

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.3874 of 2017

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Anil Kumar @ Mantu Sao, Son of Ram Krit Sao, Resident of Village- Menka,
P.S.- Imamganj, District- Gaya at present residing at Village- Bankey Bazar,
P.S.- Bankey Bazar, District- Gaya.

... .. Petitioner/s

Versus

1. State of Bihar
2. Md. Dargahi, Son of late Selah @ Saleh, Resident of Village Badhauna, P.S.-
Kothi, District- Gaya.

... .. Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Praveen Prakash
For the Opposite Party/s : Mr. Shyam Kumar Singh

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 22-08-2019

Heard Mr. Surendra Kumar Singh, learned senior
Advocate for the petitioner and Mr. Shabbir Ahmad,
learned Advocate for Opposite Party No. 2.

The petitioner has challenged the order dated
28.04.2014 passed by the learned Sub-divisional
Magistrate, Sherghati, Gaya in Miscellaneous Case No. 233
of 2013, whereby the entire plot of land of 1.90 acres,
claimed to have been purchased by the petitioner, has
been attached and a receiver has been appointed.



From the records, it appears that a proceeding under Section 144 Cr.P.C. was initiated at the instance of Opposite Party No. 2 who claims to have purchased 26.5 decimals of land from one Zahida Khatoon on 21.02.2012.

It is the case of the Opposite Party No. 2, who was the first party before the Magistrate, that in an unauthorized manner, the petitioner in the present petition, who was the second party before the Magistrate, had purchased a bigger plot of land which included the plot of 26.5 decimals of land, which had earlier been purchased by the Opposite Party No. 2. Since there was a counter claim with respect to possession of the aforesaid plot of land, a request was made to promulgate Section 144 of the Code of Criminal Procedure as an emergency measure.

The proceedings were converted under Section 145 Cr.P.C. by the order of the Magistrate.

On the perusal of the material brought before him, the learned Magistrate, by the order impugned came to the conclusion that since the claimants to the respective



plots of land which dovetailed into each other had the potency of galvanizing the dispute into the full fledged skirmish as the parties came from two different religious communities, the entire plot of 1.90 acre was attached and the Officer-in-Charge of Bankey-Bazar Police Station was made the receiver.

The aforesaid order was challenged by the first party / petitioner in revision before the learned Additional and Sessions Judge-VI, Gaya, who dismissed the petition on the ground of the order of attachment being an interlocutory order and, therefore, not revisable before a Court of law in view of the bar provided under Section 397(2) of the Code of Criminal Procedure, 1973.

The present petition, therefore, is against the order of attachment as also the order passed in revision, holding such order to be interlocutory and, therefore, not revisable.

Mr. Surendra Kumar Singh, learned senior Advocate, after some arguments, did not press the petition



with respect to correctness of the order passed in revision holding the order of attachment to be an interlocutory order. He submits that if the issue of attachment itself is appraised by this Court, the lis would be decided.

The submissions advanced on behalf of the petitioner is primarily that from the pleadings made by the Opposite Party No. 2 in the proceedings before the Magistrate, it is an admitted fact that he staked his claim only over a small portion of the bigger plot, i.e. to the extent of 26.5 decimals which is said to have been purchased by him from one Zahida Khatoon. If there was any cloud over the aforesaid plot of land with respect to the possession of the either of the parties, the Magistrate would have been well within his powers to attach the same if he considered the case to be of grave emergency or came to the opinion that nobody over the aforesaid plot of land was in possession in the past or in the circumstance that he could not decide about the issue of possession over the aforesaid plot of land.



The second submission on behalf of the petitioner is that in the event of learned Magistrate having specifically stated in the order impugned that such attachment was made because of fear of breach of law and order, it has to be understood in that context only.

Thirdly, it has been submitted that since the Opposite Party No. 2 was the first party before the Magistrate, it was incumbent upon him to let the Magistrate know as to in which part of the bigger plot of 1.90 acres which is claimed to have been purchased by the petitioner, fell such 26.5 decimals of land which is said to have been purchased by him but disputed by the petitioner.

