioner : Mr.K.Samidurai



For Respondents : Mr.Mayil Vahana Rajendran
Additional Public Prosecutor

COMMON ORDER ON REFERENCE

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V.RAMASUBRAMANIAN, J

Many times, places of worship, to which people go, seeking solace and peace, become places where there is disruption of peace. No place of worship of any particular religion is an exception to this Rule. In 2 out of 3 cases on hand, the dispute relates to places of worship. In one case, the dispute is inter religious and in the other it is intra religious.

Brief facts of the cases on hand

2. In a village known as Panipulanvayal Village, Kannankottai Group, Devakottai Taluk, Sivagangai District, a church known as St.Arokyamary Church was constructed, nearly about 30 years ago, in a huge land of an extent of about 2 acres. The church comes under the control of Sivaganga Diocese.

3. It appears that the conduct of the annual festival in the church became the subject matter of controversy from the year 2007. Proceedings were initiated by the Revenue Divisional Officer, Devakottai, under Section 145 of the Criminal Procedure Code, 1973 (in short "the Code") and an order was passed on 15.9.2009.

4. The said order became the subject matter of challenge in a petition in Crl.O.P.(MD)No.9462 of 2010. In the said petition, a learned Judge passed an order on 22.9.2011, directing the Revenue Divisional Officer to take cognizance of the dispute and follow the procedure contemplated under Sub-Section (1) of Section 145 of the Code and thereafter to follow the procedure prescribed under Sub-Sections (2) and (4) of Section 145 of the Code and pass orders.

5. Pursuant to the said order, the Revenue Divisional Officer issued notices to both parties, held an enquiry and passed a final order, dated 03.10.2011. It was held in the said order that the church in question was under the control of the Sivagangai Diocese till the year 2007 and that after disputes arose, the Diocese stopped its intervention. The Revenue Divisional Officer also found that a civil suit had already been filed in O.S.No.153 of 2010 on the file of the Sub-Court, Devakottai and that therefore, until the disposal of the suit, the Bishop of Devakottai shall look after the administration and the conduct of the festivals as was done till the year 2006-2007.

6. Challenging the final order passed under Section 145 of the Code on 03.10.2011, a revision has been filed in Crl.R.C.(MD) No.863 of 2011 under Section 397 read with Section 401 of the Code.



7. The main ground of attack to the order of the Revenue Divisional Officer was that the same was passed without complying with the mandatory requirement of a preliminary order under Sub-Section (1) of Section 145 of the Code.

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8. But, it was contended on behalf of the respondents that the passing of a preliminary order under Section 145(1) of the Code does not give jurisdiction to the Magistrate to initiate and proceed with the enquiry. The moment the Executive Magistrate arrives at a subjective satisfaction (i) that there exists a dispute with regard to land or water and (ii) that such dispute was likely to cause breach of peace, the Executive Magistrate gets jurisdiction and that it does not depend upon whether he made a record of such a subjective satisfaction, with reasons or not.

9. Finding (i) that in a catena of decisions, this Court has held the passing of a preliminary order under Section 145(1) of the Code to be mandatory, (ii) that in none of those judgments, the question of assumption of jurisdiction was ever considered, (iii) that those decisions were based upon a wrong comparison with the provisions of Section 133 of the Code and (iv) that therefore, an authoritative pronouncement on the issue was required from a Larger Bench of this Court, this Reference was made by the learned Judge, by an order dated 10.6.2015, passed in CrI.R.C.(MD)No.863 of 2011. Four questions were referred by the learned Judge for the consideration of this Full Bench and they are as follows:

"(i) Whether the absence of a preliminary order under Sub-Section (1) of Section 145 of the Code would affect the very jurisdiction of the Executive Magistrate to proceed further and to pass final order under Section 145 of the Code ?

(ii) Whether the failure of the Executive Magistrate to pass a preliminary order under Section 145(1) of the Code is a mere irregularity or is it an illegality, affecting the very jurisdiction of the Magistrate?

(iii) If it is answered that it is only an irregularity, whether such irregularity would vitiate the final order automatically, even in the absence of any prejudice or miscarriage of justice to the parties?

(iv) If it is answered that the absence of a preliminary order is only an irregularity, whether the party aggrieved is required to raise objection at the earliest point of time or is it suffice if such an objection is raised at any stage subsequently?"

<https://hcservices.ecourts.gov.in/hcservices> After the learned Judge referred the aforesaid questions for the consideration of a Full Bench in CrI.R.C.(MD). No.863 of 2011, another case in CrI.O.P.(MD).No.4819 of 2015 came



up before another learned Judge. The challenge in this original petition was to an order passed by the Revenue Divisional Officer on 31.12.2014, directing two groups of persons not to enter into the disputed property.

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11. Though the memorandum of grounds of criminal original petition filed under Section 482 of the Code, does not state anywhere that the order impugned therein had been passed without there being a preliminary order, the learned Judge, before whom the criminal original petition came up for admission on 17.2.2015, granted interim stay and posted the same before the Full Bench, solely on the basis of an oral representation that a final order under Section 145(4) had been passed without a preliminary order under Section 145(1).

12. Similarly, a criminal revision case in CrI.R.C.No.315 of 2015 under Sections 397 read with 401 of the Code, challenging an order passed by the Sub-Collector, Cheranmahadevi, came up for orders as to admission before a learned Judge on 31.7.2015. The dispute that led the Sub-Collector to pass an order on 8.6.2015 related to a lease hold land, on which, a place of worship was attempted to be constructed and the objections raised to the same by people belonging to a different religion. By his order dated 8.6.2015, the Sub-Collector prevented further construction of the place of worship not only on the ground that there is a dispute, but also on the ground that the permission of the Collector had not been obtained as required by law in so far as the District of Kanyakumari is concerned. This criminal revision case was admitted on 31.7.2015. We do not find from the grounds of revision that the failure of the Sub-Collector to pass a preliminary order has been taken as the main ground of challenge to the final order. However, this criminal revision case was also tagged along with the above revision and original petition.

Submissions of Counsel on the questions referred :

13. Apart from the learned counsel appearing for the parties, a few other counsel also made submissions, in view of the importance of the issues raised. Thus, we have heard M/s.T.Lajapathi Roy, K.K.Ramakrishnan, M.Karunanidhi, N.Mohideen Basha and K.Samidurai, learned counsel appearing on one side, Mr.Mayil Vahana Rajendran, learned Additional Public Prosecutor and Mr.Isaac Mohanlal, learned counsel appearing on the other side.

