

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No.521 of 2017

Order reserved on: 17-5-2017

Order delivered on: 20-6-2017

Joyal Bechak, S/o late Shri S. Bechak, aged about 74 years,  
President – Church Management Committee, M.E.C. Madan  
Mohan Malviya Ward, Nayamunda, Jagdalpur, District Bastar  
(C.G.)

---- Petitioner

Versus

1. Subhash Sawal, S/o late Saul, aged about 65 years, R/o Mission Compound (D.S. Bunglow), Jagdalpur, District Bastar (C.G.)
2. The State of Chhattisgarh, Through the Collector, Bastar, Collectorate Office, Jagdalpur, District Bastar (C.G.)

---- Respondents

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| For Petitioner:              | Dr. N.K. Shukla, Senior Advocate with Mr. P.P. Sahu and Mr. Vikram Sharma, Advocates. |
| For Respondent No.1:         | Mr. V.V.S. Murthy, Senior Advocate with Mr. Saurabh Dangi, Advocate.                  |
| For State/Respondent No.2: - | Mr. Bhaskar Payashi, Panel Lawyer.                                                    |

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Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking jurisdiction of this Court under Section 482 of the CrPC, the petitioner herein calls in question the order dated 12-4-2017 passed by the Sessions Judge, Bastar at Jagdalpur in Criminal Revision No.5/2017 by which the learned Sessions Judge has declined to set aside the order dated 10-2-2017 passed by the Sub Divisional Magistrate, Jagdalpur, directing restoration of possession to respondent No.1 in exercise of power conferred

under Section 145 of the CrPC.

2. The aforesaid challenge has been made on the following factual backdrop: -

[For the sake of convenience, the petitioner herein will be referred as party No.2 and respondent No.1 herein will be referred as party No.1 as they were referred before the Sub Divisional Magistrate.]

2.1) The petitioner and respondent No.1 belong to Christian community. The dispute relates to the properties owned by Methodist Church in India, Jagdalpur, District Bastar, including Church, girls home, boys hostel, Kushal Niwas, Aaradhana Bhawan and other properties. On account of certain dispute with regard to issue of actual/de facto possession over the said Church, the matter was reported to the jurisdictional police, which on apprehending threat to public peace and tranquility filed an *istegasha* before the Court of Sub Divisional Magistrate, Jagdalpur on 21-8-2015 to resolve the dispute of actual physical possession under the provisions of Section 145 of the CrPC which was taken cognizance by the learned Magistrate and proceedings under Section 145 of the CrPC were initiated being Misc. Criminal Case No.7/2015. Thereafter, preliminary order dated 26-8-2015 was passed by the learned Magistrate directing the parties to submit their reply and adduce their evidence in support of their respective claim. In response to the notice on preliminary order passed by that Court, both the parties submitted their written response and the petitioner being party No.2 adduced his evidence by examining

himself, whereas respondent No.1 being party No.1 examined himself and four other witnesses listed in the *istegasha*. The learned Sub Divisional Magistrate passed final order on 10-2-2017 granting application under Section 145 of the CrPC and thereby declaring that party No.2 i.e. the petitioner herein has caused breach of peace and possession of party No.1 / respondent No.1 herein was established and party No.1 was declared possession holder of the said Church and restrained party No.2 from entering into the said Church.

2.2) Feeling aggrieved and dissatisfied with the order granting application under Section 145 of the CrPC, the petitioner herein filed revision under Section 399/401 of the CrPC before the Court of Sessions. The Court of Sessions by its impugned order upheld the order passed by the learned Sub Divisional Magistrate leading to filing of this petition under Section 482 of the CrPC by the petitioner herein questioning the order passed by the revisional Court affirming the order of the learned Sub Divisional Magistrate as unsustainable and bad in law. Respondent No.1 has filed his reply to the said petition opposing the same.

