

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 348 of 2023

Amit Ramchandra Gupta .. Petitioner
Versus
The State of Maharashtra and anr .. Respondents

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Mr.Virendrasinh V. Tapkir with Mr.Vikram Walawalkar, Ms.Sayali Gangal for the petitioner.

Mr.Y.M. Nakhkwa, APP for the State.

Mr.Shashikant P. Chaudhari and Snehal S. Chaudhari, Gyan Prakash Pal, Pranot Pawar, Mrunal Lad i/b Maharashtra Law Associates for respondent no.2.

Mr.Naresh Rajwani respondent no.2 present.

CORAM: BHARATI DANGRE, J.

DATED : 17th OCTOBER, 2023

P.C:-

1 The present Writ Petition raise a challenge to a common order passed by the Sessions Court at Mumbai, in two Criminal Revision Applications; i.e. Revision Application No. 410/2020 and Revision Application No. 414/2020, by which common order passed by the Magistrate on C.C.Nos.996/M/2020 and C.C.No.1136/M/2020 has been reversed. The net approach of the impugned order passed by the Addl. Sessions

Judge is that the Revision Applicant, Naresh Kanayalal Rajwani, respondent no.2 in the present Writ Petition has been directed to continue with the possession of room no.40/B/71, Ground floor, Sindhi Chawl, Laxmibai Kelkar Marg, Vishram Wadi, Shastri Galli, Mumbai-400022, till the petitioner Amit R. Gupta approach the Civil Court to evict him by following due process of law. The order also direct maintenance of public peace as tranquility by Amit Gupta and he is directed not to disturb possession of Mr.Naresh Rajwani.

2 Section 145 of the Code of Criminal Procedure is the prescribe procedure to be followed, where the dispute concerning land or water is likely to cause breach of peace and it contemplate that whenever police officer finds that the dispute concerning any land or water or the boundaries thereof, is likely to cause a breach of the peace, he shall make a report to the Executive Magistrate of the local jurisdiction, who shall on being satisfied, 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.

For an effective understanding of this provision, I deem it appropriate to reproduce Section 145 of Cr.P.C.

Section 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 peach 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) For the purposes of this section, the expression “land or water” includes buildings, markets fisheries, crops or other produce of land, and the rents or profits or any such property.

3) A copy of the order shall be served in the manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(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 sub-section (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) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representative of the deceased party shall be made parties thereto.

(8) If the Magistrate is of the opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale proceeds thereof, as he thinks fit.

(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) Nothing in this section shall be deemed to be in derogation of the power of the Magistrate to proceed under Section 107.”

3 Sub-section (4) of Section 145 assumes great significance as it define the contours of the power of the Magistrate, as it contemplate that the Magistrate shall 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 placed before him and decide whether any and which of the parties on the date of the order made by him under sub-section (1), in possession of the subject of dispute.

The proviso carve out an exception, 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 office 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).

The satisfaction under sub-section (1) is of the Magistrate and the authoritative pronouncement on the provision have crystallized the position of law to the effect, that the scope of inquiry u/s.145 of Cr.P.C is limited to the actual possession, without reference to the merits or claim of the parties, who have right to possess the subject dispute and it is not permissible to travel beyond the scope of inquiry. It is thus settled that adjudication of claims on merits in an inquiry u/s.145 is not permissible and necessarily, the Magistrate will not look into the material revolving around the claim of title but he shall exercise the power by recording his satisfaction, which he may arrive on the basis of the police report or from other information, which in terms of the Apex Court in case of *R.H. Bhutani Vs. Miss Mani J. Desai*,¹ shall include an application by the party dispossessed.

The scope of the impugned order to be tested, is whether the Magistrate has recorded his satisfaction before

¹ AIR 1968 SC 1444,

arriving at a conclusion on the basis of the facts set out in the application before me and from collating the material that was placed before him and discern from the facts that it was prima facie sufficient and founded the basis of his conclusion.

