

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.44237 of 2015

Arising Out of PS. Case No.- Year-1111 Thana- District-

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Ravindra Kumar son of Sri Jay Kishun Sah resident of village- Dahuwa, P.S.-
Pateypur, District- Vaishali

... .. Petitioner/s

Versus

1. The State Of Bihar
2. Dharm Nath Sah son of Brahmdeo Sah resident of village- Dahuwa, P.S.-
Pateypur, District- Vaishali
3. Kishori Sah son of Late Ramautar Sah resident of village- Dahuwa, P.S.-
Pateypur, District- Vaishali

... .. Opposite Party/s

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Appearance :

For the Petitioner/s	:	Mr. Ratan Kumar Sinha, Advocate
For the O.P. No.2	:	Mr. Prakash Chandra, Advocate
For the O.P. 3	:	Mr. Satya Prakash Sinha, Advocate
For the Opposite Party/s	:	Ms. Pronoti Singh, APP

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CORAM: HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT

Date : 11-10-2023

Mr. Ratan Kumar Sinha, Ld. counsel for the
petitioner, Mr. Pronoti Singh, Ld. A.P.P. for the State, Mr.
Prakash Chandra, Ld. counsel for the Respondent no.2 and Mr.
Satya Prakash Sinha, Ld. counsel for the Respondent no. 3 are
present.

2. Learned counsel for Respondent no.2 also files counter affidavit along with annexures across the board supplying a copy of the same to the Ld. counsel for the petitioner and the same is taken on record.

3. The present petition, under Section 482 Cr.P.C., has been preferred for quashing the order dated 24.11.2014 passed by Ld. Sub-Divisional Magistrate, Mahua in Criminal Proceeding bearing No. 979 of 2014 initiated under Section 144 Cr.P.C.

4. The aforesaid proceeding was initiated by Ld. Sub-Divisional Magistrate, Mahua on report of Pateypur Police Station bearing Case No. 25 of 2014 dated 01.07.2014, as per which it was reported that there is tension between first party Dharmnath Sah son of Sri Brahmdeo Sah and 2nd party Kishori Sah son of Ramautar Sah on account of land disputes between the parties with reference to Khata No. 276, Khesra No. 981 measuring 16 decimal and Khata No. 293, Khesra No. 1277 measuring 8 decimal and there was recommendation by the police for initiating proceeding under Section 144 Cr.P.C.. Hence, proceeding under Section 144 Cr.P.C. was initiated by Ld. Sub-Divisional Magistrate, Mahua and after hearing both the parties and perusing the documents, the aforesaid

proceeding under Section 144 Cr.P.C. was converted into proceeding under Section 145 Cr.P.C. vide order dated 23.08.2014, holding that there is apprehension of breach of peace between both the parties on account of disputes between them in regard to possession of the landed property in question.

5. By the impugned order dated 24.11.2014 Ld. Sub-Divisional Magistrate, Mahua attached the land in dispute holding that despite initiation of proceeding under Section 145 Cr.P.C. there is apprehension of breach of peace between both the parties and Officer-in-charge of Pateypur P.S. was appointed as receiver and both the parties were directed to adduce evidence in support of their claims on the next date. It further transpires that Dharmnath Sah who was first party before the Ld. Executive Magistrate and Respondent no.2 herein has purchased the land bearing Khata No. 293, Khesra No. 1277 measuring 8 decimal from one Ramesh Sah and he is allegedly in possession of the same. However, the same property is being claimed by the petitioner herein Ravindra Kumar on account of alleged purchase of the same land from Kishori Sah, who is Respondent no.3 herein and who was 2nd party before Ld. Executive Magistrate. It further transpires that the land bearing Khata No. 276, Khesra No. 981 measuring 16 decimal is in

alleged possession of Dharmnath Sah, who was first party before Ld. Executive Magistrate and Respondent no.2 herein, is being claimed by respondent no.3 Kishori Sah, who was 2nd party before Ld. Executive Magistrate as his own property. It also transpires that on account of the aforesaid dispute Dharmnath Sah, who was first party before the Ld. Executive Magistrate, has filed one civil suit on 17.01.2017 against Ravindra Kumar, Kishori Sah and Ramesh Sah in court of Ld. Sub-Judge-Ist, Vaishali at Hajipur bearing Title Suit No. 55 of 2017 seeking declaration that sale deed executed by Kishori Sah in favour of Ravindra Kumar is null and void and inoperative. The same suit is still pending consideration before Ld. Civil Court.