3. Dr. N.K. Shukla, learned Senior Advocate appearing for the petitioner, would submit that the learned Sub Divisional Magistrate has committed legal error in not determining the actual date of dispossession on the date of passing of preliminary order. He would further submit that the learned Magistrate while granting final order did not determine the date of dispossession prior to next two

months before from the date of passing of preliminary order and thereby committed a legal error and as such, the conditions precedent for exercise of power under Section 145 (1) and (4) of the CrPC have not been recorded by the learned Magistrate. Therefore, the order impugned passed by the learned Sessions Judge upholding the order passed by the Sub Divisional Magistrate deserves to be set aside.

4. Mr. V.V.S. Murthy, learned Senior Advocate, ably assisted by Mr. Saurabh Dangi, Advocate, appearing for respondent No.1, would submit that question about the determination of date of dispossession on the date of preliminary order and the fact regarding finding of dispossession within next two months before the date of filing of report by the police has been raised for the first time before this Court which should not be permitted to be raised for the first time, as it was not taken either before the Sub Divisional Magistrate or before the revisional Court. He would further submit that since the petitioner himself has admitted the date of dispossession in his statement before the Sub Divisional Magistrate, therefore, non recording of finding with regard to date of dispossession will not vitiate the order of the Sub Divisional Magistrate on account of non-recording of the finding on the date of dispossession or the date of dispossession that is prior to two months next before the date of passing of final order, which was duly affirmed by the revisional Court. He would also submit that the learned Sub Divisional Magistrate by order dated 10-2-2017 has only declared that respondent No.1 herein has forcefully been

dispossessed from the Church in question and declared him possession holder and by a separate order dated 24-4-2017, directed for delivering possession to party No.1 / respondent No.1 which is strictly in accordance with law and that order cannot be taken exception to by the petitioner on the ground that though party No.1 / respondent No.1 is not in possession, yet the order injuncting party No.2 / petitioner has been passed declaring party No.1 to be the possession holder. The remedy open to party No.2 who is unsuccessful to the proceeding under Section 145 of the CrPC is to institute civil suit and also to apply for temporary injunction, if any, as such, the present petition under Section 482 of the CrPC is not maintainable, as the two Courts below have concurrently held that the petitioner is not in possession, whereas respondent No.1 is the possession holder who has been forcefully dispossessed and entitled for possession on the date of final order.

5. In rejoinder submission, Dr. N.K. Shukla would submit that it is the case of respondent No.1 herein that they were not in possession on the date of preliminary order to which Mr. Murthy would submit that there is no dispute to this argument of Dr. Shukla. Dr. N.K. Shukla would further submit that the learned Magistrate as well as the revisional Court have stressed great emphasis on the question of title of respondent No.1 rather than right to possession and ignored the fact as to who was in possession next two months prior to the date of passing of preliminary order, therefore, wrong principle has been applied while determining the rights of the parties. Mr. Dangi would then submit that the learned Magistrate

has considered the fact as to who was in possession two months prior to the date of preliminary order and thereby applied correct principle in considering the application under Section 145 (1) of the CrPC.

6. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the record with utmost circumspection.
7. In order to judge the correctness of the plea raised at the Bar, it would be advantageous to refer and reproduce the provisions contained in Sections 145(1) to 145(6) of the CrPC for ready reference which are as under: -

**“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)."

8. A focused glance of the scheme of Section 145 of the CrPC would show that it is intended to prevent breach of peace and to maintain tranquility and for that end to provide a speedy remedy by bringing the contending parties before the court and ascertaining who of them was in actual possession of subject property to maintain

status quo until their rights are finally determined by a competent court, as the life of the order is coterminous with passing of decree by the civil court.

