

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 09.05.2017

Delivered on: 31.05.2017

+ W.P(CRL) 1968/2015

ANOOP LOHIA & ANR.

..... Petitioner s

Versus

**THE STATE GOVT. OF NCT OF DELHI
& ANR.**

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr. Amit Sharma with Mr.Aditya Bhardwaj
and Mr.Karan Kakkar.

For the Respondent No.1 : Mr.Ashish Aggarwal, ASC with Mr.Piyush
Singhal.

For the Respondent No.2 : Ms.Nitya Rama Krishnan with Mr.Sarim
Naved.

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The petitioners have impugned the order dated 14.08.2015 passed by the learned SDM, Vasant Vihar, in a proceeding vide No.SDM/VV/3405 whereby plot No.B-239 measuring 150 sq.yards (Khasra No.1049-1050) in Vasant Kunj Enclave, Village Malikpur Kohi

@ Rangpuri, New Delhi has been attached until the determination of the rights of the parties thereto by a competent Court. By the same order, the SHO of the police station Vasant Kunj (South) has been appointed as a receiver of the plot who has been directed to ensure that no construction or any other activity takes place on the said plot and to hold the property under attachment until a decree or order of the competent Court determining the rights of the parties, is passed.

2. Respondent No.2, Manpreet Singh lodged a complaint on 11.06.2015 before the SDM, Vasant Vihar, alleging that despite his possession over plot No.B-239 in Vasant Kunj Enclave, efforts are being made by the petitioners to encroach upon the said land. It was further alleged that earlier also complaints were made with the police but such complaints went unheeded. The immediate cause of approaching the Magistrate was stated to be an attempt to construct a boundary wall and gate along with a room by the petitioners. Hence it was requested that a proceeding under Section 145 of the Code of Criminal Procedure be initiated. On the registration of the aforesaid complaint, it was directed to be posted for consideration on 12.06.2015. The petitioners and the sub Inspector of the Vasant Kunj (South) police station were noticed by the learned SDM. The records reveal that the proceedings could not be conducted for some reason or the other and on 14.07.2015 the petitioners and the officer incharge of the concerned police station were directed to submit all documents pertaining to the case and the matter was posted for 17.07.2015. The matter was kept on being adjourned till 28.07.2015 when the learned Magistrate noted the appearance of the counsel for the

petitioners and the respondent No.2. The case was reserved for orders. Thereafter on 14.08.2015, the impugned order was passed.

3. It has been argued on behalf of the petitioners that by the order impugned, the property has been attached without recording any satisfaction regarding existence of any dispute which is likely to cause breach of peace. It has been submitted that no order of attachment under Section 146 of the Cr.P.C could have been passed without the preliminary order under Section 145(1) of the Cr.P.C. It has further been argued on behalf of the petitioners that assuming but not admitting that the order impugned was a composite order under Section 145 and 146, what the learned Magistrate has recorded is only a possibility of breach of peace in view of construction of a boundary wall and a gate.

4. The order is sought to be assailed on factual aspects as well viz. despite the availability of ample documentary evidence regarding the actual physical possession of the petitioners, the order of attachment has been passed. That apart, even the police report indicated that the plot in question (B-239, Vasant Kunj Enclave) was purchased by the petitioners in 2007 from one Anita Garg and since then the petitioners are members of the RWA of Vasant Kunj Enclave and that the allegations leveled by the respondent No.2 are false and unsubstantiated.

5. In response to the aforesaid proposition of the petitioners, learned counsel appearing for the respondent No.2 has stated that the satisfaction regarding the apprehension of breach of peace was recorded by the learned Magistrate as mandated under Section 145(1) of the Cr.P.C and no fault could be found with the composite order of the Magistrate, attaching the plot. It was further argued that respondent No.2, in his

complaint before the Magistrate, had clearly stated that over the plot in question, the respondent No.2 was in possession till the morning of 11.06.2015, when he was forcibly dispossessed by the encroachers who were trying to erect the boundary wall. The complaint also referred to earlier attempts at encroachment. It has been submitted that in the records available before the Magistrate, there are photographs showing the land to be vacant and the statements of neighbours namely Sanjay Dhillon and Mr.Surinder Kapoor regarding threats by the beat constable at the behest of respondent No.2. The report of the police, it was asserted was collusive and prima facie appeared to be patently biased. Without any basis, a conclusion was drawn regarding the title and possession of the plot being with the petitioners. The impugned order, therefore, is absolutely justified.