6. Heard Ld. Counsel for the petitioner and Ld. APP for the State as well as Ld. Counsel for the Respondent nos.2 and 3.

7. Ld. Counsel for the petitioner submits that the orders dated 23.08.2014 and 24.11.2014, passed by Ld. Executive Magistrate in criminal proceeding bearing no. 979 of 2014 are liable to be quashed because the same have been passed mechanically without any fulfillment of the precondition required for passing the orders. In fact, they are abuse of the

process of the court. He further submits that first and foremost condition to invoke jurisdiction under Section 145 Cr. P.C. is apprehension of breach of public peace on account of dispute regarding possession of landed property. However, the alleged facts and circumstances, at most constitute a civil dispute between the parties, which could be adjudicated only by Civil Court and Civil Court is already seized of the matter by way of civil suit bearing Title Suit No. 55 of 2017 filed by Respondent No.2 against the petitioner and Respondent no.3 regarding the same landed property. There is no material on record to show any apprehension of breach of peace. He further submits that even pre-requisites for invoking jurisdiction under Section 146(1) to attach the property in dispute are not there and Ld. Executive Magistrate has passed the order arbitrarily without any jurisdiction.

8. Ld. Counsel for Respondent No.3 adopts the submissions advanced on behalf of the petitioner.

9. However, Ld. APP for the State and Ld. Counsel for Respondent No.2 defend the orders dated 23.08.2014 and 24.11.2014, passed by Ld. Executive Magistrate submitting that there is no illegality or infirmity in them. In the facts and circumstances of the case, initiation of proceeding

under Section 145 Cr. P.C. and attachment of property under Section 146(1) Cr. P.C. are legally sustainable.

10. Before I proceed to consider the rival submissions of the parties, it is imperative to know the ambit and scope of jurisdiction under Section 146 of the Cr. P.C.

11. Section 146 Cr. P.C. reads as follows:-

“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;

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.”

12. As Section 146 Cr. P.C. is interconnected with Section 145(1) Cr. P.C., it is also pertinent to refer to Section 145(1) Cr. P.C., which reads as follows:-

"145(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."

13. **Hon'ble Supreme Court** in para 4 of **Mathuralal Vs. Bhanwarlal & Anr. [(1979) 4 SCC 665]** has elaborately explained the object and scope of Section 145 and Section 146 Cr. P.C. observing that quite obviously, Sections 145 and 146 of the Criminal Procedure Code 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. If Section 146 is torn out of its setting and read independently of Section 145, it is capable of being construed to mean that once an attachment is effected in any of the three situations mentioned therein, the dispute can only be resolved by a competent court and not by the Magistrate effecting the attachment. But Section 146 cannot be so separated from Section 145. It can only be read in the context of Section 145. Contextual construction must surely prevail over isolationist construction. Otherwise, it may mislead. That is one of the first principles of construction.

14. Looking at Section 145 and Section 146 Cr. P.C., **Hon'ble Apex Court** observed in para 4 itself that Section 145 contemplates, first, the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace exists concerning any land or water or their boundaries, and, next, the issuance of an order known as a preliminary order, stating the grounds of his satisfaction and requiring the parties concerned to attend his Court and to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Sections 145 and 146.

15. **Hon'ble Supreme Court** continues to observe in para 4 that the first of the situations in which an attachment may be effected under Section 146 of the 1973 Code has to be “at any time after making the order under sub-section (1) of Section 145” while the other two situations have, necessarily, to be at the final stage of the proceeding initiated by the preliminary order. Now, the preliminary order is required to enjoin the parties not only to appear before the Magistrate on a specified date but also to put in their written statements.

16. **Hon'ble Supreme Court** continues to observe in para 4 that the scheme of Sections 145 and 146 is that the

Magistrate, on being satisfied about the existence of a dispute likely to cause a breach of the peace, issues a preliminary order stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements. Then he proceeds to peruse the statements, to receive and to take evidence and to decide which of the parties was in possession on the date of the preliminary order. On the other hand if he is unable to decide who was in such possession or if he is of the view that none of the parties was in such possession he may say so. If he decides that one of the parties was in possession, he declares the possession of such party. In the other two situations he attaches the property. Thus a proceeding begun with a preliminary order must be followed up by an enquiry and end with the Magistrate deciding in one of three ways and making consequential orders. There is no half way house, there is no question of stopping in the middle and leaving the parties to go to the civil court. Proceeding may however be stopped at any time if one or other of the parties satisfies the Magistrate that there has never been or there is no longer any dispute likely to cause a breach of the peace. If there is no dispute likely to cause a breach of the peace, the foundation for the jurisdiction of the Magistrate disappears. The Magistrate then cancels the

preliminary order. This is provided by Section 145 sub-section (5). Except for the reason that there is no dispute likely to cause a breach of the peace and as provided by Section 145(5), a proceeding initiated by a preliminary order under Section 145(1) must run its full course.