9. In the matter of **Chandu Naik and others v. Sitaram B. Naik and another**<sup>1</sup>, way back in the year 1977, Their Lordships of the Supreme Court have held that in substance and in effect a proceeding under Section 145 of the CrPC is not for the purpose of evicting any person from any land but is primarily concerned with the prevention of the breach of peace by declaring the person found in possession to be entitled to remain in possession until evicted therefrom in due course of law.
10. Likewise, Their Lordships of the Supreme Court in the matter of **Shanti Kumar Panda v. Shakuntala Devi**<sup>2</sup> considering the nature of proceedings under Section 145 of the CrPC held that the proceedings under Sections 145/146 of the CrPC are quasi-civil, quasi-criminal in nature or an executive or police action.
11. In sum and substance, Sections 145 and 146 of the CrPC together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace because of a dispute concerning any land or water or their boundaries. (See **Mathuralal v. Bhanwarlal and another**<sup>3</sup>.)
12. Section 145 of the CrPC authorises a Magistrate to issue a declaratory order in favour of the party that is entitled to possession

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1 (1978) 1 SCC 210

2 (2004) 1 SCC 438

3 AIR 1980 SC 242



“until evicted therefrom in due course of law”. The Magistrate does not decide or purport to decide a party's title or right to possession of the land as those areas are especially reserved for the Civil Court. The foundation of assumption of jurisdiction is an apprehension of breach of the peace. The Magistrate only makes a temporary order irrespective of the rights of the parties which will have to be agitated and determined in the manner provided by law. Under Section 145 (1) the jurisdiction of a Magistrate is exclusively limited to decide whether any and which of the parties was, on the date of the preliminary order, in possession of the land in dispute. The order only declares the actual possession of a party on the specific date.

13. However, in the event of any party who has been forcibly and wrongly dispossessed within two months next before the date of the preliminary order, the Magistrate is authorised to treat the party who was dispossessed as if he had been in possession on such date. The power is enjoined in proviso to Section 145 (4) read with sub-section (6) thereof. Thus, the Magistrate has to decide who is in actual possession on the date of his preliminary order but if he finds that the party in defecate possession on that date had obtained possession forcibly and wrongfully dispossessing the other party within two months next preceding the date of his order. The Magistrate can treat the dispossessed party as if he was in possession on such date and restore possession to him, and, prohibit the dispossessor from interfering with the possession until eviction of that person in due course of law.

14. Proviso to Section 145 (4) of the CrPC is grounded on the principle that forcible and wrongful dispossession is not to be recognised under the criminal law. The word 'dispossessed' in the proviso means and includes to be out of possession ousted, ejected, removed from the premises or excluded. Even a person having a right to possession cannot dispossess another by taking the law into his hands and making a forcible entry otherwise than in due course of law. (See **R.H. Bhutani v. Miss Mani J. Desai**<sup>4</sup>.)
15. In the matter of **R.H. Bhutani** (supra), Their Lordships of the Supreme Court while considering the provisions contained in Section 145 (1) of the CrPC have held that the jurisdiction under Section 145 being of an emergency nature, the Magistrate must act with caution but that does not mean that where on an application by one of the parties to the dispute he is satisfied that the requirements of the section are existent, he cannot initiate proceedings without a police report. Once the Magistrate, having examined the applicant on oath, is satisfied that his application, discloses the existence of the dispute and the likelihood of breach of peace, there is no bar against his acting under Section 145 (1) of the CrPC.
16. Their Lordships of the Supreme Court also considered in **R.H. Bhutani** (supra) the meaning of the word 'dispossessed' as employed in the proviso to Section 145 (4) of the CrPC and held, dispossession of the party within two months next preceding the date of that order has to be considered and further held that

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4 AIR 1968 SC 1444

enquiry under Section 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 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 and observed as under in paragraph 8: -

“8. 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 by a competent court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute, regarding an immovable 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-section (1) and thereafter to make an enquiry under sub-section (4) and pass a final order under sub-section (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 [Section 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 Section 145.”

17. Their Lordships further held in **R.H. Bhutani** (supra) that the Magistrate has first to decide who is in actual possession at the date of his preliminary order. If, however, the party in de facto possession is found to have obtained possession by forcibly and wrongfully dispossessing the other party within two months next preceding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the disposessor from interfering with the possession until eviction of that person in due course of law.