4 The Division Bench of this Court in case of *Romell Housing LLP and anr Vs. The State of Maharashtra and ors* on 14/2/2018, has propounded the scope of Section 145 and the Division Bench speaking through Justice B.R. Gavai (As his Lordship was then), has succinctly set out the scope of the provision in the following words :-

“18 Sub-section (4) of Section 145 would reveal that 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, if possible, decide whether any any which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject dispute. The proviso thereto also enables the Magistrate to find out as to whether 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. It can further be seen that in such circumstances, the learned Magistrate is required to treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

19 Clause (a) of sub-section 6 of Section 145 of the Cr.P.C, provides that, where 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. It also provides that, when the Magistrate proceeds under the proviso to sub-section (4), he may restore the possession to the party forcibly and wrongfully dispossessed.

20 It could thus be seen that there is no ambiguity in the provisions and the procedure prescribed under Section 145 of the Cr.P.C, as has been found by the Joint Police Commissioner in his report. If there is likely to be a breach of peace on account of rival claim by two parties with regards to possession of the property, the police officer is required to make a report to the Metropolitan Magistrate immediately. The Metropolitan Magistrate is required to pass a preliminary order under Sub Section 1 of Section 145. After conducting a detailed enquiry which he is entitled to conduct, he is required to come to a conclusion as to who was in possession on the date on which he has passed a preliminary order. In case, if it is a case of any party prior to preliminary order being passed under sub section 1 of section 145, he was forcibly dispossessed, the Magistrate is also entitled to conduct an enquiry as to whether such a party was forcibly evicted within a period of two months prior to the date of making a preliminary order. After completing the enquiry, he is entitled to declare as to who is entitled to be in possession and direct the possession to be handed over to him. If he finds that a party has been forcibly dispossessed, he is also empowered to restore the possession to such a party which is forcibly dispossessed. He is also entitled to pass an order preventing all others from disturbing such possession till an order of eviction is passed by the competent court. In that view of the matter, we do not find that there is any ambiguity in the provisions under Section 145 of the Cr.P.C, as is felt by the Joint Commissioner of Police, Traffic.”

5 In the light of the aforesaid exposition of Section 145, when I have perused the two orders placed before him; the first order being passed by the Metropolitan Magistrate, 51st Court, Kurla, Mumbai on two cases presented before him, one initiated by the Senior Inspector of Sion Police Station and another filed by Amit R. Gupta i.e. C.C.No. 1136/M/2020, I have no hesitancy to hold that the Magistrate has not adhered to the above principle of law which has been well settled while dealing with proceedings

under Section 145 of Cr.P.C and that is the specific reason why the Addl. Sessions Judge has reversed the finding by allowing the Revision Applications and directed the possession to be handed over to the other party who was found to be in possession of the subject property.

6 From perusal of the order of the Magistrate passed on 9/10/2020, it can be very well discerned that the Magistrate was conscious of the legal position as in para-31, he has recorded the submission advanced on behalf of the counsel for the respondent no.2, that it is open to him only to ascertain the fact of possession of the party, in the disputed room as it was submitted that the respondent no.2 i.e. Mr.Ramesh Rajwani, was in possession of the disputed room.

Further reading of the order which has narrated the facts, make reference to the contentions, in order to arrive at a conclusion that each of the party was in possession of the room in question.

At this stage, it is necessary to take into consideration the rival contention which came to be advanced before the Magistrate.

7 The dispute arose between Shri Naresh Kanhaiyalal Rajwani and Shri Amit Gupta regarding Room No.40 T 71, Matunga Sindhi Camp, Bhaudaji Road Extension, Mumbai-400022.

