

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46131 of 2013

Against order dt 09.09.13 passed by the S.D.M., Aurangabad in Case No. 2548/2013.

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Anita Devi, Wife of Rajesh Kumar Pankaj, Resident of Village + Post- Poiwan,
P.S. Muffasil, District- Aurangabad

.... Petitioner

Versus

1. The State of Bihar
2. The Circle Officer, Block- Aurangabad, District- Aurangabad
3. Sri Prem Kumar Daruka, Son of Late Mahavir Prasad Daruka, Resident of New Area, Maharajganj Road, P.S. Town Aurangabad
(O.P. No. 3 since deceased has been substituted by following heirs and legal representatives vide order dated 11.07.2016 passed by the Court on I.A. No. 785/2016 filed in Cr. Misc. No. 42871/2013)

3(i) Mira Daruka, W/o Late Prem Kumar Daruka,
3(ii) Raghvendra Kumar Daruka, S/o late prem Kumar Daruka,
3(iii) Manish Kumar Daruka, S/o Late Prem Kumar Daruka, resident of New Area Maharajganj Road, Aurangabad, P.S. and District Aurangabad,
3(iv) Rashmi Tibrewal, D/o Late Prem Kumar Daruka, resident of Belair Apartment, Main Road, Ranchi, P.S. + District Ranchi,
3(v) Ritima Agarwal, D/o Late Prem Kumar Daruka, resident of Belair Apartment, Main Road, Ranchi, P.S. + District Ranchi

.... Opposite Parties

With

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Criminal Miscellaneous No. 42871 of 2013

Against order dt 09.09.13 passed by the S.D.M., Aurangabad in Case No. 2548/2013.

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Rakesh Kumar Pawan S/o Sri Ajay Kumar Singh Resident of Village & P.O. - Poiwan, P.S. Mofassil Aurangabad, District- Aurangabad.

.... Petitioner

Versus

1. The State of Bihar
2. Prem Kumar Daruka, S/O Late Mahavir Prasad Daruka, Resident of New Area, Maharajganj Road, Aurangabad, P.S. and District- Aurangabad (Bihar)
(O.P.No. 2 since deceased has been substituted by following heirs and legal representatives vide order dated 11.07.2016 passed by the Court on I.A. No. 785/2016 filed in Cr. Misc. No. 42871/2013)

2(i) Mira Daruka, W/o Late Prem Kukmar Daruka,
2(ii) Raghvendra Kumar Daruka, S/o late prem Kumar Daruka,
2(iii) Manish Kumar Daruka, S/o Late Prem Kumar Daruka, resident of New Area Maharajganj Road, Aurangabad, P.S. and District Aurangabad,
2(iv) Rashmi Tibrewal, D/o Late Prem Kumar Daruka, resident of Belair Apartment, Main Road, Ranchi, P.S. + District Ranchi,
2(v) Ritima Agarwal, D/o Late Prem Kumar Daruka, resident of Belair Apartment, Main Road, Ranchi, P.S. + District Ranchi

.... Opposite Parties.



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Appearance:

(In Cr. Misc. No.46131 of 2013)

For the Petitioner/s : Mr. H.S. Himkar,
Mr. Kumar Kaushlendra and
Mr. Sanjay Kumar, Advocates.
For the Opposite Party-State : Mr. Suresh Prasad Singh, A.P.P.
For the Opposite Party no. 3 : Mr. Ramakant Sharma, Sr. Advocate &
Mr. Narendra Kumar and
Mr. Rajesh Kumar, Advocate.

(In Cr. Misc. No.42871 of 2013)

For the Petitioner/s : Mr. H.S. Himkar and
Mr. Raj Kishore Prasad, Advocate.
For the Opposite Party-State : Mr. Abhay Kumar, A.P.P.
For the Opposite Party 2 : Mr. Ramakant Sharma, Sr. Advocate &
Mr. Narendra Kumar and
Mr. Rajesh Kumar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

Date: 19-07-2017

Both the aforementioned Cr. Misc. Applications arise out of a order dated 09.09.2013 passed by learned Sub Divisional Magistrate, Aurangabad U/S 146(1) of the Code of Criminal Procedure in Case No. 2548/2013 (Prem Kumar Daruka & Ors. v. Ajay Kumar Singh & Ors.) and the consequential notice dated 10.09.2013 issued under signature of the Circle Officer-cum-receiver calling upon the petitioners in both the cases as also other purchasers to vacate the premises in question, if they are in occupation. The petitioner in Cr. Misc. No. 46131/2013 has challenged the notice and in sum and substance assailed the order of attachment and appointment of receiver by the learned Sub Divisional Magistrate



pursuant to which the notice was issued; in Cr. Misc. No. 42871 of 2013, the petitioner has challenged the order dated 09.09.2013 passed by learned Sub Divisional Magistrate U/S 146(1) and by filing supplementary affidavit informed this Court that during pendency he was evicted from the premises by the receiver, thus a prayer has also been made for restoration of possession.