18. Similarly, in the matter of **R.C. Patuck v. Fatima A. Kindasa and others**<sup>5</sup>, the Supreme Court considered the provisions contained in the proviso to Section 145 (4) of the CrPC and held that in absence of any police report or receipt of information by the Magistrate as to loss of possession by the party in question within the period contemplated by the proviso, restoration of possession cannot be granted. It has been observed in paragraph 9 of the report as under: -

“9. It will be seen from the facts stated above that the order under [Section 145\(1\)](#) was passed by the learned Magistrate on 16.3.1993. The question is whether the Magistrate could have passed any order in favour of the petitioner under sub-section (4) of [Section 145](#). Going by the main sub-clause (4) of [Section 145](#) it is clear that the Magistrate could initially decide who was in possession as on the date when the order under [Section 145\(1\)](#) was passed on 16.3.1993. In cases

where the proviso to the said sub-clause (4) applied, that is, if it appeared to the Magistrate that any party had 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), the Magistrate might treat the party so dispossessed as if the said party had been in possession on the date of his order under sub section (1). In other words, if the conditions mentioned in the proviso to sub-section (4) were satisfied, the Magistrate could deem a person to be in possession as on the date of the order under [Section 145\(1\)](#) notwithstanding the fact that he was not infact in possession on that date, but lost possession earlier, within two months next before the order. In this case unfortunately there is no material to show that any report of a police office or other information was received by the Magistrate within the period contemplated by the proviso. On the other hand, petitioner's admissions show that she lost possession much before the period mentioned in the said proviso.”

19. Thus, under Section 145 (1) of the CrPC, claim, in respect whereof a Magistrate is empowered to decide is the fact of actual possession of the subject of dispute. Sub-section (4) of Section 145, which defines the scope of the enquiry empowers the Magistrate to decide the said question without reference to the merits of the claims of the parties to a right to possess the subject of dispute. Therefore, the question of a right to possession is foreign to the scope of the enquiry. Only the question of actual possession has to be determined and to be decided by the learned Magistrate and the question of title should not be allowed to be agitated, as the question of title or right to possession are beyond the scope of proceeding under Section 145 of the CrPC and the Magistrate has only to decide who is in actual physical possession of the land in dispute and not who has the right to possession, and

he is entitled to a declaration under Section 145.

20. Sub-section (6) (a) of Section 145 of the CrPC treats the party dispossessed within the period provided in the proviso to sub-section (4) as being in possession of the disputed property on the date of order made under sub-section (1) and restoration of possession to the party forcibly and wrongfully dispossessed attracting the proviso to sub-section (1) is a substance and net effect to be the party to the possession for deciding his possession on the date of preliminary order made under sub-section (1) or next two months before the date of preliminary order, as the case may be.
21. Taking note of the statutory provisions relating to Section 145 (1) read with the proviso to Section 145 (4) of the CrPC and its principle deducing therefrom and also taking note of the relevant and pertinent decisions of the Supreme Court in that regard, I would proceed with the merits of the matter.
22. The first submission raised on behalf of the petitioner is that the learned Magistrate while passing the order of restoration of possession has not recorded a finding that respondent No.1 was forcefully and wrongfully dispossessed from the property in question next two months prior to the date of passing of preliminary order under Section 145 (1) of the CrPC.
23. At this stage, Mr. Dangi, learned counsel appearing for respondent No.1, has raised an objection that this question of not recording finding by the learned Magistrate that respondent No.1 was

dispossessed prior to two months from the date of passing of preliminary order has never been raised either before the Magistrate or, particularly, before the learned Court of Sessions. He placed reliance upon the judgments of the Supreme Court rendered in the matters of Kamlesh Babu and others v. Lajpat Rai Sharma and others<sup>6</sup> and Narne Rama Murthy v. Ravula Somasundaram<sup>7</sup>.