Naresh Rajwani claimed that Draupadi Sevakram Serai and Kamla Sevakram Serai, owners of the room were his maternal aunts and they continued to reside in the room. Kamla Serai passed away in the year 2017, and thereafter, Draupadi Serai continued to reside alone in the room till her death, which occurred on 18/5/2020. After the death of Draupadi, Naresh Rajwani claimed that he performed her funeral rites, but since it was covid time and lock-down was imposed, he simply locked the room and retained the case keys with him. However, he was surprised to find that Amit Gupta took possession of the room by breaking open the lock on 18/7/2020 and on 25/7/2020, when he visited the room, he found one man and one woman residing therein, and when he questioned them, he was told that the room was purchased by Amit Gupta.

As far as Amit Gupta is concerned, it is his case that he had entered into an agreement with Kamla Serai on 13/6/2014 and he paid an advance amount of Rs.Five lakhs as a part consideration and on 15/6/2014 and thereafter, in between 2014 to 2017, he paid sum of Rs.35 lakhs by cash. On 21/1/2016, an affidavit and a sale deed of the room was executed and he even made an application to the Corporation to enter his name.

It is the specific case of Amit Gupta that an understanding was reached that as long as the two sisters continued to reside in the room, he shall not take possession and he lived upto his assurance and when Draupadi Serai passed away

on 18/5/2020, he accompanied with his wife, went to the room on 18/7/2020 and took possession of the room.

This is how the dispute arose.

In the proceedings which were placed before the Magistrate, it was imperative for him to restrict himself to the aspect as to which of the party to the dispute was in possession of the room. The Magistrate disbelieved the case of Amit Gupta, when he observed in paragraph no.35 to the following effect :-

“35 The Ld. Advocate for respondent no.2 was asked how respondent no.2 took possession of disputed room on 18/07/2020 after coming to Mumbai. He took instruction from respondent no.2 in court and submitted that the door was not having lock and therefore, he opened door and took possession on 18/07/2020 after coming from his native place. It cannot be believed that after death of Draupadi on 18/05/2020, the room was kept unlocked till 18/07/2020. It goes to show that respondent no.2 though might have entered in agreement with late Kamla regarding disputed room, possibility cannot be ruled out that without obtaining possession, without residing in room only done paper work to enter his name to disputed room on the basis of so called sale deed (page no.7), affidavit of late Kamala Serai (page no.11).”

8 The Magistrate, in paragraph no. 33, recorded the contention on behalf of Amit Gupta that it was agreed that he shall not claim possession of the room while the two sisters are alive, and dealing with the said argument, the following observation was made :-

“The agreement/sale deed (page no.7), affidavit of Late Kamala (page no.11) no where show such condition. There is no any other evidence produced by respondent no.2 filed to show that he was residing in the disputed room with Late Kamala and Draupadi. On

the contrary, the sale deed and the affidavit of late Kamala show that they handed over possession of the disputed room to respondent no.2. Thus, the contention of the respondent no.2 as to his residence appears to be made afterthought to show his possession in the disputed room which I have discussed hereinbelow. Even, it cannot be believed that even after selling of dispute room late Kamala and her sister were residing in disputed room with respondent no.2 who is stranger to them.”

9 On referring to the Station Diary dated 25/7/2020, when the information was received that the dispute arose about the room, Amit Gupta reported to the police station, complaining about his dispossession by Naresh Rajwani and panchnama dated 25/7/2020 reveal that the disputed room was sealed, but it record that before it was sealed, it was found to be locked and key was with the President of the Society. There was no one in the room but Naresh Rajwani identified the clothes of his aunt and accordingly, the panchnama was prepared and the room was sealed in presence of panchas. The Magistrate was critical about exercise of this power by the Station Officer, and on perusal of the Station Diaries and the panchnama, he finds inconsistency and contradiction and he arrived at a conclusion that the same cannot be relied upon to hold that Naresh Rajwani was in possession of the room before sealing it on 25/7/2020.