2. In view of the common facts and the issues involved in both the cases, as requested by the learned counsel for the parties, both the applications have been heard together and are being disposed of by this common order.

3. Learned counsel for the petitioners in both the cases requested this Court to take up the facts of the case for purpose of disposal from Cr. Misc. No. 42871/2013. Learned counsel for the opposite party no. 2 and 3 as also learned A.P.P. appearing for the State agreed to the same.

4. Before narrating the facts of the case it would be in the fitness of things to say that the maxim '*res ipsa loquitur*', i.e., the things speak for itself is fully applicable in this Case. In other words mere occurrence of some kinds of accident is sufficient to imply negligence. The petitioners have narrated the facts which are uncontroverted as no counter affidavit / reply has been filed on behalf of the contesting opposite parties despite pendency of the present



applications for about three years and nine months in this Court.

FACTS OF THE CASE

5. According to the petitioner, one Mahavir Prasad Daruka (since deceased) had two sons, namely, (i) Dr. Babulal Daruka and (ii) Prem Kumar Daruka and seven daughters. All the seven daughters were married and were living with their respective husbands and children at their in-laws' house. Late Mahavir Prasad Daruka, in his life time, partitioned the property in question being a land bearing Plot No. 196 in Ward No. 1 and Holding No. 128 and the building standing thereon falling within the jurisdiction of Aurangabad Municipality in the town of Aurangabad. There was a residential house on the land and said Mahavir Prasad Daruka decided to partition the same between his two sons – Babulal Daruka and Prem Kumar Daruka. He, during his life time, wrote a letter dated 20.01.1988 to the Executive Officer, Aurangabad Municipality in which he informed the Executive Officer that he had partitioned the southern part of the building to Babulal Daruka and the western part to Prem Kumar Daruka, therefore, the municipality was requested to create holdings separately in the name of both the sons after removing the name of the applicant Mahavir Prasad Daruka. He also requested that both the portions should be separately assessed and the taxes should be divided in two parts so that both the sons can pay the taxes



immediately. Annexure-1 to the present application is the said latter dated 20.01.1988 addressed to the Executive Officer, Aurangabad Municipality.

6. On receipt of the said information, the Executive Officer, Aurangabad vide his letter no. 06 dated 07.01.1991 called upon both the sons to appear for hearing in the matter of mutation of the names in respect of the said holdings. Mahavir Prasad Daruka died on 27.06.1992 and thereafter both the brothers wrote a letter to the Executive Officer, Aurangabad in which they informed him that whatever outstanding taxes are there both the brothers shall pay the same equally and rent receipts thereof should be issued separately in the names of both the brothers. As agreed between the two brothers, the rent receipts were issued separately.

7. Learned counsel for the petitioners further submits that late Babulal Daruka was a doctor and had opened a clinic in his own house which was given to him as a share in his property, therefore, a notice for commercial rent fixation was issued by the Anchala Adhikari, Aurangabad Municipality to him vide Case no. 5/03-04. The notice was issued U/S 23(4) of the Bihar Tenancy Act and objection was invited as to why 5% of the market rate be not fixed for commercial use of land. A copy of the said notice dated 07.01.1991 is Annexure-3 to the present application. After death of



Babulal Daruka, his wife Aruna Daruka got her name mutated in respect of the said property and rent receipt was also issued in her name which has been enclosed as Annexure '5' to the application. It is evident from the said rent receipt that the total area covered under the receipt is 34.5 decimals. It is further stated that sons of Prem Kumar Daruka, namely, Manish Kumar Daruka and Raghvendra Daruka partitioned the land bearing Plot No. 196 under Khata No. 52 measuring area 41 decimals which had fallen in the share of their father late Prem Kumar Daruka. It is a positive case of the petitioner that both the sons of late Prem Kumar Daruka had executed a partition deed and the same was signed by Prem Kumar Daruka and Babulal Daruka as a witness, the said deed provides for partition of a total area of 41 decimals of Plot No. 196 under Khata No. 52 belonging to the share of Prem Kumar Daruka. The aforementioned facts have been emphatically placed by the learned counsel for the petitioners in both the cases to establish that there was already a partition in the life time of Mahavir Prasad Daruka with respect to the land and building in question and there was another partition in between the sons of Prem Kumar Daruka in the year 2006 itself.