14. Drawing our attention to the observations of the Supreme Court in paragraphs 8 and 10 of the decision in R.H.Bhutani Vs. Mani J.Desai [AIR 1968 SC 1444], the observations contained in paragraph 4 of the decision of the Supreme Court in Mathuralal Vs. State of Uttar Pradesh [(1979) 4 SCC 665], the observations recorded in paragraph 10 of the decision of the Supreme Court in Ashok Kumar Vs. State of Uttarakhand [(2013) 3 SCC 366] and the decision of a



Division Bench of this Court in M.Krishnamoorthy Vs. P.M. Neelamegham [2003 CrI.L.J. 3820], it is contended by Mr.T.Lajapathi Roy, learned counsel for the revision petitioners that the failure to pass a preliminary order under Section 145(1) of the Code is not a mere irregularity, but an illegality, which destroys the very jurisdiction of the Magistrate to proceed further under Section 145 of the Code. According to the learned counsel, the failure to pass a preliminary order would vitiate the final order, irrespective of the causation of prejudice to the other party and irrespective of whether the party raised or failed to raise an objection to the same at the earliest point of time.

15. Mr.M.Karunanidhi, learned counsel, contended (i) that all possible irregularities that could arise in the course of any proceeding under the Code, are already enlisted in Sections 460 and 461 of the Code and hence, anything that falls outside these two provisions would be an illegality and not an irregularity, (ii) that what is contemplated under Sub-Section (1) of Section 145 is an objective satisfaction and hence, the statute uses the expression "shall make an order in writing", (iii) that even Section 146(1), which is required to be read along with Section 145, refers to an order under Section 145(1) as the foundation for passing an order of attachment, (iv) that the comparison made between Section 145 and Section 133 of the Code may not be proper, as both of them deal with different contingencies, and (v) that the issue is already settled by the decision of the Supreme Court in Rajpati Vs. Bachan [1980 CrI.L.J. 1276] wherein the Supreme Court approved the views expressed by the Punjab and Hyderabad High Courts.

16. Mr.N.Mohideen Basha, learned counsel submitted that Sections 106 to 110 of the Code, deal respectively, with security for keeping peace on conviction, security for keeping peace in other cases, security for good behaviour from persons disseminating seditious matters, security for good behaviour from suspected persons and security for good behaviour from habitual offenders. But, the procedure to be followed by the Magistrate, while acting under those Sections, is stipulated in Section 111 and that the difference in the very language employed in Section 111 and in Section 145(1) would throw light upon the questions raised.

17. Mr.K.K.Ramakrishnan, learned counsel contended (i) that the Code deals with two types of jurisdiction, namely, preventive jurisdiction and precautionary jurisdiction and Section 145 is included in Chapter-X of the Code, that deals with precautionary jurisdiction, (ii) that by the very reference in Section 146(1) to the date of passing of the order under Section 145(1) for determining possession, it would be clear that a preliminary order under Section 145(1) is necessary, (iii) that even the Proviso to Sub-Section (4) of Section 145 makes a reference to the order under Sub-Section (1) for invoking the deeming fiction with regard



to the possession of a party and (iv) that again Sub-Section (1) of Section 145 speaks about the deeming fiction prescribed in the proviso to Sub-Section (4) indicating thereby that an order under Sub-Section (1) forms the basis for all further proceedings.

18. Mr. Mayil Vahana Rajendran, learned Additional Public Prosecutor, submitted that the opinion expressed by the Supreme Court in paragraph 4 of the decision in Mathuralal is a complete answer to all the four questions referred to this Full Bench.

19. Projecting the opposite point of view, it is contended by Mr. Isaac Mohanlal, learned counsel (i) that the failure to pass a preliminary order is a curable irregularity, which will not strike at the jurisdiction of the Executive Magistrate, (ii) that persons, who participated in the enquiry under Section 145 at all stages, cannot come up after the passing of the final order raising a specious plea that the whole proceedings were vitiated due to the failure to pass a preliminary order, and (iii) that the object behind Section 145 of the Code being to prevent breach of peace, the same cannot be defeated by making the procedure for its invocation more complicated than what was contemplated by the law makers.

20. It is further contended by Mr. Isaac Mohanlal, learned counsel for private respondents that any finding, sentence or order passed by a Court of competent jurisdiction is protected under Section 465(1) of the Code from being reversed or altered by a court of appeal, merely on account of any error, omission or irregularity in the proceedings under the Code, unless a failure of justice, in the opinion of the court, had been occasioned thereby. Therefore, it is his contention that a final order passed under Section 145 cannot be assailed merely on the ground that a preliminary order was not passed under Sub-Section (1), unless it is established that a failure of justice has occasioned. For determining whether a failure of justice had occasioned, the litmus test provided in Sub-Section (2) of Section 465 of the Code is to find out whether the objections to the procedure adopted could and should have been raised at an earlier stage in the proceedings or not. Therefore, the learned counsel contended that the failure to pass a preliminary order is merely an irregularity and it is not open to be raised after a final order is passed, especially by a person, who kept quiet all along, participated in the proceedings and suffered an order.

21. On the decisions of the Supreme Court, on which, very strong reliance is placed by the learned counsel appearing for the petitioners, it is argued by Mr. Isaac Mohanlal, learned counsel for the private respondents that none of those decisions raised the questions now referred for our consideration, precisely. These decisions relied upon by the petitioners, according to the learned counsel for the private respondents, cannot be treated as ratio decidendi on the very same questions.



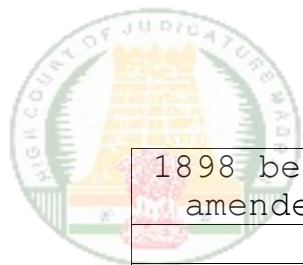
22. In contrast, the very same questions raised herein were dealt with and answered in one decision by the Full Bench of the Calcutta High Court, one decision by the Division Bench of this High Court, one decision of a Full Bench of the Allahabad High Court, one decision of a Division Bench of the Patna High Court, one decision of the Bombay High Court and two decisions, one each of Calcutta and Orissa High Courts. The decisions that Mr. Isaac Mohanlal, learned counsel for the private respondents relied upon, are as follows:

- (i) Khosh Mahomed Sirkar Vs. Nazir Mahomed [(1996) ILR 33 Cal. 352];
- (ii) T.Kamal Kutty Vs. Udayavarma Raja Valia Raja of Chirakkal [CDJ 1912 MHC 128];
- (iii) Kapoor Chand Vs. Suraj Prasad [AIR 1933 All. 264];
- (iv) S.M.Yacub Vs. T.N.Basu [AIR (36)1949 Patna 146];
- (v) Khudiram Mandal Vs. Jithendra Natha [AIR 1952 Calcutta 713];
- (vi) Padma Charan Vs. Prafulla Chandra [1975 Cr1.L.J. 1190 Orissa];
- (vii) V.K.Rao Vs. Chandappa Appa Devadiga [(1977) 79 BOM LR 16] &
- (viii) R.H.Bhutani Vs. Miss Mani J.Desai [AIR 1968 SC 1444].

