

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 649 OF 2023

Dharamchand s/o Motilal Jain

Petitioner

Versus

The State of Maharashtra & others

Respondent

Mr. H. I. Pathan, Advocate for the petitioner.

Mr. M. K. Goyanka, APP for the State.

Mr. P. V. Ambade, Advocate for respondent No. 4.

WITH

CRIMINAL WRIT PETITION NO. 630 OF 2023

Parasmal Motilal Jain

Petitioner

Versus

The Sub Divisional Magistrate & others

Respondents

Mr. S. V. Dixit, Advocate for the petitioner.

Mr. M. K. Goyanka, APP for the State.

Mr. P. V. Ambade, Advocate for respondent No. 6

CORAM : R. M. JOSHI, J.

RESERVED ON : 5th DECEMBER, 2023.

PRONOUNCED ON : 7th DECEMBER, 2023.

PER COURT :

1. Both these petitions take exception to orders passed on 1st April, 2023 in Criminal Revision Applications No. 4/2023 and

5/2023 confirming the order dated 13th February, 2023, passed by SDPO, Wasmant, under Section 145 of Code of Criminal Procedure.

2. Parties are referred to Dharamchand and Parasmal for the sake of convenience. Dharamchand and Parasmal are real brothers and there is dispute between them with regard to the right, title and interest as well as possession over land bearing Gat No. 150/6/B admeasuring 12.46 R. From order passed by the Executive Magistrate under Section 145 of Code of Criminal Procedure, it indicates that report was given by Wasmant City Police Station on 23rd November, 2022 stating that owing to the dispute between the parties over the property in question, there is likelihood of breach of peace and possibility of commission of serious offence is not ruled out. In view of the said report, proceedings under Section 145 Code of Criminal Procedure were undertaken. Notices were issued to the respective parties who made written as well as oral submissions before the said authority. In order to ascertain the possession of the disputing persons over the said property, the concerned police station also conducted panchanama. The authority, after taking into consideration the said panchanama, reports lodged with police station as well as panchanama drawn, has held that there are

disputes between the petitioners who are real brothers and that there is possibility of breach of peace owing to the said dispute. Authority thereby passing order dated 13th February, 2023, proceeded to restrain both petitioners from entering into the disputed property. They were, however, permitted to enter into the said premises for religious purpose with prior permission of the PI, Wasmat City Police Station.

3. Learned counsel for Dharamchand submits that the order passed by the Magistrate in exercise of Section 145 of Code of Criminal Procedure is not tenable in law as the same is passed in disregard of the panchanama drawn. By referring to the provisions of Section 145 of Code of Criminal Procedure, it is contended that irrespective of claims of the parties over the property, it is open for the authority to record prima facie finding with regard to the possession thereof. It is submitted that from the panchanama drawn by the concerned police station, it is clear that Dharamchand was in possession of the said property as the goods purchased by him are found therein however he is prevented from entering into property. It is submitted that it was not open for the authority to ignore the said panchanama and pass order impugned. It is submitted that the

contention of Parasmal about his tenant being in possession of the suit property is not sustainable in view of evidence placed before the concerned authority. It is submitted that the order in question has caused irreparable loss and great prejudice to him as his business is stand still.

4. Learned counsel for Parasmal submits that infact the concerned authority ought to have recorded finding that he is in possession of the premises and he ought not to have been restrained from entering therein. It is submitted that though now it is sought to be argued by learned counsel for Dharamchand that there was no tenant in the said premises, by referring to the document on record it is contended that while filing application for bail in connection with the crime regisitered by Parasmal, Dharamchand has claimed that in October 2022 the tenant of Parasmal had surrendered the said premises. This, according to him, indicates that there is no substance in the contention in claiming possession by Dharampal of the disputed property. It is submitted that the dispute between the parties is pending before Civil Court in Special Civil Suit No. 2/2023 and hence it is not open for the Magistrate to pass any order invoking provisions of Section 145 of Code of Criminal Procedure. In support

of his submissions be placed reliance on judgments in case of Prakash Chand Sachdeva vs. The State and another, **AIR 1994 Supreme Court 1436**, Ram Sumer Puri Mahant vs. State of U.P. and others, (1985) 1 **Supreme Court Cases 427** and Sarbhansingh Nukumsingh Keer and others vs. Hussein Khan Kadarnawaz Khan and others, 1986(1) **Bom.C.R. 459**.