DISPUTES BETWEEN THE PARTIES

8. The dispute between the parties arose when after death of Dr. Babulal Daruka, his widow Aruna Daruka and only



daughter, namely, Bharti Dalmiya started planning to sell certain properties which were inherited / succeeded by them through Dr. Babulal Daruka. On coming to know that they were planning to sell the properties, the two sons of Sri Prem Kumar Daruka filed a partition suit bearing no. 180/2010 (297/2011) in the court of learned Sub Judge III, Aurangabad. In the partition suit, the plaintiffs claimed 1/9th share in the whole property as according to the plaintiffs the seven daughters of late Mahavir Prasad Daruka, who were parties to the partition suit, were also entitled for 1/9th share each. A copy of the plaint giving rise to the partition suit has been brought on record by way of a supplementary affidavit (Annexure-22 to the supplementary affidavit of the petitioner). The prayer made in the plaint are as under:

“A- That a preliminary decree of partition to the extent of plaintiff : share be passed in the suit land.

B- On appointment of a survey knowing advocate commissioner a separate takhata of the plaintiffs share be carved-out and accordingly final decree be passed thereafter the plaintiff be put in possession of the same through the process of the court.

C- That full cost of the suit be awarded to the plaintiffs.

D- That any other relief or reliefs which the court thinks fit and proper be awarded in favour of the plaintiffs.”

9. In the said partition suit, Aruna Daruka and his daughter Bharti Dalmiya are defendant no. 1 and 2 respectively. The



plaintiffs, who are the two sons of late Prem Kumar Daruka, filed an injunction application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure and prayed that the defendant no. 1 and 2 be restrained from transferring the land and the house to the extent of their own share to anybody else. The said application came up for consideration before the learned Sub Judge on 06.05.2011 and the same was dismissed by a reasoned order. A view was taken while rejecting the injunction application that there was a partition between the two brothers and the plaintiffs were not able to make out a *prima facie* case in their favour; the balance of convenience also did not lie in their favour and no irreparable loss or injury shall arise if the defendants are not restrained from selling the properties. A copy of the order dated 06.05.2011 passed in the injunction matter is Annexure-8 to the present application.

10. On 27.06.2011, i.e., after refusal of the injunction application, Manish Kumar Daruka, one of the sons of Prem Kumar Daruka, filed a Complaint Case no. 512/2011 in the court of the learned Chief Judicial Magistrate, Aurangabad alleging therein that there was no partition in between the two brothers of his father and all the properties are still in the name of his grand-father but Most. Aruna Daruka got her name mutated in the office of the Circle Officer by committing a forgery. It was also alleged that she had also sold the



land appertaining to Khata No. 43, Plot No. 221 and 62 and all the consideration amount has been grabbed by her. A copy of the said complaint petition is Annexure-9 to the present application; however, Annexure-10 is a copy of the order dated 11.08.2011 passed by Sri Abhay Srivastava, learned Judicial Magistrate 1st Class, Aurangabad dismissing the Complaint Case no. 512/2011.

11. In yet another attempt, one of the daughters of late Mahavir Prasad Daruka, namely, Kalavati, who is defendant no. 5 in the partition suit, filed an application before the Land Reforms Deputy Collector, Aurangabad (in short 'LRDC') and sought partition of the land in question giving rise to the instant Case no. 4/2012. The learned LRDC vide order dated 04.05.2012 passed a preliminary decree of partition holding therein that all the parties in the suit are entitled for 1/9th share in the property left by late Mahavir Prasad Daruka whereas Most. Aruna Daruka and her daughter are entitled for 1/18th share (Annexure 11 to the application). The order dated 04.05.2012 passed by the LRDC was challenged before this Court in CWJC No. 22670/2012 and on coming to know the facts of the case, this Court was pleased to pass an order dated 18.12.2012 (Annexure 12 to the application) restraining the official respondents from taking steps for implementing the order dated 04.05.2012 passed in Land Dispute Resolution Case No. 4/12. The order dated 18.12.2012 passed



in CWJC No. 22670/2012 is Annexure-12 to the present application. The order dated 04.05.2012 was later on set-aside by the Appellate Authority.

12. Having failed to get the fruit of the order dated 04.05.2012 passed by the LRDC it is stated that an application under Section 144 Cr.P.C. was filed by one Dilip Kumar Ritaria and Sanjeev Agrawal against the purchasers of the land appertaining to Khata No. 43, Plot no. 62 measuring area 1.73 acres which was one of the properties in the Partition Suit and Dispute Resolution Case no. 04/2012. The Sub Divisional Magistrate, Aurangabad initiated a proceeding under Section 144 Cr.P.C. Case No. 1366/13 and after obtaining records from the police decided to drop the said proceedings vide order dated 03.08.2013. A copy of the order dated 03.08.2013 is Annexure-13 of the present application. A reading of the order passed by the Sub Divisional Magistrate would show that the learned Sub Divisional Magistrate was of the view that since a partition suit is already going on in respect of the disputed property, it would not be just and proper for him to pass any order and, therefore, the first party was directed to await receipt of the order of the competent court. The proceeding was dropped.