6. In order to appreciate the contention of the parties, it is necessary to make a quick reference to the relevant provisions, for the purposes of present discussion of Section 145 and 146 of the Code of Criminal Procedure:-

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)

(3)

(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 subsection (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)

(8)

(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)

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;*
(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);”*

7. The proceedings under Section 145/146 of the Code of Criminal Procedure have been held to be of quasi civil and quasi criminal in nature. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of peace by submitting the dispute to the Executive Magistrate for resolution as between the parties over the question of possession over the property. What is mandated under the aforesaid sections is that the Executive Magistrate would decide the question of possession only and not ownership, which can only be determined by a competent Court. In fact, the language of the section is plain and clear, barring the Magistrate from taking any decision with

respect to ownership. What the Magistrate has to look for is possession simplicitor.

8. Apart from this, the Magistrate gets the authority to interfere only when there is a dispute and there is a likelihood of breach of peace.

9. Section 146, as can be seen from the wordings of the Section, clothes the Magistrate with the power of attaching the property in question if at any time after making the order under sub Section (1) of Section 145 (satisfaction regarding the apprehension of breach of peace), he considers the case to be one of emergency or when none of the parties at dispute are in possession or if he is not in a position to decide as to which one of the parties is in possession of the property in question. The attachment of the property would be co terminus with the determination of the rights of the parties with regard to the title and possession, by a competent Court having jurisdiction.

10. There does not appear to be any bar in the exercise of powers under Section 145(1) and 146 of the Cr.P.C simultaneously. In fact the scheme of the Act itself provides that if there is an apprehension of the breach of peace, necessary executive interference is required and if the case is of emergency and the Magistrate is not in a position to decide as to who was in possession at the relevant time or finds that no one was having possession, the property could be attached under Section 146. The section does not at all warrant a proposition that there must be two separate orders, one under Section 145(1) and the other under Section 146 of the Code of Criminal Procedure. The object of attachment is to keep the property in custody of the Magistrate so as to prevent any breach of peace in an attempt to obtain the actual possession of the property. An order of

attachment, obviously, cannot be passed without a Magistrate assuming jurisdiction to decide about the possession in the first instance. The jurisdiction to decide about possession is made available to a Magistrate only when there is a dispute and there is an apprehension of breach of peace and not otherwise. Thus for all practical purposes, provisions of Section 146 is only a sequel or corollary to Section 145. Section 146 does not stand in isolation and the provisions of Section 146 can only be invoked after 145 proceedings are initiated. However, as stated earlier there is no reason to infer that the two orders, one under Section 145(1) and the other under Section 146, cannot be passed simultaneously.

11. The object of Section 145 is to prevent breach of peace and Chapter 10 of the Code of Criminal Procedure (Maintenance of public order and tranquility) deals with the necessary provisions.

12. As is evident from the provisions of Section 145 of the Code of Criminal Procedure, a Magistrate can assume jurisdiction to decide about the possession only when there is an apprehension of breach of peace. The question, therefore, would be as to what are relevant materials for the Magistrate to come to the conclusion that there is an apprehension of breach of peace or that a particular contending party is in possession or was in possession two months ago when he was dispossessed.

13. The language of Section 145 is clear. The relevant materials before the Magistrate would be “report of a police officer” or “other information” regarding the possibility of a dispute. A Magistrate can arrive at his satisfaction both from the police report and from other information which necessarily means an application of the party dispossessed or under the threat of dispossession.