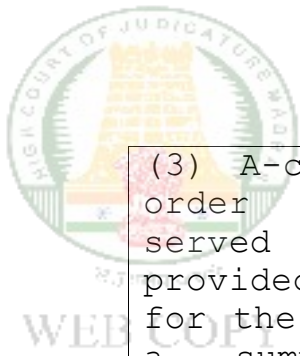
23. However, the decisions of the Calcutta, Hyderabad, Patna, Orissa and Bombay High Courts and the decision of this Court in T.Kamal Kutty are sought to be distinguished by Mr.T.Lajapathi Roy, learned counsel for the petitioner on the ground that all those decisions would have no application to the position that prevails after the Code was revamped in entirety under Act 2 of 1974. According to the learned counsel, the sweeping changes made under the 1973 Amendment, by themselves, would show that the decisions rendered under the old Code cannot have any application.

24. We have carefully considered the rival submissions. Historical Background of Section 145

25. Before we take-up the rival contentions one after another, we are obliged to notice the 3 milestones that Section 145 had crossed in a period of about 75 years. Section 145, as it stood under the 1898 Code, as it came to be amended under the 1955 Act and as it got metamorphosised under the 1973 Code, are presented in a tabulation as follows:-



1898 before it was amended in 1955	1898 Code after the amendment of 1955	1973 Code
(a)	(b)	(c)
145(1) Whenever a District Magistrate, Sub-Divisional or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall make 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, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.	145(1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his 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, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and further requiring them to put in such documents, or to adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims.	145(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.
(2)	(2)	(2)

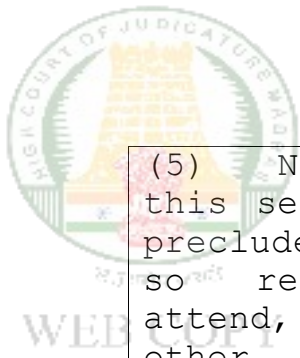


(3) A-copy of the order shall be served in manner provided this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.	(3) A-copy of the order shall be served in manner provided this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.	(3) A-copy of the order shall be served in manner provided this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.
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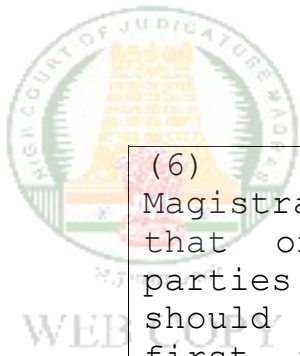


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(4) The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned a such possession of the said subject: Provided that..... Provided also that if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.	(4) The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the enquiry, as far as may be practicable, within a period of two months from the date of appearance of the parties before him and, if possible, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject: Provided that..... Provided further that..... Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.	(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements, so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute: Provided that.....
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(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (I) shall be final.	(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.	(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.
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(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) , be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted there from in due course of law, and forbidding all disturbance of such possession until such eviction, and when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.	6) If the Magistrate decides that one of the parties was or should under the second proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted there from, in due course of law, and forbidding of all disturbance of such possession until such eviction and when he proceeds under the second proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.	(6) (a) If a Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted there from in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeded under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed. (b)
(7)	(7)	(7)
(8)	(8)	(8)
(9)	(9)	(9)
(10)	(10)	(10)

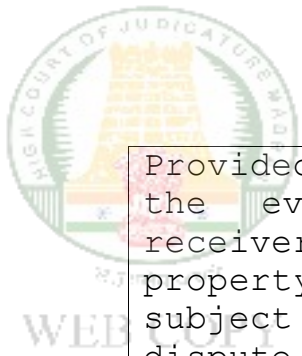


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146(1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person caused to possession thereof:	146(1) If the Magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in sub-section (4) of Section 145; and he shall direct the parties to appear before the Civil Court on a date to be fixed by him :	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 :
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Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time, if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.	Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time, if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute. (1A) (1B) (1C) (1D) (1E)	Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.
(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure :	(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure :	(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908) :



Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall there-upon be discharged.	Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall there-upon be discharged.	Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate— (a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him ; (b) may make such other incidental or consequential orders as may be just.
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Nature of the power under Section 145 and the changes brought forth by the Amendments

26. The Supreme Court, in its decision in R.H.Bhutani considered the object and scheme of the said provision. In paras 8 and 9, it was observed as follows:-

"The object of Section 145, no doubt, is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined a competent court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute, regarding an immoveable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the Section requires him to pass a preliminary order under Sub-S.



(1) and thereafter to make an enquiry under Sub-S. (4) and pass a final order under Sub-S. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or exist. The enquiry under Sec.145 is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties. Under the second proviso, the party who is found to have been forcibly and wrongfully dispossessed within two months next preceding the date of the preliminary order may for the purpose of the enquiry be deemed to have been in possession on the date of that order. The opposite party may of course prove that dispossession took place more than two months next preceding the date of that order and in that case the Magistrate would have to cancel his preliminary order. On the other hand, if he is satisfied that dispossession was both forcible and wrongful and took place within the prescribed period, the party dispossessed would be deemed to be in actual possession on the date of the preliminary order and the Magistrate would then proceed to make his final order directing the dispossessor to restore possession and prohibit him from interfering with that possession until the applicant is evicted in due course of law. This is broadly the scheme of Sec. 145"

"The satisfaction under Sub-S.(1) is of the Magistrate. The question whether on the materials before him, he should initiate proceedings or not is, therefore, in his discretion which, no doubt, has to be exercised in accordance with the well recognised rules of law in that behalf. No hard and fast rule can, therefore, be laid down as to the sufficiency of material for his satisfaction. The language of the Sub- Section is clear and unambiguous that he can arrive at his satisfaction both from the police report or "from other information" which must include an application by the party dispossessed. The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material, which has satisfied the Magistrate."

27. Regarding the nature of the order passed by the Magistrate under Section 145 of the Code, the Supreme court had the following to say in its judgment in Chandu Naik Vs. Sitaram B.Naik {1978 (1) SCC 210} :-



"From the comparative table of the provisions, it is seen that there were two principal changes made by the 1955 amendment. The first was that the preliminary order was also to require the parties to put in documents and the affidavits of such persons as they intended to rely upon in support of their claims. The magistrate was to decide the case on a consideration of the written statements the documents and the affidavits put in by the parties and after hearing them. The position earlier was that the parties had the right to adduce evidence and the magistrate could take further evidence if he so desired. The second change was that in the two situations where he was unable to satisfy himself as to which of the parties was in possession or where he decided that none of the parties was in possession, after attaching the property, the magistrate was himself to refer the dispute to the Civil Court instead of leaving it to the parties to go to the Civil Court. He was to obtain the finding of the Civil Court and thereafter conclude the proceeding under Section 145 of Criminal Procedure Code in conformity with the decision of the Civil Court. The revised procedure introduced by the 1955 amendment was not found to work satisfactorily and, therefore, it was apparently, thought desirable to revert to the old procedure. The provisions of Sections 145 and 146 of the 1973 Code are substantially the same as



the corresponding provisions before the 1955 amendment. The only noticeable change is that the second proviso to Section 145(4) as it stood before the 1955 amendment) has now been transposed to Section 146 but without the words "pending his decision under this Section" and with the words "at any time after making the order under Section 145(1)" super-added. The change, clearly, is in the interests of convenient draftsmanship. All situations in which an attachment may be made are now mentioned together in Section 146. The words "pending his decision under this section" have apparently been omitted as unnecessary since Section 145 provides how the proceeding initiated by a preliminary order must proceed and end and therefore an attachment made 'at any time after making under Section 145(1)' can only continue until the termination of the proceeding. At the termination of the proceeding, if he finds one of the parties was in possession as stipulated, the magistrate must make an order as provided in Section 145(6) and withdraw the attachment as provided in Section 146(1) since there can be no dispute likely to cause a breach of the peace once an order in terms of Section 145(6) is made."