PRESENT PROCEEDING

13. In the aforementioned background of facts, in their



fresh attempt to raise the issue Sri Prem Kumar Daruka and his sons took recourse to Section 145 Cr.P.C. giving rise to Aurangabad Case No. 2548/2013. It is this case which brought the desired result and the same has fallen for consideration before this Court. As the story unfolded, on 08.09.2013 the Circle Officer, Aurangabad wrote a letter bearing no. 0/Camp to the Sub Divisional Magistrate by which he informed the Sub Divisional Magistrate that according to the information received by the Circle Officer, Most. Aruna Daruka, widow of late Babulal Daruka, had sold the properties mentioned in the said letter through different sale deeds executed on 29.08.2013 in favour of (i) Smt. Anita Devi, (ii) Smt. Manju Kumari, (iii) Sri Rakesh Kumar Pawan and (iv) Sri Rajesh Kumar Pankaj. All these land were within the 24 decimals area of Plot No. 196 under Khata No. 52 and there is a pathway with a Pucca building over the land. The eastern side exit of the land leads to Maharajganj road which is used by both the parties. The letter also stated that all the purchasers, after purchasing the properties, broke open the lock on the main gate from the eastern side and they have forcibly entered in the premises which were objected to by Prem Kumar Daruka and his family. In fact, they had also lodged Town P.S. Case No. 414/2013 in this respect. The Circle Officer further stated that because of these occurrences, a law and order problem / tension had cropped up



between the two families and there were chances of law and order problems. In these circumstances, the Circle Officer requested the Sub Divisional Magistrate that in order to keep peace and to maintain law and order problem under control, a proceeding under Section 145 /146 Cr.P.C. should be initiated and necessary steps be taken. He also recommended action under Section 146(1) Cr.P.C. because of the emergency situation. A copy of the letter no. 0/Camp dated 08.09.2013 is Annexure 24 to the supplementary petition filed on behalf of the petitioner. On receipt of the information, the Sub Divisional Magistrate seems to have passed an order dated 08.09.2013 showing his satisfaction on the report of Circle Officer and issued a notice to the aforementioned purchasers showing their addresses as that of Village and P.O. Poiwan, district Aurangabad. The notice however states that on the basis of the records and his spot visit it appeared to him that there being a dispute with respect to Plot No. 196, measuring area 0.24 decimals there may be breach of peace, hence, the noticees were asked to submit there written statements with respect to their possession over the given land (disputed land) either themselves or through their lawyers. The petitioner has brought a copy of the notice allegedly served on him on 08.09.2013 itself at 11:30 P.M. The case of the petitioner, however, is that the notice was not served on him. On record, save and except the copy of the notice



(Annexure-29 to the supplementary affidavit on behalf of the petitioner) there is no material showing passing of any order by the learned Sub Divisional Magistrate, Aurangabad in terms of Section 145(1) Cr.P.C. The case of the petitioner is that in fact no order under Section 145(1) Cr.P.C. was passed by the learned Sub Divisional Magistrate. A specific statement to this effect has been made in Paragraph 2 of the second supplementary affidavit filed on behalf of the petitioner. The statement has not been denied by the contesting opposite parties or the State. However, in course of hearing a Xerox copy (not certified copy) of the order dated 08.09.2013 has been produced by Sri Ramakant Sharma, learned Senior Counsel representing the opposite parties to show that the Sub Divisional Magistrate had passed an order dated 08.09.1993 and on being satisfied with the report of the Circle Officer he had directed issuance of notice under Section 145 Cr.P.C. to the purchasers and accordingly the notices were issued and also pasted on a conspicuous place over the disputed property. The latter part of the order dated 08.09.2013 shows time evening 11:30 as the time for service of notice and pasting of the same. Since the order dated 08.09.2013 is not under challenge in any of these two cases, this Court need not go into the legality or validity of the order dated 08.09.2013.

14. On record there is an order dated 09.09.2013 passed



by the Sub Divisional Magistrate, Aurangabad in Case No. 2548/13 which shows that some of the purchasers appeared before the Sub Divisional Magistrate and pointed out the lacuna in service of notice upon them as also to allow them sufficient time to submit their written statements. The purchasers submitted that although the dispute has been shown between Prem Kumar Daruka and others on the one hand and Ajay Kumar Singh on the other hand but no notice was served upon said Ajay Kumar Singh, instead notices were served on the son and daughter of said Ajay Kumar Singh. The notice did not contain the description of the property in dispute and the boundaries are also not mentioned. The notices were not served properly and the members of the second parties have not been served. The Sub Divisional Magistrate passed an order for correction in the notice and also took note of the strong objection taken by the second parties against the manner in which the Sub Divisional Magistrate was acting in haste to pass an order even without giving an appropriate opportunity to the second parties to submit their written statements. The second parties questioned the independence and impartiality of the Sub Divisional Magistrate and requested for transfer of the matter to a competent authority. The Sub Divisional Magistrate took note of the grievances of the second party as regards his impartiality but rejected the same as baseless. He directed his Peshkar to register the matter as a regular



case in the court and directed to place the record on 14.09.2013.