5. Before dealing with the facts as well as submissions sought to be made by rival parties, it would be relevant to take into consideration provisions of Section 145 of Code of Criminal Procedure. According to said provision, whenever Executive Magistrate is satisfied from the report of police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or immovable property, he shall make an order stating the ground of being so satisfied and pass appropriate order in this regard. Further, said provision contemplates the parties to the dispute to be heard before passing any order. Sub-section 4 of Section 145 of Code of Criminal Procedure indicates that a Magistrate without reference to the merits of the claim of any of the parties right to possess the subject of dispute, may 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. Thus, once there is reason to believe likelihood of breach of peace over dispute between parties, it is within jurisdiction of Executive Magistrate to pass order directing any particular party to retain possession over such disputed immovable property. The basic intention behind such order is to prevent causing of breach of peace and not to determine even right of possession.

6. Reverting back to the facts of the present case, it is a case of Dharamchand that though the property in dispute stands in the name of Parasmal, however, the said property is joint family property and it was purchased in the name of Parasmal. It is sought to be contended that there was oral partition of this as well as other properties of the family in July 2019. It is his further claim that one brother failed to adhere to this partition, another writing came to be executed on 5th January, 2023. On 6th January, 2023, Special Civil Suit bearing No. 2/2023 came to be filed before Civil Judge Junior Division, Basmath, seeking declaration that Dharamchand is owner and in possession of the properties including the property in dispute. On the other hand, Parasmal denies any oral or written partition between them and claims possession over property. The claim of

Dharamchand in respect of possession of property is based upon the articles/goods stored in the premises in dispute whereas Parasmal claims that his tenant was in possession thereof and thereafter he was sought to be dispossessed illegally and hence report came to be logged by him against Dharamchand bearing Crime No. 427/2022 registered with Wasmal police station.

7. No doubt, under Section 145 of Code of Criminal Procedure it is within power of the said authority to record its prima facie finding with regard to possession of disputed property irrespective of the claim of parties thereof and also to prevent entry of otherside therein. However, that does not mandate that in all circumstances and in each case such finding must be recorded. Needless to say that there could be cases where it would not be possible for Magistrate to record any findings as to the possession of particular person. What is relevant is that the likelihood of breach of peace is averted. Here in this case, the Executive Magistrate has thought it appropriate to prevent both sides from entering into the disputed premises.

8. The question lies for consideration before this Court is as to whether order passed by Magistrate preventing both parties from entering into disputed property is justified in facts of the case. Prima facie, consideration of material placed on record is insufficient to record finding about possession of property owing to apparent inconsistencies in stand of both sides and evidence sought to be relied upon by them. Such determination cannot be permitted in exercise of powers under Section 145 of Code of Criminal Procedure. This Court is of considered view that the said issue can be decided only by competent Civil Court. Undisputedly, suit being Special Civil Suit No. 2/2023, has already been filed by Dharamchand claiming title and possession over disputed property. It is therefore for parties herein to get the said dispute adjudicated from Civil Court.

9. On the other hand, there is ample material to indicate the dispute between the parties and likelihood of causing breach of peace owing to the said dispute. In such circumstances, the SDPO, Wasmal is fully justified in preventing both sides from entering into disputed property. Needless to record that such order shall remain in force till the time appropriate order with regard to the possession of the property is passed by competent Civil Court. This Court,

therefore, finds no substance in both the petitions. Both the petitions stand dismissed.

(R. M. JOSHI)
Judge

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