29. In yet another portion, it was observed in Mathuralal, by the Supreme court as follows:-

"Section 145 contemplates, first, the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists concerning any land or water or their boundaries, and, next, the issuance of an order, known to lawyers practising in the Criminal Courts as a preliminary order, stating the grounds of his satisfaction and requiring the parties concerned to attend his Court and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute. A preliminary order is considered so basic to a proceeding under Section 145 that a failure to draw up a preliminary order has been held by several High Courts to vitiate all the subsequent proceedings. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Sections 145 and 146. In fact, the first of the situations in which an attachment may be effected under Section 146 of the 1973 Code has to be "at any time after making the order under sub-section (1) of Section 145" while the other two situations have, necessarily, to be at the final stage of the proceeding initiated by the preliminary order. Now,



the preliminary order is required to enjoin the parties not only to appear before the Magistrate on a specified date but also to put in their written statements. Sub-Section (3) of Section 145 prescribes the mode of service of the preliminary order on the parties. Sub-Section (4) casts a duty on the Magistrate to peruse the written statements of the parties, to receive the evidence adduced by them, to take further evidence if necessary and, if possible, to decide which of the parties was in possession on the date of the preliminary order. If the Magistrate decides that one of the parties was in possession he is to make a final order in the manner provided by Sub-Section (6). Provision for the two situations where the Magistrate is unable to decide which of the parties was in possession or where he is of the view that neither of them was in possession is made in Section 146 under which he may attach the subject of dispute until the determination of the rights of parties by a competent Court. The scheme of Sections 145 and 146 is that the Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements. Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the preliminary order. On the other hand if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such possession he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations he attaches the property. Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties to go to the Civil Court. Proceeding may however be stopped at any time if one or other of the parties satisfies the magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. 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 Section 145 Sub-Section (5). Except for the reason that



there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course. Now, in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146 (1) in which an attachment may be effected. There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145 Sub-Section (4) is against any such implication. Suppose a Magistrate draws up a preliminary order under Section 145(1) and immediately follows it up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace."

Possession is nine points in law:

30. In Shanti Kumar Panda Vs. Shakuntala Devi {2004 (1) SCC 438}, the Supreme court observed in paras 10, 11 and 12 as follows:-

"Possession is nine points in law. One purpose of the enforcement of the laws is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc. as defined in Sub-Section (2) of Section 145 having arisen, causing a likelihood of a breach of the peace, Section 145 of the Code authorizes the Executive Magistrate to take



cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings under Sections 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive on police action. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in proviso to Sub-Section (4) of Section 145, and maintain the status quo as to possession until the entitlement to possession was determined by a court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned."

"Under Sub-Section (1) of Section 145, a preliminary order taking cognizance of the dispute having been passed, the Magistrate would, under Sub-Section (4), decide who was in possession of the disputed property on the date of the passing of the preliminary order. Consistently with such finding, a declaration by Magistrate in favour of such party would follow under Sub-Section (6) entitling it to retain possession over such property until evicted therefrom in due course of law. And until such eviction all disturbances in its possession shall be forbidden. If any party is found to have been forcibly or wrongfully dispossessed within two months next before the date on which the report of a police officer or other information setting the Magistrate in motion was received by him or between such date and the date of order under Sub-Section (1), then the party dispossessed has to be fictionally treated as



one in possession on the date of preliminary order under Sub-Section (1). The declaration of entitlement to possession under proviso to Sub-Section (4) read with Sub-Section (6) shall be made in favour of such party and the party found to have been so dispossessed forcibly and wrongfully may also be restored into possession. The declaration having been made, it would be for the unsuccessful party to approach the competent court and secure such order as would enable his entering into possession and evicting the party successful in proceedings under Section 145."

"What is an eviction "in due course of law" within the meaning of Sub-Section (6) of Section 145 of the Code? Does it mean a suit or proceedings directing restoration of possession between the parties respectively unsuccessful and successful in proceedings under Section 145 or any order of competent court which though not expressly directing eviction of successful party, has the effect of upholding the possession or entitlement to possession of the unsuccessful party as against the said successful party. In our opinion, which we would buttress by reasons stated shortly hereinafter, ordinarily a party unsuccessful in proceedings under Section 145 ought to sue for recovery of possession seeking a decree or order for restoration of possession. However, a party though unsuccessful in proceedings under Section 145 may still be able to successfully establish before the competent court that it was actually in possession of the property and is entitled to retain the same by making out a strong case demonstrating the finding of the Magistrate to be apparently incorrect. "

Magistrate concerned only with breach of peace :

31. Further, in a proceeding initiated under Section 145, the Executive Magistrate is only concerned with the likelihood of breach of peace between parties and he has to deal with the question of possession of the property and not either with its title or the right to possession while passing an order. In this regard, in Shanti Kumar Panda, the Supreme Court had observed in paragraphs 15 and 18 as follows:-

"A decision given under Section 145 of the Code

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has relevance and is admissible in evidence to show :- (i) that there was a dispute relating to a



particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment under Section 146(1), on the given date, and (iv) that the Magistrate found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession through, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the Court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate's order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court."

"An order made under Section 145, Cr.P.C., deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to decision of the civil Court. The unsuccessful party therefore must get relief only in the civil Court. He may move the civil court with a properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil Court has jurisdiction to give a finding different from that which the Magistrate has reached."

Cannot decide either title or right to possession of the property:

32. The Supreme Court expressed vide judgment in Ranbir Singh Vs. Dalbir Singh & Others {2002 (3) SCC 700} that in these proceedings, the court is concerned with actual possession and not about other issues and observed in para 8 as under:

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"The Court, while dealing with a proceeding under Section 145 Cr.P.C., is mainly concerned with



Decision not binding on civil courts:

34. Under Section 145 of the old Code, the Supreme Court had an occasion to consider the effect of the Executive Magistrate's order on the civil court's jurisdiction and it had observed as follows:-

"Under Sec. 145(6) of the Code, a Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is conterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. The Privy Council in Dinomoni Chowdhurani Vs. Brojo Mohini Chowdhurani tersely states the effect of orders under S.145 of the Code of Criminal Procedure thus: "These orders are merely police orders made to prevent breaches of the peace. They decide no question of title....."