15. As it appears from the record, on the same date, at about 6:00 P.M., the Circle Officer, Aurangabad and the Officer-in-charge, Town Police Station, Aurangabad submitted a joint report to the Sub Divisional Magistrate; a copy of the same has been brought on record as Annexure-26 to the supplementary affidavit filed on behalf of the petitioner. In this joint report it is stated that the purchasers broke open the lock of the purchased house and entered in the house on 07.09.2013 which was objected to by Prem Kumar Daruka and his sons leading to assault by both the parties to each other. This had given rise to P.S. Case No. 412/13 and again on 08.09.2013 both the parties indulged in assaulting each other over possession of the said house for which P.S. Case No. 414/13 has been lodged and a proposal for initiation of a proceeding under Section 107 / 116(3) Cr.P.C. had been submitted to the Sub Divisional Magistrate. The report further said that as both the parties were desperate against each other due to the dispute over possession of the property, hence, in order to prevent law and order problem police force has been deputed there. In the last paragraph of the joint report they wrote that in view of the risk envisaged the Sub Divisional Magistrate should attach the property immediately and appointed a receiver so that peace may be maintained.



16. On receipt of the aforesaid joint report at about 6:00 P.M. on 09.09.2013, the Sub Divisional Magistrate passed the impugned order which is under challenge. Apparently, the impugned order has been passed under Section 146(1) Cr.P.C. by which the property has been attached and the Circle Officer, Aurangabad has been appointed as a receiver under Section 146(2) Cr.P.C. The order has been made applicable in respect of 24 decimals of land with building and the order has been made operative till a decision is rendered by a competent court of law with respect to the person entitled for possession. Very next day on 10.09.2013, the Circle Officer, Aurangabad-cum-Receiver served a notice on all the purchasers including these petitioners calling upon them to immediately vacate the premises, if they are in possession thereof failing which strict legal action shall be taken. From Annexure 32 to the Supplementary Affidavit it is apparent that the Circle Officer evicted the purchasers on 12.09.2013 and their house-hold articles were seized and taken out of the premises.

SUBMISSION OF THE PARTIES

17. Learned counsel for the petitioners in both the cases has vehemently argued that the very initiation of the proceeding under Section 145(1) Cr.P.C. and then passing of the order under Section 146(1) and 146(2) Cr.P.C. are not in accordance with law. According



to him, Section 145(1) Cr.P.C. specifically provides that whenever an Executive Magistrate is satisfied from the report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land, 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 on a specified date and time and to put in written statements of their respective claims as respects the facts of actual possession of the subject of dispute. The word 'satisfied' occurring under Section 145 is a word of wider connotation otherwise the legislature would have simply permitted the Executive Magistrate to proceed under Section 145(1) Cr.P.C. on the basis of a police report or upon other information. In the present case, according to the learned counsel, the Sub Divisional Magistrate had not recorded his satisfaction and only proceeded on the basis of the letter written by the Circle Officer, Aurangabad. He would further submit that the manner in which notices under Section 145(1) Cr.P.C. were sought to be served upon the purchasers on 08.09.2013 at 11:30 P.M. speaks for itself. Further, service of notices on some of the purchasers and/or their family members at the said hours in night was possible only because they were in possession of the house in question which is an admitted fact even appearing from the joint report dated 09.09.2013. The Sub Divisional Magistrate had fixed the matter for



14.09.2013 allowing the purchasers to submit their written statements but on the same day at 6:00 P.M. a joint report was placed before him and he passed an *ex parte* order under Section 146(1) Cr.P.C. At this stage also he had not considered as to whether anyone of the circumstances enumerated under Section 146(1) Cr.P.C. exists. Section 146(1) Cr.P.C. specifically states that 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, but in the present case the word 'emergency' has been used in a most mechanical manner against the interpretation given by the Hon'ble Supreme Court as also this Court on several occasions. Learned counsel submits that an order passed in haste indicates much towards a mala fide exercise of power vested in the authorities concerned; otherwise there was no reason why an order under Section 146(1) and 146(2) Cr.P.C. could be passed at 6:00 P.M. on 09.09.2013 in absence of the purchasers who were in possession and were impleaded as second parties. Learned counsel has specifically