24. I have considered the objection raised by learned counsel for respondent No.1.

25. It is correct to say that no finding has been recorded by the learned Sub Divisional Magistrate that respondent No.1 was dispossessed prior to two months from the date of passing of preliminary order. It is also correct to say that no such plea has been raised by the petitioner before the revisional Court. It is also true that it is not the case of respondent No.1 that he was in possession of the property in question on the date of passing of preliminary order. Therefore, the proviso to sub-section (4) of Section 145 of the CrPC applies and as such, the Magistrate was obliged to record a specific and clear cut finding in order to grant restoration of possession of the property in question to respondent No.1 that he has been forcibly and wrongfully dispossessed within two months next before the date on which the report of the police officer or other information was received by the Magistrate, or after that date and before the date of his preliminary order under sub-section (1) of Section 145

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6 (2008) 12 SCC 577

7 (2005) 6 SCC 614

of the CrPC so that 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).

26. Since the plea raised by the petitioner goes to the root of the matter and it is a jurisdictional fact for passing order of restoration under Section 145 (6) of the CrPC that the party must have been forcibly and wrongfully dispossessed within two months after the receipt of report of the police officer or after that date or on or before the date of passing order under Section 145 (1) of the CrPC. The petitioner in sum and substance is questioning the finding of the revisional Court resting its plea in light of statutory requirement for directing restoration of possession, as such, it goes to the root of the matter and respondent No.1 is entitled to raise such a plea before this Court in a petition under Section 482 of the CrPC. Judgments relied upon by respondent No.1 are not helpful to respondent No.1 and are clearly inapplicable to the facts of the present case.

27. This determination would bring me to the merits as well as to the facts of the present case.

28. The disputed property is said to have been owned by Methodist Church in India, Jagdalpur which includes Church, girls home, boys hostel, Kushal Niwas, Aaradhana Bhawan and other properties. On a complaint filed by respondent No.1 / party No.1 to Police Station Bodhghat, District Bastar, the said police station submitted istegasha before the Sub Divisional Magistrate on 21-8-2015 complaining dispute between the parties and there is likelihood of



breach of peace and tranquility between the petitioner and respondent No.1. The learned Magistrate on 26-8-2015, after having satisfied that there is likelihood of breach of peace with regard to actual possession of the property between the parties, passed a preliminary order directing both the parties to submit their reply on merits and also directed the Nazul Officer, Jagdalpur to submit its inspection report. The petitioner / party No.2 filed his reply whereas, respondent No.1 being party No.2 examined himself and four other witnesses namely Jitendra Singh, Naresh Shetti, Smt. Jyotika Rani and Shailendra Singh. They were examined and cross-examined. The Nazul Officer also submitted his inspection report. The learned Sub Divisional Magistrate by its order dated 10-2-2017 held that party No.1 / respondent No.1 herein has forcibly and wrongfully been dispossessed from the property in question and by a separate order dated 24-4-2017 directed for delivery of possession to party No.1 and recorded following findings: -

1. Methodist Church in India was established in the year 1981 and previously it was known as Methodist Episcopal Mission, in 1954 it was dissolved and Methodist Church in Southern Asia was constituted, thereafter, it was registered in 1954 as Trust Association Methodist Church in Southern Asia and after its dissolution, Methodist Church in India was constituted on 7-1-1981 and it is governed by Book of Discipline. The Book of Discipline contains the law and rules for its administration.

2. Party No.1/respondent No.1 is posted at Methodist Church in India, Branch Jagdalpur and he is Superintendent of all the properties held by the Trust, he is the Pastor In-charge of the Church and all the properties belonging to the Church are in control and superintendence of respondent No.1.
3. All the properties of Methodist Church in India at Jagdalpur were earlier leased to M.I. Mission and pursuant to the order of the High Court, the lease relating to entire properties spread in 44.07 acres of land was renewed in the name of Methodist Church in India.
4. Pursuant to the order of the Sub Divisional Magistrate, the Nazul Officer and other revenue officers inspected the property in question and submitted its report on 1-2-2017 and prepared panchnama.
5. According to the said panchnama, the girls home and Aaradhana Bhawan are being run by the petitioner / party No.2, whereas the boys hostel has been let out by respondent No.1 / party No.1 to Sahkari Seva Sanstha (NGO) and other properties like playground, school and mango-groves are recorded in the name of M.I. Mission. As per the report, the Church building (Aaradhana Bhawan) and girls home (Kushal Niwas) were alleged to have been possessed by the petitioner / party No.2.
6. Membership of party No.2 and his 73 associates has been terminated by the Executive Board in its Regional

Conference by order dated 17-10-2014 for acting against the interest of Methodist Church in India, as per the Book of Discipline, paras 61 and 1262.