Scope of Section 145 of Cr.P.C:

35. Dealing with Section 145 of the Cr.P.C under the new Code, the Supreme Court summarised the law in Shanti Kumar Panda in para 23 as follows:-

"For the purpose of legal proceedings initiated before a competent court subsequent to the order of an Executive Magistrate under Sections 145/146 of the Code of Criminal Procedure, the law as to the effect of the order of the Magistrate may be summarized as under:-



(1) The words 'competent court' as used in Sub-Section (1) of Section 146 of the Code do not necessarily mean a civil court only. A competent court is one which has the jurisdictional competence to determine the question of title or the rights of the parties with regard to the entitlement as to possession over the property forming subject matter of proceedings before the Executive Magistrate;

(2) A party unsuccessful in an order under Section 145(1) would initiate proceedings in a competent court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily, a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held custodia legis by the Magistrate for and on behalf of the party who would ultimately succeed from the court it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession.

(3) A decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal court and that too based on a summary enquiry. The order is entitled to respect and weight before the competent court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the court, the order of the Magistrate is only one out of several pieces of evidence.

(4) The Court will be loath to issue an order of interim injunction or to order an interim arrangement inconsistent with the one made by the Executive Magistrate. However, to say so is merely stating a rule of caution or restraint, on exercise of discretion by Court, dictated by prudence and regard for the urgent/emergent executive orders made within jurisdiction by their makers; and certainly not a tab on power of Court. The Court does have jurisdiction to make an interim order including an order of ad-
interim injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an



exception. Even at the stage of passing an ad-interim order the party unsuccessful before the Executive Magistrate may on material placed before the Court succeed in making out a strong prima facie case demonstrating the findings of the Executive Magistrate to be without jurisdiction, palpably wrong or self-inconsistent in which or the like cases the Court may, after recording its reasons and satisfaction, make an order inconsistent with, or in departure from, the one made by the Executive Magistrate. The order of the court final or interlocutory, would have the effect of declaring one of the parties entitled to possession and evicting therefrom the party successful before the Executive Magistrate within the meaning of Sub-Section (6) of Section 145."

Cannot move forums parallelly:

36. In Ram Sumer Puri Mahant Vs. State of U.P. [1985 (1) SCC 427], the Supreme Court also held that after filing a civil suit, it is not open to the parties to initiate proceedings under Section 145 of the Code :-

"When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under Section 145 of the Code. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the criminal court in a matter like the one before us. Counsel for respondents 2-5 was not in a position to challenge the proposition that parallel proceeding should not be permitted to continue and in the event of a decree of the Civil Court, the criminal court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during dependency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue and the order of the learned Magistrate should be quashed. We accordingly allow the appeal and quash the order of the learned Magistrate by which the proceeding under Section 145 of the Code has been initiated and the property in dispute has been attached. We leave it



"We are unable to accept the submission that the principles laid down in Ram Sumer's case would only apply if the civil Court has already adjudicated on the dispute regarding the property and given a finding. In our view Ram Sumer's case is laying down that multiplicity of litigation should be avoided as it is not in the interest of the parties and public time would be wasted over meaningless litigation. On this principle it has been held that when possession is being examined by the civil Court and parties are in a position to approach the civil Court for adequate protection of the property during the



pendency of the dispute, the parallel proceedings i.e. Section 145 proceedings should not continue."

"We clarify that we are not stating that in every case where a civil suit is filed, Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil court that proceedings under Section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil Court would be binding on the Magistrate."

39. Even in its subsequent decision in *Mahar Jahan Vs. State of Delhi* {2004 (13) SCC 421}, the Supreme Court made a similar observation, which is as follows:-

"4. It is not disputed by the learned counsel for the parties that this very property, which is the subject-matter of these criminal proceedings, is also the subject-matter of the civil suit pending in the civil court. The question as to possession over the property or entitlement to possession would be determined by the civil court. The criminal proceedings have remained pending for about a decade. We do not find any propriety behind allowing these proceedings to continue in view of the parties having already approached the civil court. Whichever way proceedings under Section 145 Cr.P.C., may terminate, the order of the criminal court would always be subject to decision by the civil court. In as much as the parties are already before the civil court, we deem it proper to let the civil suit be decided and therein appropriate interim order be passed taking care of the grievances of the parties by making such arrangement as may remain in operation during the hearing of the civil suit."

Effect of non-passing of a preliminary order on the final order:

40. Even the question whether the non-passing of a preliminary order would vitiate the final order of an Executive Magistrate and what is the scope of the reviewing power of the High Court either under Section 482 of the Code or under Article 226/227 of The Constitution was also answered by the Supreme Court on more than one decision. In *R.H. Bhutani*, the Court held:-



"The question is whether the preliminary order passed by the Magistrate was in breach of Sec. 145 (1), that is, in the absence of either of the two conditions precedent. One of the grounds on which the High Court interfered was that the Magistrate failed to record in his preliminary order the reasons for his satisfaction. The section, no doubt, requires him to record reasons. The Magistrate has expressed his satisfaction. on the basis of the facts set out in the application before him and after he had examined the appellant on oath. 'That means that those facts were prima facie sufficient and were the reasons leading to his satisfaction...."

"This material being before the Magistrate, it was hardly 'fair to blame the Magistrate that he had passed his preliminary order lightly or without being satisfied as to the existence of the 'two conditions required by the sub-section..."

"Was the High Court next justified in observing that the Magistrate ought to, have got a police report on the allegations made in the application before he passed his said order ? Such a view has been taken in some decisions. In Phutania v. Emperor the view -taken was that it was a safe general rule for a Magistrate to refuse to take action under S. 145 except on a police report and that the absence of such a report is almost conclusive indication of the absence of any likelihood of breach of peace. A similar opinion has also been expressed in Ganesh Vs. Venkataswara where, (1) (1924) 25 Cr.L.J.1109 (2) (1964) 2 Cr.L.J. 100 relying on Raja of Karvetnagar Vs. Sowcar Lodd Govind Doss, the Mysore High Court observed that law and order being the, concern of the police it is but natural that the Magistrate should either be moved by the police or if moved by a private party, he should call for a police report regarding the likelihood of breach of peace."