pointed out that when a partition suit had already been brought by the two sons of Prem Kumar Daruka in which they are themselves seeking a decree to be placed in possession and a prayer for injunction had already been refused by the learned Civil Court, Aurangabad, during pendency of the said suit, initiation of a parallel proceeding under Section 145 and then passing an order under Section 146 Cr.P.C. is bad in law and the proceeding itself is not maintainable as the parties including vendor of the second parties were already there before the competent court of law where all orders could have been prayed for and the court was competent to grant any relief. Thus, at the outset, drawing of a parallel proceeding was result of exercise of power in excess of jurisdiction in a frivolous and vexatious litigation. It is further submitted that there was a *mala fide* reason to somehow or other disallow the co-sharers Aruna Daruka and her daughter Bharti Dalmiya from selling the property of their share and / or the purchasers from them should not be allowed to reap the fruit of the purchases made by them. In order to buttress his point, learned counsel has specifically drawn my attention towards the order dated 18.12.2012 passed in CWJC No. 22670/2012 where a co-ordinate bench of this Court had restrained the official respondents from giving effect to the order dated 04.05.2012 passed by the LRDC at the instance of one of the sisters of Prem Kumar Daruka. Further, learned



counsel submits that it is surprising that initially when one Dilip Kumar Ritaria and Sanjeev Agrawal filed applications under Section 144 Cr.P.C. in respect of one of the properties which was also subject matter of Partition Suit and order dated 04.05.2012 passed by LRDC in Dispute Resolution Case No. 4/2012, the learned Sub Divisional Magistrate, Aurangabad was not persuaded and after obtaining reports from police he was pleased to drop the proceedings vide order dated 03.08.2013 which is Annexure-13 to the present application, but just after a change in the incumbent of post how only after few days a proceeding under Section 145 Cr.P.C. could be initiated by the learned Sub Divisional Magistrate. Learned counsel further submits that Sections 145 and 146 Cr.P.C. are in fact a scheme in themselves and they cannot be read in isolation. The judgments relied upon on behalf of the petitioners shall be referred at appropriate stage hereinafter.

18. Learned counsel further submits that in fact during pendency of the present application before this Court the Circle Officer and the Sub Divisional Magistrate with the help of police evicted the petitioners and attached the household goods lying in the premises. The petitioner has filed supplementary affidavit in Cr. Misc. No. 42871/2013 and has placed Annexure-32 showing the articles which were attached / seized from the residential house. The brother-



in-law of the petitioner, who has sworn the affidavit, has put his signature on the seizure list clearly indicating that the seizure list was served on him on behalf of the petitioner. Learned counsel submits that the entire exercise, right from initiation of the proceeding under Section 145(1) Cr.P.C. and then eviction of the petitioners from the premises show the highhandedness on the part of the Circle Officer and the Sub Divisional Magistrate with the help of local police; they have virtually taken the law in their hands and evicted the petitioners who were having possession of the property. The submission is that in a proceeding under Section 145 Cr.P.C., the Executive Magistrate is not concerned with the question as to right of possession of a party; he is concerned with the question as to which party was in possession at the date of the proceeding under Section 145 Cr.P.C. Submission is also that in the present case, the basic principles of law on the subject has not been followed and the whole exercise has been done in an arbitrary and fanciful manner; thus the impugned order is liable to be quashed and possession of the petitioners be restored at this stage leaving it open for the petitioners to challenge the order if any passed U/S 145 Cr.P.C. or to pray for dropping the proceeding and also to claim damages, if any, available to them in accordance with law.

19. On the other hand Sri Ramakant Sharma, learned Senior Counsel appearing on behalf of the contesting opposite parties



who are legal heirs of Prem Kumar Daruka (Since deceased) has placed reliance upon the order dated 08.09.2013 and submitted that the learned Sub Divisional Magistrate was fully justified in initiation of a proceeding under Section 145(1) Cr.P.C. and he has rightly recorded his satisfaction with the report received from the Circle Officer. The learned senior counsel further submitted that there was a law and order problem as per the joint report submitted by the Circle Officer, Aurangabad and the Officer-in-charge of Town P.S., Aurangabad, therefore, the Sub Divisional Magistrate was equally justified in passing the order U/S 146(1) & 146(2) Cr.P.C. on 09.09.2013 at 6:00 P.M. even though the second parties were not present and had been earlier in the day given time till 14.09.2013 to file their written statements. According to him, there was an emergency situation as envisaged under Section 146(1) Cr.P.C. and the Sub Divisional Magistrate rightly proceeded in the matter; thus, no illegality or infirmity may be found with the impugned order. Learned A.P.P. for the State simply followed the submissions of the learned Senior Advocate representing contesting opposite parties.

