

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.46646 of 2013

Arising Out of PS.Case No. -null Year- null Thana -null District- DARBHANGA

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1. Md. Yunus Ansari Son of Abdul Aziz @ Bhola Ansari Resident of
Village-Afjala, P.S.-Riraul, District-Darbhanga

2. Abdullah Ansari Son of Abdul Aziz @ Bhola Ansari Resident of
Village-Afjala, P.S.-Riraul, District-Darbhanga

.... Petitioners

Versus

1. The State of Bihar

2. Md. Suleman Shah Son of Late Md. Alam Shah

3. Md. Akram Hussain, son of Md. Suleman Shah,

Both are R/o Village- Bauram, P.S.-Jamalpur, Sub-Division-Biraul,
District-Darbhanga. Opposite Parties

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Appearance :

For the Petitioners : Mr. Satish Kumar Sinha, Advocate

For the Opposite Parties : None.

For the State : None.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date: 02-08-2017

Heard learned counsel for the petitioners.

No one appears on behalf of opposite party nos. 2 & 3
and also no one appears on behalf of the State.

The petitioners, in the present case, are
seeking quashing of the order dated 19.07.2013
passed by learned Sub-Divisional Magistrate, Biraul
in M.R. No. 572/2009, by which the learned
Magistrate passed order of attachment under Section
146(1) of the Code of Criminal Procedure and further



in exercise of his power under Section 146(2) appointed Circle Officer and Officer-in-Charge, Police Station, Biraul as Joint Receiver of the property bearing plot no. 8188 (old 1317) under Khata No. 551 measuring area 2 dhoors and 8 Kanwa, and plot no. 8189 (old 1318) measuring area 3 dhoors and 4 Kanwa.

Learned counsel for the petitioners submits that earlier an order under Section 144 Cr.P.C. was passed. The effect of which was lost on expiry of 60 days period. The petitioners had challenged the said order in Criminal Revision No. 424/2003 before the learned Sessions Judge, Darbhanga, however, the same was rendered infructuous vide order dated 19.01.2004. The opposite party nos. 2 & 3 came to this court in Cr.W.J.C. No. 369 of 2008 which was disposed of vide order dated 04.02.2009, a copy of the order is Annexure '1' to this application, relevant part thereof are quoted hereunder for a ready reference : -

"It is submitted by the petitioners that police earlier had submitted a report vide annexure 7 in which possession of the petitioners was found. However, the SDM, Biraul, refused to pass any positive order as



the matter involved a civil dispute.

After hearing the parties, this court is of the view that if the petitioners file an application before the SDO, Biraul with all necessary documents he would examine the same and pass appropriate order after hearing respondent nos. 11 and 12.

The writ petition is thus disposed of.”

Thereafter, the opposite party nos. 2 & 3 filed an application before the learned Sub-Divisional Magistrate, Biraul for initiation of a proceeding under Section 145 Cr.P.C. A copy of the same has been brought on record by the opposite parties as Annexure-1 to the counter affidavit filed on behalf of the opposite party no. 2.

Even before filing of the application for initiation of a proceeding under Section 145 Cr.P.C. on receipt of the aforesaid order of this Court, the Sub-Divisional Magistrate, Biraul vide his order dated 06.05.2009 took a *prima facie* view after hearing learned counsel for the opposite parties that these petitioners have wrongly entered upon the land in question and are disturbing the opposite party nos. 2 & 3, and, therefore, there is some tension on this issue. A notice was issued to these petitioners calling



upon them to appear and file their reply by 19.05.2009. These petitioners appeared and filed their reply, which is Annexure-3 to the present application. In their reply, they took a stand that a Title Suit No. 4/2003 has been pending between the parties with respect to the disputed land. The Title Suit was filed on 17.02.2003, in which an application for injunction was also filed on behalf of opposite party nos. 2 & 3 who were first party before the Sub-Divisional Magistrate, Biraul. The injunction application filed by the first party was, however, rejected vide order dated 01.06.2005. A copy of the certified copy of the said order dated 01.06.2005 has been brought on record by the petitioners in the present case by filing a supplementary affidavit today.

Learned counsel for the petitioners referring to Annexure-3 to the application submitted that it was the stand of the petitioners who were second party before the Sub-Divisional Magistrate, Biraul that the disputed property being subject matter of the suit and the first party has not been *prima facie* found in the possession of the property, a parallel proceeding under Section 145 Cr.P.C. should



not be drawn. In paragraph-8 and 9 of their reply, the petitioners while making their submissions substantiated their argument by referring certain judgments of the Hon'ble Supreme Court as well as this Court. Paragraph-8 and 9 of the reply of the petitioners filed before learned Sub-Divisional Magistrate, Biraul are quoted hereunder:

“8. That Honourable High Court Patna and so Apex Court in various decisions have deprecated parallel proceeding u/s 145 Cr.P.C. during pendency of civil litigation. It clear view of Honourable High Court Patna that during pendency of civil litigation criminal proceeding u/s 145 Cr.P.C. being not maintainable and there is no question of attachment of any property u/s 146 of the Code for the same following decisions of Patna High Court have been filed on behalf of the petitioners.