17. **Hon'ble Apex Court** further observed in para 4 that in a case of emergency, a Magistrate may attach the property, at any time after making the preliminary order. This is the first of the situations provided in Section 146(1) in which an attachment may be effected. There is no express stipulation in Section 146 that the jurisdiction of the Magistrate ends with the attachment. Nor is it implied. Far from it. The obligation to proceed with the enquiry as prescribed by Section 145 sub-section (4) is against any such implication. Only provision for stopping the proceeding and cancelling the preliminary order is to be found in Section 145(5) and it can only be on the ground that there is no longer any dispute likely to cause a breach of the peace.

18. In para 7 of **Chandu Naik & Ors. Vs. Sitaram B. Naik & Anr. [(1978) 1 SCC 210]**, **Hon'ble Apex Court** has guided Executive Magistrate how to proceed under Section 145 and Section 146 Cr. P.C. **Hon'ble Apex Court**

observed that the Magistrate, in the first instance, will try to conclude the proceeding in accordance with the various provisions of Section 145 of the Code. If he is able to declare the possession of either party on consideration of the evidence adduced or to be adduced before him he would do so. In that event the other party will be forbidden from creating any disturbance of the possession of the party declared in possession. The Magistrate, then, will have to withdraw the attachment in accordance with the proviso to sub-section (1) of Section 146, because, as per his order declaring a party in possession there would be no longer any likelihood of the breach of the peace with regard to the subject of dispute. The party not found in possession by the Magistrate will have to seek the redress of his grievance, if any, elsewhere. If, however, the Magistrate decides that none of the parties was in possession of the disputed property on the date of the order made under sub-section (1) of Section 145 or if he is unable to satisfy himself as to which of them was then in possession of the subject of dispute he need not lift the attachment until a competent Court had determined the rights of the parties as provided for in Section 146(1). In such a situation, recourse, if necessary, may be taken to sub-section (2) of Section 146 of the

Code either by the Magistrate or a civil court, as the case may be.

19. Hon'ble Supreme Court in para 6 of **Ashok Kumar Vs. State of Uttarakhand & Ors. [(2013) 3 SCC 366]**, explaining the object and scope of Section 145 Cr. P.C., observed that the object of Section 145 CrPC is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.

20. Hon'ble Supreme Court further held in para 9 that under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145 CrPC. It can only be read in the context of Section 145 CrPC. If after the enquiry under Section

145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

21. **Hon'ble Supreme Court** further held in para 10 that 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.

22. **Hon'ble Supreme Court** further held in para

11 that 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. It is not for the SDM to decide whether the possession is legal or illegal.

23. Hon'ble Uttarakhand High Court in Rameshwar Havelia Vs. M/s. Asian Agro Farms India Ltd. & Anr. (2009 CRI. L.J 2753) has held in para 13 that from a bare perusal of sub-section (1) of Section 146 Cr. P.C., it appears that the Magistrate at any time after making the preliminary order u/S. 145(1) Cr. P.C. considers — (a) that the case is of emergency or (b) if he decides that none of the parties was then in such possession as is referred to in Section 145, or (c) if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute.

24. Hon'ble Patna High Court in Ram Swarup Prasad Vs. The State of Bihar & Ors. [2008 (3) PLJR 604] has held in para 4 that according to Section 146(1) of the Code the Magistrate in a proceeding under Section 145 of the Code can attach the disputed property in any of the conditions viz. (i) when he considers the case to be of emergency, and (ii) when after enquiry he is unable to decide who among the parties is in possession or decides the name of the party in actual possession.

A case of emergency, contemplated under Section 146(1) of the Code is different from a mere case of apprehension of breach of peace. The provision of emergency attachment, as envisaged under Section 146(1) of the Code may be invoked only in cases where the Magistrate records satisfaction that attachment of the property is essential as the breach is imminent and to make out a case of emergency there must be some material before the Magistrate on record from the statements of the parties, documents produced or evidence adduced and not upon personal impression of the Magistrate. But there was no such material in that case and hence order of the Ld. Executive Magistrate was set aside.

25. Hon'ble Madras High Court in para 4 of **C. K.P. Memmon & Ors. Vs. K.P. Sulaiman & Ors. (2000 CRI. L.J. 221)** has held that it is the duty of Ld. Executive Magistrate to direct the parties to put forth their contentions by way of written statement and then to take evidence and make enquiry in order to ascertain if possible as to who are in possession. Unless and until the Ld. Executive Magistrate makes an enquiry contemplated under S. 145, Cr.P.C. i.e., unless he has examined his witness and considered the evidence produced by parties the Ld. Executive Magistrate has no jurisdiction to

proceed under S. 146, Cr.P.C. Section 146, Cr.P.C. presupposes an enquiry by the Magistrate on the evidence recorded. After holding enquiry, if the Executive Magistrate comes to a conclusion that it is a case of emergency or none of the parties are in possession or no decision was possible as to possession, he should exercise his discretion to order attachment.