CONSIDERATION

20. I have heard the parties at length and perused the records. The sequence of facts, as stated in the earlier part of this order/judgment, has not been disputed by filing any counter affidavit



by the contesting opposite parties. This Court refrains from taking a view as against the order dated 08.09.2013 said to have been passed U/S 145 (1) Cr.P.C. as the same is not under challenge in these petitions.

21. This Court would, however, examine the legality and validity of the order dated 09.09.2013 and the consequential notice of eviction dated 10.09.2013. Facts remain that after service of notice U/S 145 (1) Cr.P.C. on 08.09.2013 at 11:30 P.M., on the very next date on 09.09.2013 even though the Sub Divisional Magistrate accepted the submission of the purchasers - second parties with regard to the discrepancies and corrections were ordered fixing next date 14.09.2013 for filing of their written submissions, only in the evening at about 6:00 P.M., i.e., close to office hours, a joint report submitted by the Circle Officer and the Officer-in-charge had been made the basis for passing of an order under Section 146(1) and 146(2) Cr.P.C. The million dollar question is what was the haste? It is all the more surprising that the Circle Officer, who was appointed as a receiver, immediately issued an eviction notice on 10.09.2013 (Annexure-15 to the petition under Section 482 Cr.P.C.) calling upon all of them to vacate the house in question if they were residing therein failing which the same shall get evicted and harsh legal action shall be taken against them. Later on, this Court has been informed by filing a



supplementary affidavit that they have been evicted and their household goods have been attached / seized as noticed above.

22. Sections 145 and 146 of the Code of Criminal Procedure are quoted hereinbelow for a ready reference:

“145. Procedure where dispute concerning land or water is likely to cause breach of peace. – (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) For the purposes of this section, the expression “land or water” includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in the manner provided by 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.

(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 if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(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.

(6) (a) If the 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 therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any



document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.”

“146. Power to attach subject of dispute and to appoint receiver. – (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:

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 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 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.”

23. Learned counsel for the petitioners has relied upon some judgments of the Hon’ble Apex Court and this Court would discuss the relevant judgments on the subject hereinafter. The Hon’ble Supreme Court laid down a law with regard to the scope and ambit of Section 145/146 Cr.P.C. In case of **Ram Sumer Puri Mahant v. State of U.P. & Ors.**, reported in **AIR 1985 SC 472 : 1985 (1) SCC 427**, the Apex Court has held that there should not be a parallel proceeding when the Civil Court is examining the question of title and possession.

24. In the case of **Amresh Tiwari v. Lalita Prasad Dubey & Anr.**, reported in **(2000) 4 SCC 440**, the Hon’ble Supreme Court has reviewed some of the judgments earlier rendered by the Apex Court and quoted Para 2 from the judgment of **Ram Sumer Puri Mahant** (supra) which reads as under:

“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 proceedings 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 pendency 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....”

25. Again in the case of **Ashok Kumar v. State of Uttarakhand**, reported in **(2013) 3 SCC 366**, the Hon’ble Supreme Court has after discussing the facts of the case held in Para 10 & 11 which read as under:

“**10.** 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, 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 a 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 material on record before the Magistrate when the submission of the parties is filed, documents produced or evidence adduced.”

“11. We find from this case that there is nothing to show that an emergency exists so as to invoke Section 146 (1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency.....”

26. In the case of **Chet Lal Mahton & Ors. v. Rewa Lal Mahton & Ors.**, reported in **1983 PLJR 257**, a bench of this Court has also examined the scope of Section 146(1) Cr.P.C. and has taken a cue from the judgment of the Hon’ble Apex Court. The relevant part of Paragraph 9 of the said judgment is quoted thus:

“9. The word ‘emergency’ mentioned in Section 146 (1) of the Code envisages a situation completely



different from one in which there is apprehension of breach of the peace, which is one of the basic legal necessity for imitating a proceeding under Section 145 of the Code. It is not enough merely to state that some abnormal situation had arisen. The magistrate, even if he states in his order that in his opinion it was a case of emergency that by itself cannot be held to be sufficient for passing an order of attachment under Section 146 (1) of the Code. The order should contain the fact and circumstances on the basis of which a reasonable inference can be drawn that it was a case of emergency. The order should contain at least, so much of material that it may be possible for a higher court to test objectively whether the Magistrate had applied his mind for recording his satisfaction about emergency....”