14. A plain reading of Section 145 does not indicate that the Magistrate passing an order is compulsorily required to call for a police report. As a matter of prudence and caution, police report is more often than not called for but there is no statutory compulsion in calling for a police report as “other information” also can be sufficient for the Magistrate to assume jurisdiction.

15. In ***R.H.Bhutani vs. Mani J.Desai & Ors, AIR 1968 SC 1444***, the Supreme Court has clarified that a Magistrate can initiate the proceedings either on the police report or on other information. The relevant paragraph of the decision referred to above is hereunder:-

12. Was the High Court next justified in observing that the Magistrate ought to have got a police report on the allegations made in the application before he passed his said order? Such a view has been taken in some decisions. In Phutania v. Emperor [(1924) 25 Cr LJ 1109] the view taken was that it was a safe general rule for a Magistrate to refuse to take action under Section 145 except on a police report and that the absence of such a report is almost conclusive indication of the absence of any likelihood of breach of peace. A similar opinion has also been expressed in Ganesh v. Venkataswara [(1964) 2 Cr LJ 100] where, relying on Raja of Karvetnagar v. Sowear Lodd Govind Doss [(1906) ILR 29 Mad 561] the Mysore High Court observed that law and order being the concern of the police it is but natural that the Magistrate should either be moved by the police or if moved by a private party, he should call for a police report regarding the likelihood of breach of peace. But the High Court of Madras in the case of Raja of Karvetnagar [(1906) ILR 29 Mad 561] , did not lay down any such proposition but merely sounded a note of caution that in the absence of a police report the statements of an interested party should not be relied on without caution and without corroboration the proposition that the Magistrate before proceeding under Section 145(1) must, as a rule, call for a police

report where he is moved by a private party or that the absence of a police report is a sure indication of the absence of possibility of breach of peace, is not warranted by the clear language of the section which permits the Magistrate to initiate proceedings either on the police report or “on other information”. The words “other information” are wide enough to include an application by a private party. The jurisdiction under Section 145 being, no doubt, 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. The view taken in the aforesaid two decisions unnecessarily and without any warrant from the language of sub-section (1) limits the discretion of the Magistrate and renders the words “other information” either superfluous or qualifies them to mean other information verified by the police. In our view, once the Magistrate, having examined the applicant on oath, was satisfied that his application disclosed the existence of the dispute and the likelihood of breach of peace, there was no bar against his acting under Section 145(1).

16. Another important aspect of Section 145 of the Code of Criminal Procedure is that only under emergency, issue of possession is decided and more so when there is no possibility of obtaining a determination of the rights entitling a party to the title and consequent possession by a competent Court immediately. The order under Section 145 remains in existence only till the determination of the title or possession by a competent Court. In case, a civil suit or a proceeding is pending before the competent Court regarding title and possession, the Magistrate, instead of entering into the arena for deciding the possession, would normally direct the parties to go to the aforesaid forum for seeking an injunction for temporary relief and protection of property.

17. It may be clarified that it may not be necessary, at all times, to defer an action under Section 145 or 146 in case any proceeding is pending before any Court which is competent to decide about the right, title and possession. Equally true would be the proposition that pendency of any proceeding before the competent Court may prevent the Magistrate from exercising its powers under Section 145/146 of the Code of Criminal Procedure but only when necessary orders for protection of the property or the possession thereof can be obtained from the court where the proceeding is pending.

18. The law on this aspect has been settled by the Supreme Court in ***Ram Sumer Puri Mahant vs. State of U.P, 1 (1985) SCC 427*** wherein it has been held:-

“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....”

19. Whenever possession is being examined by the Civil Court or any competent Court and parties are in a position to approach the Civil Court for judicial protection of the property during the pendency of the dispute, parallel proceedings under Section 145 Cr.P.C should neither be initiated nor continued. However, it is not that in every case where a civil suit is filed, order under Section 145 Cr.P.C cannot be passed. It is only in such cases where the proceedings are pending before a competent Court for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property or possession thereof can be applied for and granted by the Civil Court that the proceedings under Section 145 should not be allowed to continue. The reason behind this proposition is that the Civil Court is competent to decide the question of title and possession, which would be binding on the Magistrate but not vice versa.