26. Hon'ble Allahabad High Court in Ramesh Chandra Saxena Vs. VIth Additional Sessions Judge, Aligarh & Ors. (1998 CRI. L.J. 3794) has held in para 9 that there is much obfuscation about the scope of Section 146. The power of attachment conferred in Section 146 of the Code has to be exercised in emergent situations, i.e. where there is no alternative but to maintain the peace and tranquility by attaching the property concerning which rival contentions about the possession have been raised. Therefore, power to attach the subject of dispute given under Section 146 must not be exercised light heartedly as it is a desperate remedy for cases in which the Magistrate finds it quite impossible to choose between the conflicting evidence adduced by two sides. The resultant effect of the attachment under Section 146 is almost the same as an act of confiscation and, therefore, a Magistrate should naturally be reluctant to make use of this Section and it

becomes necessary to use the same, it should be in exceptional and sparing circumstances. Experience shows that now-a-days, attachment under Section 146 is resorted to as a normal course to supposedly quell the disturbances and breach of peace on account of disputes with regard to immovable properties. A power which is to be exercised in rarest of rare cases, has now become a normal course, which is lightly adopted by the Magistrates. Where rival contentions of the parties and the evidence on the question of possession of both the parties is equibalanced and the Magistrate is unable to decide, which means some real hurdle, some genuine obstacle, some difficulty, which the Magistrate considers to be insurmountable, that is to say, even though an honest attempt is made to arrive at a correct conclusion by disentangling the complex question of fact, from the mass of evidence placed before him, he is unable to make up his mind as to which party is in possession, then only an order of attachment should be passed and that too in emergency. Emergency cannot be confused with interest of justice. To make out a case of emergency, there must be some material before the Magistrate coming forth on the record from the statements of the parties, documents produced by them or such other evidence as they may choose to adduce and not upon the personal

impression carried by the Magistrate at the time of visit on spot. Emergency means that apprehension of breach of peace is imminent and to fortify, the preventive measure, attachment is an absolute essentiality.

27. Hon'ble Patna High Court in Amrit Singh & Ors. Vs. Gyandeo Sharma & Anr. (1978 CRI. L.J. 671) has held in para 2 that Section 146(1) of the Code of Criminal Procedure lays down that the Magistrate at any time after making the order under sub-section (1) of section 145, if he considers (1) the case to be one of emergency, or (2) if he decides that none of the parties was then in such possession as is referred to in Section 145, or (3) 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 same until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof.

28. Hon'ble Patna High Court held in that case that admittedly the case was not covered by the second and the third clauses. The only question was whether it was a case of emergency in the opinion of the Magistrate and, therefore, he could pass an order of attachment under Section 146(1) of the Code. The Magistrate has not said expressly that it was a case of

emergency. It may be that even in such cases where the Magistrate does not say that the case is one of emergency but if the circumstances are such that the superior Court thinks that the case was one of emergency, then that Court may not interfere. Here, the Magistrate has merely said that breach of the peace might take place at any time. In each and every case where a proceeding under Section 145 is initiated, there is an apprehension of breach of the peace : that is, breach of the peace may take place any time. If there is no apprehension of breach of the peace, then a proceeding under Section 145 of the Code cannot be initiated. Therefore, a case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. Both cannot be equated. A mere statement on the part of the Magistrate that he thinks that there may be breach of the peace on the disputed land any time cannot be taken to be that in his opinion it is a case of emergency. Even if the Magistrate says that the case is of emergency, that by itself may not be sufficient for attachment. In the order to be passed by the Magistrate he must explain the circumstances why he thinks it to be a case of emergency, so that the superior Court may judge whether the Magistrate has really applied his mind to the facts or not and

whether his satisfaction of the case of emergency is a judicial and objective one. in absence of this, the order of attachment on the ground of emergency cannot be sustained.

29. Hon'ble Gauhati High Court in para 8 of **Md. Ansar Uddin Vs. State of Assam & Ors. [2008 Cri. L.J. (NOC) 479 (GAU.)** held that while considering the above aspect of the matter, it needs to be noted that the very case, set up by the first party, clearly reflects that the dispute, in question, was a dispute confined to the parties to the proceeding. Such a dispute is a private dispute and does not involve the members of the public, in general. When the members of the public have no interest in a dispute, such a dispute cannot become the foundation for exercise of powers under section 145(1).

30. Hon'ble Gauhati High Court further held in para 9 that it is, at this stage, imperative to recall the scheme of section 145 read with section 146, Cr. P.C. Section 145 appears under Chapter X of the Code, which reads, "Maintenance of Public Order and Tranquillity". This chapter is divided into separate groups. Section 145 and 146 fall under Group-D. Though the heading of the chapter, in any legislation, is not the sole criterion for determination of the scope of the provisions, which may be embodied in such a chapter, the fact remains that the heading of the chapter in a piece of legislation does reflect the legislative

intent. A careful analysis of the various provisions, contained in Chapter X, would show that this chapter essentially deals with maintenance of public order and tranquillity. In other words, a private dispute or a dispute, which has no bearing on public order and tranquillity, cannot be regarded as a dispute and such a dispute does not empower an Executive Magistrate to exercise jurisdiction under sub-section (1) of section 145.