- 1. 2006 (3) P.L.J.R. 334 (AIR 1985 SC 472 Relud upon)*
- 2. 2005 (2) P.L.J.R. 506*
- 3. 2007 (2) P.L.J.R. 110*
- 4. 2006 (2) P.L.J.R. 181*
- 5. 2007 (1) P.L.J.R. 340*

9. That it is respectfully submitted that as title suit is pending before competent civil court involving title and possession of the parties regarding the property of present proceeding but when a civil litigation involving question of title and possession is pending for the same property, a parallel proceeding u/s 145 Cr.P.C. will amount to multiplicity of litigation and wastage of public



time and money because question of title and possession has to be finally decided in the civil present suit and not in the present proceeding u/s 145 Cr.P.C. hence present proceeding is liable to be dropped.”

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By the impugned order dated 19.07.2013, the learned Sub-Divisional Magistrate, Biraul has attached the property by saying that there are chances of breach of peace as had been submitted on behalf of the first party.

Learned counsel for the petitioners submits that although the petitioners took a stand in reply that there is no dispute on the disputed land and also that there is no chance of breach of peace, the learned Sub-Divisional Magistrate, Biraul should not pass any order of attachment under Section 146 Cr.P.C. Despite this, the learned Sub-Divisional Magistrate, Biraul proceeded to pass the impugned order on the basis of report submitted by the Officer-in-Charge, Biraul without there being any ‘emergency’ or without holding any inquiry as envisaged under Section 145(4) Cr.P.C. So far as the report of the Officer-in-Charge, Biraul is concerned, the report also confirms possession of the second parties-petitioners,



though it says possession has been taken illegally.

Submission of learned counsel for the petitioners is that the order under Section 146 is in the nature of a drastic order because the effect of the order is of attachment of the property that too in the present case when the petitioners were admittedly in possession rightly or wrongly and the injunction application filed by the first party in the Title Suit was already rejected, there was no reason to pass an order of attachment and appointment of Receiver as has been done by the learned Magistrate.

Although, name of learned counsel for the opposite party nos. 2 & 3 is appearing in the list but he is not present.

I have heard learned counsel for the petitioners and have perused the records. A counter affidavit has been filed on behalf of opposite party no. 2 and I have perused the counter affidavit in order to appreciate the plea of the opposite party nos. 2 & 3. It is not in dispute that a Title Suit is pending between the parties and an application for injunction earlier filed on behalf of the opposite party nos. 2 & 3 was rejected by the Civil Court. The learned Sub-



Divisional Magistrate, Biraul while passing the impugned order has not at all gone into the reply filed on behalf of the petitioners. There is no consideration of the submissions made on behalf of the 2nd parties. There is also no consideration of the judgment cited on their behalf.

In the present case, as is evident from the impugned order, there is no inquiry under Section 145(4) Cr.P.C. and the impugned order under Section 146(1) and 146(2) has been passed only taking note of the report submitted by the Officer-in-Charge of the Biraul Police Station. There is no discussion even on the issue of emergency which could have been one of the grounds for passing the order. Whether a parallel proceeding under Section 145 Cr.P.C. could have been held to be maintainable, in the facts of the present case, when a Title Suit is already pending and a Civil Court is competent to grant all such reliefs which could have been granted to either parties, is an important question raised in the reply of the 2nd party and learned Sub-Divisional Magistrate should have considered the same. The circumstances under which an order under Section 146(1) and 146(2) Cr.P.C. may



be passed are not found existing in the facts of the present case.

In the case of **Ashok Kumar v. State of Uttarakhand**, reported in **(2013) 3 SCC 366**, the Hon'ble Supreme Court has held on the issue of passing of an order under Section 146 Cr.P.C. 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.....”

In the facts and circumstances stated hereinabove, this Court is of the opinion that the impugned order dated 19.07.2013, passed by the learned Sub-Divisional Magistrate, Biraul in case no. M.R. No. 572/2009 is not a legal and valid order and the same suffers from non-consideration of the reply submitted on behalf of the second parties.

The impugned order is, therefore, set aside. The Sub-Divisional Magistrate, Biraul is hereby directed to hear the parties afresh on the point of maintainability of a proceeding under Section 145 Cr.P.C. and only when it is found maintainable, shall also examine the requirement of passing an order under Section 146(1) & 146(2) Cr.P.C. in the facts and circumstances of the present case and shall pass an appropriate order within a period of two months from the date of receipt of a copy of this order. Needless to say that the learned Sub-Divisional Magistrate, Biraul shall give appropriate opportunity of hearing to the parties.



This application is allowed to the extent indicated hereinabove.

(Rajeev Ranjan Prasad, J.)

Rajeev/-

AFR/NAFR	AFR
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