Lastly, it has been submitted that the so called purchase of 26.5 decimals of land by Opposite Party No. 2 is a misnomer as the aforesaid plot of land had already been transferred by way of gift by the aforesaid Zahida Khatoon in favour of her brother namely Iqbal Hussain, who incidentally is the vendor of the petitioner.



In support of the contention raised on behalf of the petitioner, Mr. Singh, learned senior Advocate has drawn the attention of this Court to two of the judgements of this Court namely ***Raj Kumari Devi & Anr. Versus the State of Bihar & Ors. [2008 (1) PLJR 453]*** and ***Raja Bind and Ors. Versus State of Bihar [2008 (2) PLJR 91]***.

In both the cases, the proceedings under Section 144, 145 and 146 were quashed because of the Magistrate having passed orders with respect to the property which was beyond the pale of dispute. In *Raj Kumari Devi* (supra), it has been held that in the event of the opposite party admittedly not claiming any right, title or interest over the entire disputed land and there being no dispute inter se with respect to possession between the petitioner and the opposite parties over other portion of the land, the attachment of the entire area would not be in tune with the provisions contained in Section 146 of the Code of Criminal Procedure.



Similarly, in *Raja Bind* (supra), similar issue of dispute over a small portion of the land was brought before the Magistrate and the Magistrate chose to attach the entire plot of which the disputed plot formed a small part. In that instance also, the order was set aside.

As opposed to the aforesaid contentions, Mr. Shabbir Ahmad, learned senior Advocate submits that if the first party / Opposite Party No. 2 did not bring to the notice of the Magistrate the location of the plot which is claimed to have been purchased by him, it was for the petitioner / second party to have made it known as he was the purchaser of a bigger plot of land and only he knew which part of such bigger plot was purchased by the other side; more so, when the date of sale of the bigger plot is a day later than the sale of 26.5 decimals of land.

He further submits that in any event, in the absence of such specific pleadings on the part of the parties, it was incumbent upon the Magistrate to have found out as to which area is under dispute. As a corollary



to the aforesaid ground, Mr. Shabbir Ahmad submits that it has to be presumed therefore that the Magistrate was of the view that the plot of land over which there is a dispute could not be segregated from the bigger plot especially for the purposes of deciding the *factum* of possession and because of such inability in determining the said fact, it was considered by him to be safer to attach the entire property so as to thwart any further danger of breach of peace.

The arguments on behalf of the parties have to be tested on the anvil of the requirements under Section 146 (1) of the Code of Criminal Procedure. Section 146 of the Code of Criminal Procedure is extracted hereinbelow for the sake of completeness and ready reference:

***"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.”

A bare reading of the Section would indicate that such power of attachment would be exercised by a Magistrate in the event of his coming to the opinion that it is a case of grave emergency; or if he decides that none of the parties contesting before him were in possession or that because of complicated set of facts and the competing claims, he is not able to satisfy himself as to which one of them was in possession. The order of attachment under Section 146 could be withdrawn by the Magistrate at any time, but only on the satisfaction that the likelihood of breach of peace with regard to the subject plot has vanished.



Per force, one would be required to look into other ancillary provision under Chapter-X of the Code of Criminal Procedure which deals with maintenance of public order and tranquility.

Section 148 mandates local enquiry if necessitated for the purposes of determination of issues under Sections 145, 146 and 147. Section 148 enumerates that a District Magistrate or a Sub-divisional Magistrate, in the event of finding it necessary for deciding a dispute under Sections 145, 146 or 147, may depute any Magistrate subordinate to him to make an enquiry and furnish him with such written instruction as may be deemed necessary for the guidance and for which the decision of the Magistrate would be final with respect to incurring the necessary / incidental expanses. The report so received would be read as a piece of evidence in the case.