31. Hon'ble Gauhati High Court further held in para 11 that the provisions, contained in sub-section (1) of section 145, show that the source of information for the purpose of drawing a proceeding, under sub-section (1) of section 145, is not material; what is material is that the Executive Magistrate must feel satisfied about existence of a dispute as envisaged in section 145(1) and must assign the grounds of his being so satisfied. This apart, the dispute must relate to any land, water or boundary thereof and the dispute must be such, which is likely to cause breach of the peace. The expression "breach of the peace" does not really mean mental peace of the parties concerned. Disturbance of public order is distinct and different from actions of the individuals, which do not disturb the society to the extent of vibrating a general disturbance of public order. The breach of peace, envisaged under section 145, Cr. P.C., means disturbance of the even tempo of the life of the community in a given locality. When a party illegally or forcibly

occupies land of another party, people, in general, or even neighbours of such a party may be shocked and mentally disturbed, but life of the community may still move keeping pace with the even tempo of life of the community. If by such act of dispossession, even tempo of life of the community is disturbed or jeopardized, it may become a case of disturbance of public order and tranquillity. The acts of a private party, which affect personal rights of another party, do not disturb the even tempo of the society, for, such feuds are private feuds. Basis of jurisdiction under section 145(1) is a dispute, which is likely to cause a breach of the peace. Ordinarily, a person, dispossessed from his land, shall sue for recovery of the immovable property under the provisions of the Specific Relief Act and if there is a threat of his dispossession, he should institute a suit to obtain injunction. These are, ordinarily, forum for establishing rights of the litigants. A proceeding under section 145 is, therefore, an extra-ordinary provision to grant extra-ordinary relief, when there is likelihood of breach of the peace in a given locality. The final order of the Magistrate is subject to the decision of the Civil Court. It is, therefore, clear that private dispute between two persons, which does not disturb law and order or occasion breach of the peace in the locality, cannot form basis for drawing a proceeding under section 145, Cr. P.C. and the forum for obtaining relief, in such a

case, is the Civil Court of competent jurisdiction and not the Executive Magistrate's Court.

32. Hon'ble Gauhati High Court further held in para 13 that in order to enable an Executive Magistrate to assume jurisdiction under sub-section (1) of section 145, necessary it is that there is a dispute with regard to any land, water or boundaries thereof and the dispute must be such, which is likely to cause breach of the peace. This apprehension of breach of the peace is one of the condition precedents for assumption of jurisdiction under sub-section (1) of section 145. The breach of the peace, which sub-section (1) of section 145 envisages, is not breach of the peace between two individuals or private parties. The dispute must be such, which involves people, in general. In other words, a private dispute is not amenable to the exercise of jurisdiction, under section (1) of section 145, unless such a dispute affects the even tempo of life of the people in a given locality.

33. Hon'ble Gauhati High Court in para 11 of **Kaushal Mishra & Ors. Vs. Raj Kumar Mishra [2008 Cri. L.J. (NOC) 272 (GAU,)]** held that the dispute in the present case was out and out a private dispute inasmuch as the dispute did not involve anyone other than the parties to the proceeding and the members of the general public were neither affected nor were they shown to be interested in the dispute. Hence, it was held that the

Ld. Magistrate had no jurisdiction in the matter and could not have drawn a proceeding under section 145.

34. Hon'ble Bombay High Court in Chirstalin Costa Vs. State of Goa (1993 MH LJ 1409) has observed that quarrels between two individuals normally does not create any problem of public order and at the most, it may lead to a problem of law and order which may be dealt with appropriate penal laws.

35. Hon'ble Delhi High Court in para 18 of **Dharampal & Ors. Vs. State of Delhi & Anr. (2012 SCC OnLine Del 5321)** has held that jurisdiction under Sections 145 and 146 Cr. P.C. is preventive in nature and can be resorted to only in case of emergency or on genuine apprehension of breach of peace or if no one is in settled possession. Hon'ble Delhi High Court further held in para 19 that in our Constitution, there is a clear separation of judicial and executive powers. The civil disputes are to be decided by civil Courts and an unsuccessful litigant has a right to file an appeal. The SDMs cannot use the power conferred on them under Sections 145 and 146 Cr. P.C. to pass an interim injunction order when the civil Court has refused to do so.

36. Hon'ble Supreme Court in para 2 of **Ram Sumer Puri Mahant Vs. State of U.P. & Others [(1985) 1**

SCC 427] has held that when a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, there is 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. 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.