41. In Rajpati, the Court restricted the scope of judicial review by Higher Courts of the order of the Executive Magistrate exercised under Section 145 of the Code in the following words:-

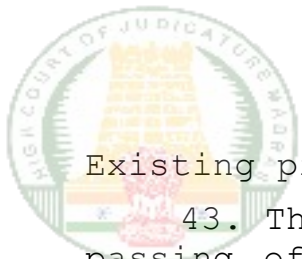
"Further, it is well settled that under S.145 it is for the Magistrate to be satisfied regarding the existence of a breach of the peace and once he records his satisfaction in the preliminary order, the High Court, in revision, cannot go into the sufficiency or otherwise of the materials on the



basis of which the satisfaction of the Magistrate is based..."

"Assuming, however, that there was an omission on the part of the Magistrate to mention in his final order that there was breach of the peace, that being an error of procedure would clearly fall within the domain of a curable irregularity which is not sufficient to vitiate the order passed by the Magistrate, particularly when there is nothing to show in the instant case that any prejudice was caused to any of the parties who had the full opportunity to produce their evidence before the Court. It was therefore not correct on the part of the High Court to have interfered with the order of the Magistrate on a purely technical ground when the aggrieved party had a clear remedy in the civil court."

42. It must also be noted that the exercise of power under Section 145 by an Executive Magistrate is only upon an information that a dispute likely to cause a breach of peace exists concerning any land or water or the boundaries. An Executive Magistrate has to be satisfied based upon the report of a police officer or on any other information. Though he is required to pass a preliminary order and serve it on the parties in the manner provided under the code, there is nothing in the said provision, which declares that the non-existence of a preliminary order will vitiate a final order passed by him. On the other hand, the internal evidence found in the very section itself shows that his order can be reviewed either at the instance of the party, who was wrongfully dispossessed within two months of the order or by a party, who was to be restored to possession. Besides that, the findings rendered by the Executive Magistrate are not conclusive and are rebuttable in a competent court. If any party moves the civil court and obtains either an interim order or a decree regarding the property, then the decision of the Executive Magistrate vanishes into thin air. The provision itself is found by the Privy Council to be based upon "police power" and the same is also coupled with a power to restore possession later, to avoid any law and order problem. Therefore it must be construed to be a mere power to restore peace and not beyond that. Therefore the aggrieved parties can always move the judicial forum i.e. the civil court to establish either the right to possession or the title to the property. Further, when the power of judicial review of the same is also limited, it is unthinkable that the Parliament would have intended to set at naught the final order passed by an Executive Magistrate on the only ground that there was no preliminary order available.



Existing precedents how far valid?

43. Though nowhere it was expressly provided that the non passing of a preliminary order will vitiate the final order, it was largely due to the decisions rendered to the contrary by the single benches as well as by a Division Bench of this court that such a situation has arisen. In the judgment of the Division Bench in M.Krishnamoorthy Vs. P.M.Neelamegham & Ors.{2004 (1) L.W (CrI.) 22}, there was no reference to any prior legal proceedings and only a factual finding was rendered in para 11 as follows:-

"In the present case, there is no dispute with regard to the fact that the Revenue Divisional Officer cum Sub Divisional Magistrate has not passed order under Sub-Section (1) of Section 145 in the matter. He has only issued summons in Na.Ka.Aa.1/2190/2002 dated 27.3.2002, requiring the parties to attend the enquiry to be held on 28.3.2002 at 11.00 a.m. After hearing the parties, he has passed order in Na.Ka.A.1/2190/2002, dated 9.5.2002, under Sub-Section (1) and Sub-Section (4) of Section 145. In other words, he exercised jurisdiction under Sections 145(1) and 145(4) and at the same time has chosen to pass the impugned order. The power of the Executive Magistrate to pass an order under Sub-Section (1) is at the preliminary stage and the power to pass an order under Sub-Section (4) is after enquiry, namely, in the final stage. Both the orders cannot be clubbed in a single order. The very fact remains that the Revenue Divisional Officer cum Sub Divisional Magistrate has not passed preliminary order under Sub-Section (1) and the entire proceedings are vitiated. It is not known as to whether the Executive Magistrate was satisfied as to the existence of a dispute likely to cause a breach of the peace and the grounds, on which, he was so satisfied and even in the impugned order, nothing is stated in this regard. We find that there is no application of mind by the Executive Magistrate and he has not followed the mandatory provisions in Sections 145 Cr.P.C. and the order passed by him in Na.Ka.A.1/2190/2002, dated 9.5.2002, is illegal."

Decisions of other High Courts:

44. The learned Referral Judge has recorded in para 19 that "this issue has not been dealt with in any of the judgments of this court". We are in full agreement with his observation. After referring to the Full Bench judgment of the Patna High Court and a Division Bench judgment of the Calcutta High Court, the learned Referral Judge has observed that the decisions of those Courts had



taken a contrary view. Hence, it is necessary to refer to those two decisions.

45. In S.M.Yaqub, a Full Bench of the Patna High Court considered the question and held that the failure of the Executive Magistrate to state the grounds does not touch the question of jurisdiction. In paragraph 12, it was observed as follows:-

"12. With regard to the first contention, it is true that the Magistrate did not act on a police report. He acted on petitions filed by members of the first party only, and though he did hear the parties and has expressed the opinion that a danger of a breach of the peace existed, he did not state his grounds for that opinion. Under S.145(1), the Magistrate in his order drawing up proceedings shall state the grounds of his being so satisfied and in this, the Magistrate's procedure is certainly not in accordance with the provisions of S.145(1). Nevertheless, I am of opinion that the High Court would be taking an unjustifiable risk and responsibility in interfering with an order merely for this reason when the Magistrate has definitely expressed his view that there is a danger to the public peace. The responsibility for maintenance of the peace is that of the Magistrate, not that of the High Court. The proceedings are only of a semi-judicial nature. To some extent they may be regarded as administrative. The failure to state the grounds, in my view, does not touch the question of jurisdiction. The ruling, upon which Mr.Das has principally relied, is Nittyanand Roy Vs. Paresh Nath Sen, 32 Cal. 771. Therein it is laid down that if the Magistrate omits in the initiatory order under S.145 (1) to state the grounds of his being satisfied as to the likelihood of a breach of the peace, the final order is without a confusion as to the nature of jurisdiction. I think no question of jurisdiction arises, and I repeat that when the Magistrate, who is responsible for the maintenance of the peace within his jurisdiction responsible for the maintenance of the peace within his jurisdiction, has expressly stated that a danger of a breach of the peace necessitating action under S.145 exists, the High Court should not lightly interfere."