7. The petitioner / party No.2 is admitted to have taken the possession of the Church property on the ground of property being alienated by Methodist Church in India, Jagdalpur Branch and they have constituted a new institution known as Chandaiya Memorial Methodist Episcopal Church, Jagdalpur and the petitioner / party No.2 has been elected as President of the said property to administer the said property and he has got control over the said property.
8. It is established that the petitioner / party No.2 has forcefully dispossessed the Church and property of M.C.I. by which there is breach of peace and interference in the prayer to be made in the said Church.
9. The property in question is already recorded in the name of Superintendent of M.I. Mission and it is in superintendence and control of Methodist Church in India which is headed by Superintendent and Pastor In-charge and it is in their possession since beginning which has been forcefully dispossessed by the petitioner / party No.2 thereby causing breach of peace as such, the possession of M.I. Mission / Methodist Church in India / party No.1 / respondent No.1 is duly established.
10. Finally, the Sub Divisional Magistrate declared the actual

possession of respondent No.1 / party No.1 and restrained party No.2 from entering into the property of party No.1 and by a separate order directed restoration of possession to respondent No.1.

29. A careful perusal of the findings recorded by the learned Sub Divisional Magistrate in the order dated 10-2-2017 would clearly show that the learned Magistrate has basically considered the right of respondent No.1/party No.1 to possess the property in question, whereas the learned Magistrate was required to consider the question whether respondent No.1 has been forcefully and wrongfully dispossessed within two months next before the date on which the istegasha was submitted before him on 21-8-2015 or after that date and before the date of his passing preliminary order under Section 145 (1) of the CrPC on 26-8-2015.
30. It appears that the learned Magistrate has proceeded to examine the entire matter as if he has to decide who is the party who has right to possession, as the entire discussion relates to the establishment of M.C.I., its control and management by respondent No.1 and no finding appears to have been recorded that party No.1/respondent No.1 has been dispossessed with the property in question within two months next before the date on which the istegasha was submitted or after that date and before the date of passing of the preliminary order or at least on the date of passing of the preliminary order. Such a finding was *sine qua non* for passing the order of restoration of possession under Section 145

(6) (a) of the CrPC. In the istegasha submitted also, no date of dispossession of the property in question of respondent No.1 / party No.1 has been recorded. In the statements made by respondent No.1 and his witnesses there is a statement that the property in question has been illegally possessed by the petitioner / party No.2. The inspection report also indicates that in some of the properties, respondent No.1 / party No.1 is in possession and in some properties, the petitioner / party No.2 is in possession. Since the provisions contained in the proviso to Section 145 (4) of the CrPC are the conditions precedent for restoration of possession under Section 145 (6) (a) of the CrPC, the Magistrate ought to have recorded a clear cut and specific finding after appreciating the material brought on record as to whether party No.1 / respondent No.1 has been forcefully and wrongfully dispossessed of the property in question within two months next before the date of submission of istegasha or at least two months prior to the date of passing of the preliminary order. But no such finding has been recorded by the learned Magistrate and merely on the ground that respondent No.1 / party No.1 has a right to possession and the petitioner / party No.2 has forcefully dispossessed him without specifying the period as to when he was dispossessed, and thereby has caused breach of peace, restoration of possession has been granted under Section 145 (6) (a) of the CrPC ignoring the imperative requirement for granting restoration of possession as provided under Section 145 (4) of the CrPC.

