

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRI. APPLN. (APL) NO. 764 OF 2020

APPLICANT :-

Sudhakar S/o Mahadeorao Tikekar, Age 88 Years, Occupation – Retired, R/o. Flat No.G-1, Satya Sai Apartment, Building No.6, Near Somalwar Nikalas High School, Khamla, Nagpur.

...VERSUS...

NON-APPLICANTS: 1. Shri Ramkrushna Vivekanand Samiti, Through Its President Vivekanand Colony, Amravati, Taluka & Dist. Amravati.

Deleted as per order dated 17/02/2021 2. ~~Sau. Ushatai Bapat, Age Years, Occupation – R/o. Vivekanand Colony, Amravati, Tahsil & Dist. Amravati.~~

Deleted as per order dated 17/02/2021 3. ~~Shri Madhukar Sitaram Ranadale, Age Years, Occupation – R/o. Vivekanand Colony, Amravati, Tahsil & Dist. Amravati.~~

4. State of Maharashtra, Through Sub-Divisional Magistrate, Amravati, Dist. Amravati.

5. State of Maharashtra, Through Its Police Station Officer, Police Station Rajapeth, Amravati, Dist. Amravati.

Mr. Rajnish Vyas, counsel for the applicant.
Mr.V.A.Kothale, counsel for the non-applicant No.1.
Mr. S.D.Sirpurkar, APP for the non-applicant Nos.4 and 5.

CORAM : MANISH PITALE, J.

DATE : 06.07.2021.

ORAL JUDGMENT

Hearing was conducted through video conferencing and the learned counsel agreed that the audio and visual quality was proper.

2. Heard the learned counsel for the rival parties.

3. By this application, the applicant has challenged order passed by the Sub-Divisional Magistrate on 28/12/2011 exercising power under section 146 of the Code of Criminal Procedure (Cr.P.C.) and order dated 20/10/2020 passed by the Court of Additional Sessions Judge, Amravati dismissing the revision application filed by the applicant.

4. Mr. Rajnish Vyas, learned counsel appearing for the applicant, submits that the order passed by the Sub-Divisional Magistrate purportedly exercising power under section 146 of the Cr.P.C., was wholly without jurisdiction and operative portion of the said order would show that the Magistrate failed to appreciate the true scope of the said provision. It was submitted that there was no situation of emergency for exercising power under the said provision and that therefore, only on this short ground, the impugned order deserves to be set aside. The Court of Additional Sessions Judge also failed to appreciate this aspect of the matter while dismissing revision application filed by the applicant. The learned counsel for the applicants placed reliance on judgment of the Hon'ble Supreme Court in the case of **Ashok Kumar v. State of Uttarakhand and others**, reported in (2013) 3 SCC 366.

5. On the other hand, Mr. V. A. Kothale, learned counsel for the contesting respondent No.1, submitted that there was sufficient material on record, correctly appreciated by the Magistrate as well as the Sessions Court to conclude that the said respondent was and is in possession of the property in question, necessitating passing of the order dated 28/12/2011 by the

Magistrate. Attention of this Court was invited to the suit filed by the applicant for declaration and injunction, which stood dismissed in default on 08/10/1993. It was submitted that the applicant had failed to make out his case in respect of the property in question before the Competent Civil Court. On this basis, it was submitted that the impugned orders did not deserve interference.

6. Mr. S.D.Sirpurkar, learned APP appeared for the respondent Nos.4 and 5.

7. Shorn of unnecessary details, the brief facts of the present case are that a proceeding under section 145 of the Cr.P.C. was initiated in a situation where the concerned Police Station Officer apprehended breach of peace. This concerned the property in question where the applicant, as well as the respondent No.1 and one Ushatai Bapat, Director of Vivekanand Balak Mandir made competing claims as regards the possession in the said property.