46. Similarly, the Division Bench of the Calcutta High Court in Khudiram Mandal, agreed with the reasoning of the Patna Full Bench and held that what was required under Section 145 of the Code was only the satisfaction and the rest of it is merely



procedural. In para 53, the Division Bench observed as follows:-

"53. The actual decision of the Full Bench did not expressly deal with this aspect of the matter, but the view must be deemed to have been accepted, as it accepted the reasons and the conclusions contained in the order of reference. In any event, we are in complete agreement with the reasoning and in my opinion, it is a complete answer to the point raised. The foundation of jurisdiction under S.145 is the satisfaction of the Magistrate. The rest is mere procedure. That procedure having been laid down must of course be strictly followed, and nothing that we say here is meant to be a premium to carelessness or as an encouragement to laxity. But the point is whether we should set aside proceedings where there are defects in procedure but no prejudice has been suffered by the parties. If the order was served in this form and the parties had no opportunity of discovering that it referred to the police report or as to what was said in the police report, or could not adduce proper evidence because of the want of the grounds or the inaccuracy of description of the property, we would at once have interfered. As I have pointed out, however, the parties knew of the grounds exactly and dealt with the same in their written statements and adduced evidence on the precise issue that is involved in the case. The parties are not bad; S.537, Criminal P.C., is conclusive on that point."

47. We must observe that the two judgments i.e. that of Patna High Court and of the Calcutta High Court have correctly set out the law on the subject. We are in full agreement with the same. In view of the above discussion, we have no hesitation to hold that the decisions of the learned Single Benches of this Court as well as the Division Bench in Krishnamoorthy, are not binding precedents and they have not set out the correct position of law.

Section 133 of the Code not comparable:

48. An attempt was made by counsels for some petitioners to rely upon the judgment of the Supreme Court in C.A.Avarachan Vs. C.V.Sreenivasan and Anr. {1996 (7) SCC 71} wherein it was held that the non-drawing of a preliminary order under Section 133 of the Code will vitiate the entire proceedings. They wanted us to draw a parallel between Sections 133 and 145 of the Code. First of all, these two provisions are not comparable, as they are worded differently.

49. Considering the intent and purport of those two provisions, the Supreme Court held in Kachrual Bhagirath Agrawal & Ors. Vs State Of Maharashtra & Ors. {2005 (9) SCC 36} that



Sections 133 and 144 of the Code are not comparable. It was observed therein as follows:-

"A comparison between the provisions of Sections 133 and 144 of the Code shows that while the former is more specific, the latter is more general. Therefore, nuisance specially provided in the former section is taken out of the general provisions of the latter section. The proceedings under Section 133 are more in the nature of civil proceedings than of criminal nature...

It has to be noted that sometimes, there is confusion between Section 133 and Section 144 of the Code. While the latter is a more general provision, the former is more specific. While the order under the former is conditional, the order under the latter is absolute. [See State of M.P. Vs. Kedia Leather & Liquor Ltd. & Ors. [2003 (7) SCC 389]."

Though the above decision of the Supreme Court compared Section 133 with Section 144, the same reasoning will also apply to Section 145 of the Code, with which, we are concerned herein. Hence, the reliance placed upon C.A. Avarachan does not appeal to us.

Contention based upon Sections 460 and 461:

50. Section 460 of the Code lists out the irregularities, which do not vitiate the proceedings. Section 461 of the Code lists out the irregularities, which vitiate the proceedings. The irregularities listed in Sections 460 and 461 of the Code are given in a tabular column as hereunder :



Irregularities listed in Section 460 of the Code	Irregularities listed in Section 461 of the Code
If any Magistrate not empowered by law to do any of the following things, namely:- (a) to issue a search-warrant under section 94; (b) to order, under section 155, the police to investigate an offence; (c) to hold an inquest under section 176; (d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction; (e) to take cognizance of an offence under clause (a) or clause (b) of sub-section (1) of section 190; (f) to make over a case under sub-section (2) of section 192; (g) to tender a pardon under section 306; (h) to recall a case and try it himself under section 410; or (i) to sell property under section 458 or section 459, erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.	If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:- (a) attaches and sells property under section 83; (b) issues a search-warrant for a document, parcel or other thing in the custody of a postal or telegraph authority; (c) demands security to keep the peace; (d) demands security for good behavior; (e) discharges a person lawfully bound to be of good behavior; (f) cancels a bond to keep the peace; (g) makes an order for maintenance; (h) makes an order under section 133 as to a local nuisance; (i) prohibits, under section 143, the repetition or continuance of a public nuisance; (j) makes an order under Part C or Part D of Chapter X; (k) takes cognizance of an offence under clause (c) of sub-section (1) of section 190; (l) tries an offender; (m) tries an offender summarily; (n) passes a sentence, under section 325, on proceedings recorded by another Magistrate; decides an appeal; (p) calls, under section 397, for proceedings; or (q) revises an order passed under section 446, his proceedings shall be void.



51. Therefore, on the basis of these two provisions, a contention was advanced to the effect that the failure of the Magistrate to pass a preliminary order under Section 145(1) is not included either within Section 460 or within Section 461 and that therefore, the failure to pass an order under Sub-Section (1) would be an illegality and not an irregularity.

52. But, the above contention lacks merit. A careful look at Section 460 would show that the items included therein are more procedural in nature. The items included in Section 461 are substantial in nature. As a matter of fact, one of the items included in Section 461 is an order under Section 133. Therefore, if a comparison is to be made with Section 133, the law makers should have included Section 145(1) also as one of the items under Section 461.

53. Moreover, Clause (i) of Section 461 includes a prohibitory order under Section 143. If a Magistrate, who is not empowered by law, issues a prohibitory order under Section 143, such an irregularity, as per Section 461, vitiates the proceedings. The law makers, who took care to incorporate a prohibitory order under Section 143 as one of the items in Section 461, did not choose to include Section 145(1), under Section 461. This can also be taken to be an indication that the failure of a Magistrate to pass a preliminary order under Sub-Section (1) of Section 145 was not considered to be one that vitiated the proceedings.

54. In any case, a careful look at Sections 460 and 461 would show that both the Sections address only those irregularities that strike at the root of the jurisdiction of the Magistrate. Section 460 begins with the words "if any Magistrate not empowered by law to do any of the following things". Similarly, Section 461 begins with the words "if any Magistrate not being empowered by law in this behalf". Both Sections 460 and 461 do not address the question as to what happens when an irregularity is committed by a Magistrate, while performing an act, which he is empowered by law to do. Therefore, the contentions based upon Sections 460 and 461 would not lead to the inference that the failure to pass a preliminary order under Section 145(1) would vitiate a final order.

Contention based upon certain expressions found in Section 145 (1) :

55. Sub-Section (1) of Section 145 uses the expression "whenever an Executive Magistrate is satisfied". It also uses the expression "shall make an order in writing". Therefore, it is contended that the satisfaction to be arrived at by a Magistrate under Section 145(1) should be an objective satisfaction. The question as to whether he arrived at such a satisfaction or not, can be determined only if an order is passed. The expression "shall" is also an indicator to show the mandatory



nature of the requirement.