31. At this stage, it is appropriate to notice the submission of the

petitioner that non-recording of finding that the petitioner/party No.2 has forcefully dispossessed party No.1 / respondent No.1 from the property in question within two months next before the date of submission of istegasha or at least two months prior to the date of passing of the impugned order is a mere irregularity and it is not an illegality, therefore, the impugned order deserves to be ignored placing reliance upon the judgment of the Madras High Court in the matter of **A. Dhaveethu v. The District Collector and others**<sup>8</sup> and the judgment of the Jammu and Kashmir High Court in the matter of **Ghulam Mohammad v. Hari Chand**<sup>9</sup>. In my view the submission deserves to be rejected. Non-recording of a finding on the statutory requirement of the proviso to Section 145 (4) of the CrPC by the learned Magistrate would amount to jurisdictional error and non-compliance of the statutory provision for directing restoration of possession. The decisions cited by Mr. Dangi i.e. **A. Dhaveethu** (supra) and **Ghulam Mohammad** (supra) are clearly distinguishable to the facts of the present case, as in **A. Dhaveethu** (supra) it has been held that the absence of a preliminary order under Section 145 (1) of the CrPC will not vitiate the final order under Section 145 of the CrPC and likewise, in **Ghulam Mohammad** (supra), incomplete preliminary order would not be sufficient to vitiate the proceeding unless there is proof of prejudice having been caused. Aforesaid cases are clearly distinguishable to the facts of the present case.

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8 2016 SCC OnLine Mad 17222

9 1978 Cri LJ 299

32. As it has already been held that in a proceeding under Section 145 of the CrPC, right to possession and title of the parties are not relevant, it has to be kept in arms distance and it has to be decided as to who was in actual possession on the date of filing of report or at least on the date of passing the preliminary order and if not, whether the party has been dispossessed two months prior to the date of passing of preliminary order. But, the learned Magistrate appears to have been influenced more with the right of respondent No.1 / party No.1 to have possession of the land and no such finding of dispossession within two months from the date of preliminary order has been recorded to direct restoration of possession to respondent No.1. Therefore, the order passed by the learned Magistrate is contrary to law and without fulfilling the requirements of the proviso to Section 145 (4) of the CrPC, as such, the order passed directing restoration of possession under Section 145 (6) (a) of the CrPC cannot be sustained.
33. The revisional Court also on revision being filed did not advert to the basic question as contained in the proviso to Section 145 (4) of the CrPC of passing the order of restoration and straightway dismissed the revision thereby perpetuating the illegality warranting interference by this Court under Section 482 of the CrPC.
34. It is well settled law that the provisions contained in Section 482 of the CrPC can be exercised to prevent abuse of the process of law and to secure the ends of justice.
35. In the present case, the learned Sub Divisional Magistrate has

failed to find out in enquiry which party was in possession within two months next before the date on which the report of the police officer received and / or on the date of passing of preliminary order under sub-section (1) of Section 145 of the CrPC, which is *sine qua non* for granting restoration of possession under Section 145 (6) (a) of the CrPC. The decision of the learned Magistrate is influenced more by the consideration of title and right of possession of respondent No.1 / party No.1 than the actual physical possession over properties in dispute. Therefore, this is a fit case where this Court can step-in under Section 482 of the CrPC and interfere with the order of the learned revisional Court affirming the order of the trial Magistrate directing restoration of possession to respondent No.1/party No.1 to secure the ends of justice.

36. As a fallout and consequence of aforesaid discussion, the petition under Section 482 of the CrPC is allowed and the order passed by the revisional Court affirming the order passed by the Magistrate is hereby set aside. The matter is remitted back and restored to the file of the Sub Divisional Magistrate, Jagdalpur to consider afresh the material available on record and to pass order after hearing the parties, clearly recording a finding whether respondent No.1 / party No.1 has been forcefully and wrongfully dispossessed within two months next before the date on which the istegasha was produced before him or within two months from the date of passing of preliminary order under Section 145 (1) of the CrPC. The learned Magistrate would conclude the proceeding expeditiously and preferably within 45 days from the date of production of a copy of



this order. There will be no order as to costs.

37. It is made clear that the learned Magistrate will take a decision on the basis of material available on the record, without being influenced by any of the observations made in this order and decide the rights of the parties strictly in accordance with law.

Sd/-  
(Sanjay K. Agrawal)  
Judge

Soma