8. On 24/02/1998, the Sub-Divisional Magistrate, Amravati directed that the said Ushatai Bapat, Director of the said

school, appeared to be in possession of part of the property, which had tin shed and that rest of the property appeared to be in possession of the competing claimants. On this basis, the parties were directed not to disturb the possession of each other. This order was challenged on behalf of respondent No.1 before the Sessions Court. By order dated 20/07/2002, the revision petition filed by the respondent No.1 was allowed and it was held that the said respondent was in possession of the property. The applicant and the said Ushatai Bapat were directed not to obstruct the possession of the respondent No.1.

9. The matter rested at the said stage till in the year 2011, when the respondent No.1 through its Secretary initiated proceeding under section 146 of the Cr.P.C. before the Sub-Divisional Magistrate. It is in this proceeding that the impugned order dated 28/12/2012 was passed by the Magistrate. Upon discussing the contentions of the rival parties, the Magistrate in the operative portion held that the applicant and the said Ushatai Bapat shall not obstruct the possession of the respondent No.1 in the said property and further directed that the Station House Officer of Police Station Rajapeth shall ensure that possession of

the property is handed over to the respondent No.1.

10. The said order was challenged by the applicant by filing a revision application before the Sessions Court, which stood dismissed by the impugned order dated 20/10/2020.

11. The contentions of the rival parties have been noted herein above. A perusal of sections 145 and 146 of the Cr.P.C. would show that they are placed in Chapter X pertaining to maintenance of public order and tranquility. Under the heading D- "Disputes as to Immovable Property", Section 145 specifically provides for procedure where dispute concerning land or water is likely to cause breach of peace. Section 146 specifically grants power to the Magistrate to attach subject of dispute and to appoint receiver.

12. The Hon'ble Supreme Court in the case of **Ashok Kumar v. State of Uttarakhand and others** (*supra*) while considering the ingredients of sections 145 and 146 of the Cr.P.C. held as follows:

“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.

13. Therefore, it is evident that there must be a situation of emergency for the Magistrate to exercise power under section 146 of the Cr.P.C. Upon the said condition being satisfied when the Magistrate exercises his power under section 146 of the Cr.P.C., it is for attaching the subject of dispute and to appoint receiver and to make orders incidental thereto.

14. In the present case, the papers on record show that the applicant had filed a suit for declaration and injunction bearing R.C.S. No.131 of 1989, which stood dismissed in default on 08/10/1993. The respondent No.1 had also filed a suit for

declaration, injunction and possession bearing R.C.S. No.147 of 2008. The applicant as well as the said Ushatai Bapat were arrayed as defendants in the said suit and in prayer clause (iii) the respondent No.1 specifically sought an order against the defendants for delivery of possession of the suit property. On 15/09/2012, the said suit was disposed of as withdrawn unconditionally. Therefore, as on today there is no proceeding pending at the behest of either party before the Competent Civil Court.

15. Be that as it may, it needs to be examined as to whether the condition precedent for exercising power under section 146 of the Cr.P.C. existed in the facts and circumstances of the present case. A perusal of the impugned order dated 28/12/2011 passed by the Sub-Divisional Magistrate shows that there is no reference to any such emergency situation. It appears that the Magistrate did not apply his mind or was not aware about the existence of such condition precedent for exercising power under section 146 of the Cr.P.C. A perusal of the said order,

particularly the operative portion thereof, shows that in the present case, the Magistrate did not exercise power either to attach the subject of dispute or to appoint a receiver. This demonstrates that the approach adopted by the Magistrate was wholly erroneous and on this short ground the said impugned order deserves to be set aside.

16. The Sessions Court also failed to appreciate that the ingredients necessary for exercising power under section 146 of the Cr.P.C. were not found by the Magistrate or even referred to in the impugned order dated 28/12/2011 and the revision application stood dismissed without any discussion on the said aspect of the matter.

17. This Court is of the opinion that both the impugned orders have been rendered unsustainable for the reason that the respondents have not understood the true scope of the power to be exercised under section 146 of the Cr.P.C.

18. In view of the above, the application is allowed and the impugned orders passed by the Sub-Divisional Magistrate dated 28/12/2011 and by the Sessions Court on 20/10/2020 are quashed and set aside.

JUDGE