56. But, we do not think so. We have no quarrel with the proposition that whenever a Magistrate passes a preliminary order under Section 145(1), such an order should satisfy all the requirements of law namely (i) the arrival of a subjective satisfaction; (ii) recording of the grounds for arriving at such satisfaction; and (iii) issuing the order in writing. But, if no order is passed under Sub-Section (1), the effect of the failure to pass such an order need not necessarily be tested solely on the basis of the language employed in Sub-Section (1), but has to be determined with reference to the nature of the power conferred by the Section in entirety. Hence, the contention based upon the expressions used in Sub-Section (1) does not merit acceptance.

Argument based upon Section 146 :

57. It was argued before us that the reference in Section 146 (1) to an order under Section 145(1) is an indication to show that the requirement to pass an order under Section 145(1) is mandatory.

58. But, we do not find such a consequence flowing out of Section 146(1). Section 146(1) confers a power upon the Magistrate to attach a property temporarily until the civil court determines the rights of parties with regard to the person entitled to possession. There are three contingencies, under which, the power under Section 146(1) can be invoked. They are :

(i) cases of emergency

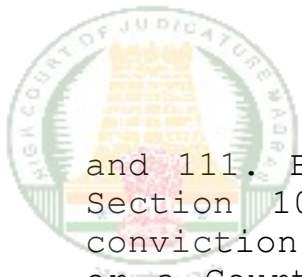
(ii) cases where the Magistrate comes to the conclusion that none of the parties was in possession at the time when the order under Section 145(1) was to be passed and

(iii) cases where the Executive Magistrate is unable to satisfy himself as to who was in possession.

59. A combined reading of Sections 145 and 146 would show that when an Executive Magistrate is satisfied about the fact that a dispute likely to cause a breach of peace exists concerning any land or water or boundaries thereof, he may pass an order requiring the parties to attend the court on a specified date and time. After passing such an order, he may also direct the attachment of the disputed property until a competent court determines rights of the parties. The reference in Section 146(1) to an order under Section 145(1) is for the purpose of indicating when an order of attachment could be passed. If an order of attachment is to be passed, then in such a case, a preliminary order under Section 145(1) may be necessary. This is all that is implied by Section 146(1).

Argument based upon Sections 106, 110 and 111 :

60. An argument was advanced on the basis of Sections 106, 110



and 111. But, we do not think that there can be any comparison. Section 106 speaks about a contingency that arises after the conviction of a person by a Court of a Magistrate of First Class or a Court of Sessions. Section 110 deals with the power of the Executive Magistrate to call upon habitual offenders to furnish security for good behaviour. Section 111 prescribes the procedure to be followed. These three Sections have nothing to do with the power conferred upon the Executive Magistrate where a dispute relating to immovable property arises and such dispute is likely to cause breach of peace.

Contra view based upon Section 465 :

61. It was contended by Mr. Isaac Mohanlal, learned counsel appearing for the private respondents that as per Section 465(1), a finding of sentence or order passed by a court of competent jurisdiction need not be reversed or altered by a court of appeal merely because of an error, omission or irregularity unless a failure of justice had in fact been occasioned thereby. Under Sub-Section (2) of Section 465, the court should have due regard to the fact whether the objection could or should have been raised at an earlier stage in the proceedings, while determining whether the error, irregularity or omission committed by the Magistrate occasioned a failure of justice or not.

62. But, we do not think that we should draw inspiration from Section 465(1). Section 465(1) begins with the words 'subject to the provisions hereinbefore contained'. Therefore, what is contained in Section 465(1) has to be read in conjunction with Sections 460 and 461. Hence, we would not test the correctness of the contention of the petitioners on the basis of what is provided in Section 465(1).

Queries answered:

63. In the light of the above discussion, we answer the questions posed by the learned Judge as follows:-

"1. Though the Executive Magistrate is required to pass a preliminary order under Section 145(1), the absence of the same will not vitiate his final order under Section 145(4) of the Code.

2. The failure of an Executive Magistrate to pass a preliminary order under Section 145(1) of the Code is a mere irregularity and will not affect his jurisdiction

3. Considering the nature of power vested on the Executive Magistrate under Section 145 of the Code, no prejudice will be caused to parties.

4. The aggrieved parties are empowered to move the very same Authority for reviewing his decision or in its absence, move the competent civil court for an appropriate relief either regarding the title or



regarding the right to possession. In rare cases, they can move this Court for a judicial review either under Section 397 of the Code or under Article 226/227 of The Constitution".

Reliefs:

64. Normally, after a reference is answered by a Full Bench, the individual petitions are placed before appropriate Court for rendering decisions in accordance with the answers given by it. In the criminal revision case in CrI.R.C.(MD)No.863 of 2011, the only issue i.e. for want of preliminary order, the final order of the Executive Magistrate must suffer, has been answered against the petitioner. Further, there has been subsequent developments before the civil courts. The petitioner along with his group has instituted a title suit. Therefore, he can work out the right before that forum. Hence, CrI.R.C.(MD)No. 863 of 2011 stands dismissed.

65. In so far as CrI.O.P.(MD)No.4819 of 2015 is concerned, we have already answered that the non-passing of a preliminary order will not vitiate a final order and further, the original petition is not maintainable. Either the parties can move the Executive Magistrate to review his order or in his absence, move appropriate civil courts for reliefs. Hence, CrI.O.P.(MD)No.4819 of 2015 also stands dismissed. The connected miscellaneous petition is also dismissed.

66. In so far as CrI.R.C.(MD)No.315 of 2015 is concerned, the only order passed by the Sub-Collector, which is under challenge, is that the revision petitioner should not put up any construction of a place of worship on a leasehold land. Apart from the fact that there are disputes, the Sub-Collector also noted that no permission was obtained to put up the construction. The revision petitioner did not, in any case, assail the order of the Sub-Collector on the ground that no preliminary order is passed. Therefore, the revision petition deserves to be dismissed. Accordingly, CrI.R.C.(MD)No.315 of 2015 is dismissed. Consequently, the connected MP is also dismissed.

Sd/-

Assistant Registrar(CS II)

/True copy/

Sub Assistant Registrar

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<https://hcservices.ecourts.gov.in/hcservices/>

2.The Revenue Divisional Officer/Sub-Divisional Magistrate, Devakottai, Sivagangai District.



3.The Inspector of Police, Taluk Police Station, Devakottai Taluk, Sivagangai District.

4.The Sub-Divisional Magistrate-cum-Sub-Collector, Cheranmahadevi Sub-Division, Tirunelveli District.

5.The Inspector of Police, Airwadi Police Station, Tirunelveli District.

6.The Revenue Divisional Magistrate/Revenue Divisional Officer, Pattukottai, Thanjavur District.

7.The Inspector Police, Thiruchittrambalam Police Station, Thanjavur District.

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Common Order
on Reference in
Crl.R.C.(MD)Nos.863 of 2011
& 315 of 2015 & Crl.O.P.(MD)
No.4819 of 2015
13.4.2016