37. Hon'ble Patna High Court, followed the ratio of **Ram Sumer Puri Mahant** case (supra) in **Atahaul Haque & Ors. Vs. Md. Allauddin [(2000) 3 PLJR 90]** and **Chandra Shekhar Singh & Ors. Vs. State of Bihar & Anr., (2000 SCC Online Pat 1095)**, and held that when a civil suit is pending in a competent Civil Court, the parties to the suit can seek their relief/reliefs from that Court. A parallel proceeding in a criminal

Court cannot be allowed to continue when civil suit is already pending between the parties regarding the subject matter.

38. Hon'ble Patna High Court in Atahaul Haque and Ors. Vs. Md. Allauddin (2000 CRI L.J. 3245) has held in para 6 that it is well settled that when a civil suit for title and possession with respect to the disputed land is pending before the civil court, no proceeding under section 145 of the Code for any portion of the suit land of the said suit can proceed. Similarly no order under section 146(1) of the Code could be passed while the matter was pending before the civil court for adjudication of title and possession.

39. Hon'ble Supreme Court in para 13 of **Amresh Tiwari Vs. Lalta Prasad Dubey & Anr., [(2000) 4 SCC 440]** explaining the ratio of **Ram Sumer Puri Mahant** (supra), held that multiplicity of litigation should be avoided as it is not in the interest of the parties and public time would be wasted over meaningless litigation. On this principle it was held that when possession is being examined by the civil court and parties were in a position to approach the civil court for adequate protection of the property during the pendency of the dispute, the parallel proceedings under Section 145 Cr. P.C. should not continue. Referring to **Jhummamal** case (supra), Hon'ble Apex Court,

clarified that it is not that in every case where a civil suit is filed, Section 145 proceedings would never lie. It is only in cases where civil suit is for possession or for declaration of title in respect of the same property and where reliefs regarding protection of the property concerned can be applied for and granted by the civil court that proceedings under Section 145 should not be allowed to continue. This is because the civil court is competent to decide the question of title as well as possession between the parties and the orders of the civil court would be binding on the Magistrate.

40. Hon'ble Patna High Court in para 5 of **Nand Kishore Prasad Sah Vs. State of Bihar, (2005(2) PLJR 506)** has held that when a civil litigation involving question of title and possession is pending for the same property, a parallel proceeding under Section 145 of the Code 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 suit and not in the proceeding under Section 145 of the Code. Hence, a proceeding under Section 145 of the Code would be a misuse of process of Court.

41. Hon'ble Patna High Court in para 7 of **Gyandeo Sharma Vs. State of Bihar (2006(2) PLJR 181)** has held that

where suit between the parties is only for declaration of title in respect of the same property in that case also a parallel proceeding under section 145, Cr.P.C. cannot be instituted or allowed to proceed.

42. Hon'ble Patna Court in Ras Bihari Rai & Ors. Vs. The State of Bihar & Anr., (2006 SCC Online Pat 263) has followed **Ram Sumer Puri Mahant** case (supra) and held that proceeding initiated under Section 145 Cr. P.C. is not maintainable in view of civil litigation pending between the parties.

43. Hon'ble Supreme Court in para 4 of Mahar Jahan vs. State of Delhi, [(2004) 13 SCC 421] has held that when the same property is subject matter of the civil suit between the parties and criminal proceeding, there is no propriety to continue the criminal proceeding.

44. Hon'ble Patna High Court in para 9 of Shrikant Prasad @ Chirkut Sah Vs. The State of Bihar [(2013) 3 PLJR 392] has held that it is essential for the assumption of jurisdiction by the Magistrate under Section 145 of the Code that he should be satisfied either from the police report or from the other information which would include an application by the party dispossessed that there is likelihood of breach of peace.

The mere fact that there is dispute concerning land is clearly not sufficient by itself to give him jurisdiction. An order under this section must be a speaking order. The failure to indicate ground that there is likelihood of breach of peace vitiates the order. Where the order is vitiated, the Magistrate fails to get the jurisdiction to hold an enquiry or pass any order under this section. The defects in the preliminary order like failure to set out the grounds of his satisfaction regarding likelihood of breach of peace relating to immovable property would make the subsequent proceeding without jurisdiction and erroneous in law.

45. Hon'ble Allahabad High Court in Sharad Yadav @ Gappu & Anr. Vs. State of U.P. & Ors. (2013 SCC Online All 4840) has held that in the police report as well as in the orders under section 145(1) and 146(1) Cr. P.C., Ld. Additional City Magistrate has admitted the possession of petitioner no.1. Thus there was no dispute regarding possession before Ld. Additional City Magistrate and there was no occasion for him to pass an order under section 146(1) Cr. P.C. attaching the property. Mere apprehension of breach of peace is not sufficient to initiate proceedings under sections 145 and 146(1) Cr. P.C.