From the perusal of the impugned order attaching the property as also the show-cause filed by the



parties, it becomes very clear that there is a competing claim over a plot of land extending to 26.5 decimals of land. There is a larger plot of land which is said to have been purchased by the petitioner comprising 1.90 acres which includes the disputed 26.5 decimals of land said to have been purchased by Opposite Party No. 2.

The claim and counter claim over the aforesaid plots of land is and should not be the matter over which the Magistrate is required to apply his mind. All that the Magistrate is required to do is to find out as to who is in possession of the said plot of land. The dispute primarily is with respect to 26.5 decimals of land which stands admitted in the order of the Magistrate as also in the show-cause reply of the Opposite Party No. 2. The Opposite Party No. 2 therefore could not have been allowed to travel beyond his admission of purchase of 26.5 decimals of land. By a quirk of circumstance, the bigger plot which is said to have been purchased by the petitioner includes the plot of 26.5 decimals.



In any view of the matter, the dispute which the Magistrate was required to decide was only with respect to 26.5 decimals of land as the petitioner contends that the vendor had already sold that 26.5 decimals of land to him whereas the Opposite Party No. 2 asserts that the sale of 26.5 decimals of land was prior to the purchase by the petitioner.

In any view of the matter, as referred to above, the title was not required to be decided by the Magistrate.

Therefore, in the opinion of this Court, the Magistrate acted in hurry in attaching the entire property of 1.90 acres for which there was no competing claim except for a small plot of 26.5 decimals of land. Where was that 26.5 decimals of land located was the duty of the parties to bring it to the notice of the Magistrate. If they had failed to do so, then for passing a sustainable order under Section 146 Cr.P.C., it was incumbent upon the Magistrate to have at least directed for a local enquiry to find out as to which part of the bigger plot is the disputed



plot which could have been attached. While attaching the entire property of 1.90 acres in a bid to prevent any breach of peace because of competing claims, the Magistrate has adopted a short-cut approach and in a way has abdicated his duty. An Executive Magistrate is not technically trained to decide a complicated question of title and therefore he rightly eschewed from foraying into the aforesaid field; nonetheless, without any enquiry or a proper determination of or identifying the disputed plot of land, the order attaching the entire property is therefore absolutely unsustainable.

There need not be any exposition of law to explain that the power of attachment is limited to the plot which is under dispute.

As already noted, the dispute does not extend beyond 26.5 decimals. Where is that land located is the issue now on which the Magistrate must apply his mind.

Under the aforesaid circumstances, the order passed by the learned Magistrate dated 28.04.2014



attaching the entire 1.90 acres of land is set aside. For avoiding any confusion in the matter, even the order passed by the revisional Court is set aside as otherwise that order would remain on record.

The Magistrate is directed to undertake an enquiry and determine as to in which part of the bigger plot of 1.90 acres of land is the disputed plot of 26.5 decimals of land falls. In the aforesaid enquiry, the Magistrate may take the help of local Commissioner. The parties shall also cooperate in the matter and any abstention of either of the parties on the appointed date would be taken by the Magistrate as an attempt to deflect the course of justice and he would be entitled to draw adverse inference against the aforesaid party. The petitioner as well as Opposite Party No. 2 are also directed to clearly state and submit before the learned Magistrate the position of the plot under dispute. After the same is determined by the Magistrate, necessary orders shall be passed with respect to attachment, if the situation still



remains explosive and the Magistrate is not in a position to decide as to who is the in possession or that grave emergency still exists. Such exercise by the Magistrate would begin within a period of one week from the date of production/communication of a copy of this order. The entire exercise ought to be completed within a period of three months from the date of the beginning of the exercise.

It is again reiterated that the parties shall cooperate to the fullest. Till such time the issue is decided by the Magistrate afresh, the order of attachment shall continue.

With the aforesaid observation / direction, this petition stands disposed off.

(Ashutosh Kumar, J)

skm/-

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CAV DATE	
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