27. An order U/S 146 Cr.P.C. is in the nature of a ‘desperate remedy’ as has been held by a bench of this Court in the case of **Nandkishore Singh & Ors. v. Bigan Lohar**, reported in **AIR 1940 Patna 113**, for the cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by the two sides. In the present case a proceeding under Section 145(1) Cr.P.C. was initiated by the learned Sub Divisional Magistrate and then notices were said to have been served on second parties / purchasers at 11:30 P.M. on 08.09.2013, the parties appeared on 09.09.2013 and pointed out the discrepancies in the notice and also



sought time to file reply. The Sub Divisional Magistrate, Aurangabad granted time till 14.09.2013 with direction to place the record on that date in regular court but on the same day in the evening at 6:00 P.M. he passed an order U/S 146(1) and 146(2) Cr.P.C. of attachment and appointment of a receiver respectively on the basis of a so-called joint report submitted by the Circle Officer and the Officer-in-charge. In the opinion of this Court, the Sub Divisional Magistrate acted in haste and in the process exceeded his jurisdiction. The purchasers had already alleged mala fide against the Sub Divisional Magistrate in the morning, a fact which the Sub Divisional Magistrate has himself recorded in the order dated 09.09.2013, therefore, he should have taken all care to act bona fide as it is well said that justice should not only be done but seems to have been done. This was not desirable. The heaven would not have fallen if the Sub Divisional Magistrate would have acted in accordance with the principles of natural justice and could have waited till 14.09.2013 for submission of the written statements by the parties. The situation was worsened when immediately after being appointed a receiver, the Circle Officer served notice for eviction to the second parties and in fact they have been evicted from the premises in question. A perusal of the joint report shows that the second parties had forcibly entered in the house premises on 07.09.2013. It is to be kept in mind that in Partition Suit



the plaintiffs have *inter alia* sought a relief to be put in possession. Even if the allegation of forcible entry is taken to be true, at least on 08.09.2013 or 09.09.2013 the second parties entered in the premises, rightly or wrongly. Section 146 has nothing to do with title of the property in dispute and it is concerned with maintaining actual possession with a view to prevent breach of peace. Reference in this regard may be made to the decision of this Court in **The District Magistrate and Deputy Commissioner v. Naga Baba Mahant Amar Das Chela & Ors.**, reported in **1992 (2) PLJR 789** (Paragraph 36).

28. In the aforesaid circumstances, this Court is of the opinion that the order dated 09.09.2013 passed U/S 146(1) & 146(2) Cr.P.C. is wholly illegal, arbitrary and without jurisdiction. The order has been passed in undue haste without giving liberty to the second parties to submit their written statements which has caused substantial prejudice to the petitioners in both the cases. The Sub Divisional Magistrate had no reason to pass such an order at 6:00 P.M. on the basis of the joint report. The joint report in itself was not an evidence as to existence of 'emergency' as envisaged U/S 146(1) Cr.P.C. It was not an 'emergency' as described in the case of **Ashok Kumar v. State of Uttrakhand & Ors.** cited above. According to Hon'ble Supreme Court if the reports indicate that one of the parties is in possession,



rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The Circle Officer having been appointed as a receiver has gone beyond his jurisdiction in serving the eviction notice dated 10.09.2013 and then evicting the second parties / petitioners from the premises on 12.09.2013 which is evident from the notice of eviction and then the list showing the articles attached from the house. It was not a case where receiver took physical control of a vacant land or building. In this case the receiver has evicted the persons in possession of a property attached U/S 146(1) Cr.P.C. Both the Sub Divisional Magistrate and the Circle Officer have, therefore, exceeded their jurisdiction in this matter and have assumed upon themselves a jurisdiction not vested in them. This is one of the cases which shows how conferment of power and position to an executive, untrained in law leads to a total miscarriage of justice. The contesting opposite parties made a successful effort to snatch an order of eviction from the Sub Divisional Magistrate in the garb of an order U/S 146 (1) and 146 (2) Cr.P.C. The order dated 09.09.2013 and the notice of eviction as regards these petitioners in both the applications are, therefore, set aside.

29. Since the properties in the hands of the receiver appointed under Section 146(2) Cr.P.C. are supposed to be in the custody of the law, i.e., *custodia legis*, as it is called in legal parlance



and reiterated by Hon’ble Supreme Court in the case of **Deo Kuer vs. Sheo Prasad**, reported in **AIR 1966 SC 359**. This Court is of the considered opinion that the Circle Officer should immediately restore possession of the petitioners who have been evicted from the premises with their house-hold goods, if those have not been released so far in their favour. The petitioners shall thereafter submit their written statements taking all such pleas which are available to them before the Sub Divisional Magistrate and the Sub Divisional Magistrate shall take a decision on all the issues with regard to the proceeding under Section 145 Cr.P.C. in the facts and circumstances of the case. It is made clear that the decision of the Sub Divisional Magistrate as to the proceeding under Section 145 Cr.P.C. must be independent and no part of the observations made hereinabove incidentally while considering the legality and validity of the impugned order dated 09.09.2013 and the consequential notice dated 10.09.2013 in the present applications shall come in the way of the Sub Divisional Magistrate in passing an appropriate order in accordance with law.

30. Both the applications are, therefore, allowed.

(Rajeev Ranjan Prasad, J)

Dilip, AR

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