46. Hon'ble Gauhati High Court in para 21 of **Madhu Sarma & Ors. Vs. Ajit Sarma [(2013) 2 Gauhati Law Reports 837]** has held that Section 145 is within Chapter X of the Cr. PC. which deals with maintenance of public order and tranquility, particularly the object of the section is to maintain law and order and to prevent a breach of peace by maintaining either one or other of the parties in possession just two months immediately before the reports submitted by the Police Officer or the information regarding the dispute likely to cause breach of peace concerning the land in dispute and not only that, in 145 proceeding the Magistrate cannot inquire the rights of the parties so far as the title of the land is concerned. He can only decide the question of possession and while considering the possession of the disputed land in question, then the Magistrate is to consider the evidence adduced by the parties in the proceeding. Every dispute between the parties regarding the possession of the land would not come within the purview of the section 145 of the Code unless there is likelihood of breach of peace and if there is no material before the Magistrate which suggests likelihood of breach of peace, then the proceeding under section 145 would be without jurisdiction. It is also settled that the likelihood of breach of peace should not only be

existed on the date of application, but also on the date of preliminary order passed by the Magistrate.

47. Hon'ble Gauhati High Court has further held in para 22 that on proper examination of sub-section (1) of section 145, it appears that for initiating a proceeding relating to dispute of land an apprehension of breach of peace in and around the locality is a sine quo non, each and every dispute of land would not attract the provisions of section 145, more particularly private dispute between two individuals for which remedy under civil law is available and to come within the purview of 2nd proviso of sub-section (4) of section 145 it has to be proved that the person dispossessed forcibly and wrongfully within two months just before the date on which the police report or otherwise, the information was received by the Magistrate.

48. In Brahmaputra Iron & Steel Co. Pvt. Ltd & Anr. Vs. Premchand Tolaram Bafna Charitable Trust, Assam [2012 Cri.L.J. (NOC) 375 (GAU.)], there was a dispute in regard to the land between the parties and civil suit was filed in Civil Court, but at the same time criminal proceeding under Sections 145 and 146 was also initiated, which was set aside by the Hon'ble Gauhati High Court, holding that if the criminal proceeding is allowed to continue, it would amount to abuse of process of the Court.

49. As such, it emerges from the statutory provisions of

Section 146 read with Section 145(1) of the Cr. P.C. and the case laws as referred to above, Section 146(1) Cr. P.C. can be invoked by Ld. Executive Magistrate only after making order under Section 145(1) Cr. P.C. It further manifests that apprehension of breach of peace is *sine qua non* for invoking jurisdiction under Section 145 Cr. P.C. by Ld. Executive Magistrate. Maintaining public order and tranquility is subject matter of Chapter X of Cr. P.C. under which fall Section 145 and Section 146. Concept of public order and peace is much wider concept than instances of tension between few individuals arising out of private disputes between them in regard to landed property. Public order and peace affects public at large. If the effect of any dispute is confined merely to few individuals who are parties to the dispute, such dispute cannot give any apprehension of breach of public order and peace. Such private civil disputes comes within exclusive jurisdiction of Civil Court. Similarly violation of penal laws by few individuals are also beyond contemplation of Chapter X of Cr. P.C. Such violation at most be treated as law and order problem, but cannot be treated as basis for apprehension of breach of public order and peace. Concept of public order and peace is much wider concept than that of problem of law and order. Stray instances of violation of penal laws by few individuals are required to be dealt with under our legal framework by prosecution of such individuals

in criminal Courts. All law and order problems cannot be treated as breach of public order and peace unless it affects the public at large, like riots, affray or public unrest. Extraordinary jurisdiction under Chapter X of the Cr. P.C. has been provided to Executive Magistrates to maintain public order and peace by nipping such breach in the bud. Hence, the Executive Magistrates are expected to invoke their jurisdiction only in cases where there is apprehension of breach of public order and peace. They should refrain from exceeding their jurisdiction and encroach upon jurisdiction of civil and criminal Courts. Such colourable exercise of jurisdiction by Executive Magistrates would be against the object and spirit of Chapter X Cr. P.C. and it would render Civil and Criminal Courts redundant and the people would get harassed by illegal and unnecessary proceedings. In our legal framework, power and jurisdiction are defined for different instrumentalities of the state and no instrumentality is expected to exceed its jurisdiction and encroach upon that of others.