20. The order impugned begins with the satisfaction of the Magistrate regarding the apprehension of the breach of peace:-

“ Whereas it has been made to appear to me that a dispute bearing Case No.58/RA/KH/2014 titled as State Vs.Anoop Lohia, Bharti Karwa likely to induce a breach of peace, existed between Sh.Manpreet Singh R/o.S-480, Greater Kailash-I, New Delhi and Sh.Anoop Lohia, Ms.Bharti Karwa wife of Sh.Lokendra Karwa R/o.Gopal Bagh, P.O.Bhullan Pur (PAC), Varanasi, U.P-221104 concerning certain dispute whereby both parties claim to be owner of suit land i.e Plot No.B-239 measuring 150 sq.yds plot, Vasant Kunj Enclave, New Delhi situated within the limits of my jurisdiction, and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said Plot No.B-239 measuring 150 Sq.Yds plot, Vasant Kunj Enclave, New Delhi.”

21. Thus it cannot be said that the order of attachment was passed without arriving at the finding of apprehension of breach of peace.

22. The police report which was on record of the learned Magistrate, though rubbishes the complaint of respondent No.2 but what is to be seen is whether such report was worthy of acceptance. A very cryptic report has been submitted by police suggesting the possession of the petitioners on the plot. The report is also required to be seen in the context of the complaint made by respondent No.2 on 11.06.2015. The complaint clearly states that respondent No.2 is in possession of the plot in question and is waiting for the mutation to be decided. It also indicates that on several occasions, attempts were made to encroach upon the property and on all such occasions, the police was informed and written complaints were filed, but no action by police was taken, requiring respondent No.2 to approach the learned Magistrate under Section 145 of the Code of Criminal Procedure for the needful.

23. The learned Magistrate, while exercising his powers under Section 145, had two sets of materials before him namely the police report which is in favour of the petitioners and the complaint which is against the petitioners. In the absence of any statutory requirement of calling for the police report necessarily in all cases where Section 145 of the Code of Criminal Procedure is invoked, what follows it is that the police report could even be ignored and the other set of material could be relied upon. In the present case, no doubt, the police report is in favour of the petitioners but in view of the complaint made by respondent No.2 regarding police inaction, the order of the Magistrate cannot be faulted with. Though as a rule of prudence, the report of the police has to be

looked into but in a case of this kind, ignoring the police report does not appear to be fatal.

24. The learned Magistrate has passed the order of attachment as she was not in a position to decide as to which of the parties before her was in possession. The revenue records submitted by Halqa Patwari reflected that the land in question was vested in Gaon Sabha vide Case No.62/RA/07 dated 21.01.2008 and that the land stood as awarded land vide Award No.2/98-99.

25. The Magistrate, thus was of the opinion that even the title of the land was questionable when the land acquisition proceedings are still pending which can only be decided by a competent Court. With respect to apprehension of breach of peace, the CCTV footage revealed that fresh construction was being carried out at the disputed site.

26. Thus awaiting a final determination by the competent Court, the order of attachment has been passed.

27. The argument of the petitioner that if land acquisition proceeding was pending before the Competent Court, the Magistrate did not have the jurisdiction to pass the order, is not tenable. It has already been stated that it is not necessary that pendency of any proceeding in a competent Court would prevent the Magistrate from exercising his/her jurisdiction under Section 145. With respect to land acquisition proceedings, necessary injunction orders may not be forthcoming from the Court where the proceedings are pending.

28. Thus the grievance of the petitioners is misplaced and unfounded. The order impugned does not suffer from the vice of non application of mind.

29. The writ petition, therefore, fails.
30. Dismissed.

Crl. M.A. No.13129/2015

1. In view of the main petition having been dismissed, this application becomes infructuous.
2. This application is disposed of accordingly.

MAY 31, 2017
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ASHUTOSH KUMAR, J