50. It further emerges from statutory provisions of Section 146 read with Section 145 Cr. P.C. and the case laws as referred to above that Ld. Executive Magistrate is duty bound to direct the parties to put in their claims by way of written statements and then to take evidence and make enquiry in order to ascertain, if possible, as to who are in possession. Unless and until,

Ld. Executive Magistrate makes an enquiry contemplated under Section 145 Cr. P.C. Ld. Executive Magistrate has no jurisdiction to proceed under Section 146 Cr. P.C. After holding enquiry, if the Executive Magistrate come to conclusion that it is a case of emergency or none of the parties are in possession or no decision was possible as to possession, he can exercise his discretion to attach the disputed property. In case of emergency, the Executive Magistrate is empowered to attach the disputed property even before completion of the enquiry provided that he has already passed order under Section 145(1) Cr.P.C. and he records his satisfaction on the basis of material on record to the effect that emergent situation exists. The emergency as contemplated here must be distinguished from mere apprehension of breach of peace. When breach of peace appears to be imminent only then the situation could be termed as “emergency”.

51. It also emerges that in case of civil disputes, parties are required to move Civil Court for remedy and not to Executive Magistrates, nor should Executive Magistrate invoke jurisdiction under Section 145 and Section 146 of the Cr. P.C. in case of such disputes. Moreover, when Civil Court is in seisin of civil disputes in regard to landed property, parallel proceedings before Executive Magistrates cannot be allowed to proceed.

52. In the case at hand, I find that there is dispute

between the parties in regard to landed property in question and there is tension prevailing between them. Hence proceeding under Section 144 Cr. P.C., which was initiated on police report, was converted into proceeding under Section 145 Cr. P.C., vide order dated 23.08.2014, holding that there is apprehension of breach of peace between both the parties on account of dispute between them in regard to possession of the landed property. Such satisfaction recorded by Ld. Executive Magistrate while initiating proceeding under Section 145 Cr. P.C., no way suggest that public at large are affected or involved in the disputes. In fact, the alleged facts and the preliminary order passed by Ld. Magistrate under Section 145(1) Cr. P.C. clearly shows that effect of the dispute is strictly confined to the parties. No one else are affected by or involved in the dispute. Hence, such dispute cannot be basis for apprehension of breach of peace. As such, basic prerequisite for initiation of proceeding under Section 145(1) Cr. P.C. is missing, vitiating all subsequent proceedings including that under Section 146(1) Cr. P.C.

53. I further find that vide order dated 24.11.2014, Ld. Executive Magistrate has invoked his jurisdiction under Section 146(1) Cr. P.C. to attach the landed property in dispute, holding that despite initiation of proceeding under Section 145 Cr. P.C., there is apprehension of breach of peace between both the parties

and Officer-in-Charge of the local police station was appointed as receiver of the property in question and parties were directed to adduce evidence in support of their claim on specified date.

54. But from the statutory provisions and the case laws as referred to above, it clearly manifests that passing an order under Section 145(1) of the Cr. P.C. does not automatically attract the attachment of property on the ground of emergent situation. Ld. Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment and he is also required to explain the circumstances under which, he thinks that it is a case of emergency. There must be material on record in support of the satisfaction of Ld. Magistrate regarding existence of emergent situation. But after perusal of the order of Ld. Magistrate, whereby property has been attached on the ground of emergency, it transpires that Ld. Magistrate has not even recorded any such finding that it is a case of emergency requiring attachment of property immediately after initiation of proceeding under Section 145(1) Cr. P.C. and before he completes enquiry. He has only recorded that despite initiation of proceeding under Section 145 Cr. P.C., there is apprehension of breach of peace between the parties on account of the disputes between them in regard to the disputed landed property. There is no finding regarding emergent situation. Even breach of peace has been

apprehended between the parties only, nor is any material on record to suggest existence of emergency. As such, exercise of jurisdiction under Section 146(1) of the Cr. P.C. attaching the property is without jurisdiction and abuse of process of Courts.

55. It also emerges from the facts and circumstances of the case that alleged facts constitute a classic case of civil dispute between the parties and Civil Court is already in seisin of the matter. The Respondent No.2 has already filed a civil suit bearing Title Suit No. 55 of 2017 before the Court of Ld. Sub-Judge-I, Vaishali at Hajipur against the petitioner and Respondent No.3. In such situation, proceeding under Section 145 Cr. P.C. and attachment of property under Section 146(1) Cr. P.C. cannot be permitted to continue, because multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation as Hon'ble Supreme Court has time and again reiterated.

56. Hence, initiation or proceeding under Section 145 Cr. P.C. vide order dated 23.08.2014 and attachment of property under Section 146(1) Cr. P.C. vide order dated 24.11.2014 is not sustainable in the eyes of law. In fact, the proceedings are abuse of the process of the Court and as such, the same are liable to be quashed under Section 482 Cr. P.C.

57. Hence, present petition is allowed quashing the

orders dated 23.08.2014 and 24.11.2014, passed by Ld. Sub-Divisional Magistrate, Mahua in Criminal Proceeding bearing No. 979 of 2014.

(Jitendra Kumar, J.)

Ravishankar/-

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