Abruptly, the Magistrate come to a conclusion that Amit Gupta has illegally dispossessed from the disputed room, unmindful of the observation in paragraph no.33 and 35 and the finding is recorded to the following effect :-

“It appears, that respondent no.1 has suppressing the fact of his going to police station on 18/07/2020 in his replies (Exh.5,6). When one P.S.O is advising respondents to approach Civil Court, Shri D.L. Vasave again went to disputed room and sealed room mentioning presence of respondent no.1 in panchnama and his three men in station diary. Thereafter, forwarded application C.C.No.996/M/2020 to this Court to pass necessary orders. The room is also sealed after the sun set when respondent no.2 and his wife are in the room. All this shows collusion of respondent no.1 and the applicant in sealing the disputed room to dispossess respondent no.2 without following due process of law. Even if it is held that respondent no.2 has illegally trespassed in disputed room on 18.07.2020, he cannot be evicted until dispossession by following the due course of law. I find substance in the submission of Ld. Advocate for respondent no.2 that disputed room has been sealed in collusion with respondent no.1.”

As a sequel to the above, in exercise of power u/s.145 of Cr.P.C, the Magistrate direct restoration of possession of the disputed room to Shri Amit Gupta and pass order against Naresh Rajwani, preventing him from committing breach of public peace and disturbing his possession till he adopt proper course of law by eviction.

Upon the Revision being filed by exercising the power u/s.397 of Cr.P.C, the Addl. Sessions Judge noted clear perversity in the order of the Magistrate and though I do not agree with the observations in para-19 of the order, about the Revisional Court indulging with an aspect, whether the amount of consideration was parted or not, since it was beyond the powers of the Magistrate to look into this aspect of consideration at the time of deciding Section 145 proceedings, the learned Judge

exercising the power u/s.397 inferred that since Mr.Naresh was the nephew of Kamala Serai and he had placed on record the pan card of the two sisters, and also the bills and he also accepted the version that it is he who had performed the last rites of the sister, who expired during covid, and thereafter he had locked the premises. Obviously, at present, it cannot be even looked into whether he was he could claim himself the nephew/legal heir of Kamla and Draupadi exist, the two deceased sisters but since this aspect could not have been looked into at the stage of Section 145, the Addl. Sessions Judge has rightly recorded the conclusion in the following words :-

“22 Mr.Naresh has also put on record that earlier Draupadi Serai was residing in room no.40 in the same building, who sold said room to one Mr.Khatun and at relevant time the details of payment were noted in the agreement and all benefit of that transaction were given to him. Mr.Amit admits that Draupadi Serai was residing with Kamala Serai and by that way impliedly admits that Mr. Naresh had/has some connection with these two ladies.

23 So Mr.Naresh was in fact entitled to continue the possession of the premises and he has accordingly put on record that after the death of Draupadi Serai, he locked the room and the possession thereof was taken by Mr.Amit forcefully on 18/7/2020. This fact appears probable on the material available on record, because on 18/7/2020 there was no possibility to have door open of the premises for Mr.Amit to enter into the premises”

10 In the wake of the limited scope in exercise of power u/s.145 which is only limited to the determination as to which of the party was in possession, in my considered opinion, the Magistrate has seriously erred and has exceeded his power and the

Addl. Sessions Judge, rightly corrected and rectified the order, while exercising his power u/s.397 of Code.

When specifically asked as to whether any proceedings for specific purpose or any other proceedings for claiming possession has been instituted by the petitioner, the learned counsel answer in the negative.

11 Needless to state that it is open for the petitioner to pursue appropriate proceedings since the direction issued u/s.145 are limited, and shall continue till the time, when the party approaches the Civil Court seeking eviction, by following due process of law.

Finding no legal infirmity or any illegality in the order passed by the Addl. Sessions Judge which has rectified the order passed by the learned Magistrate, the Writ Petition filed by Amit Gupta is dismissed.

In the wake of the order passed by the Addl. Sessions Judge dated 9/12/2022, the possession of disputed room is restored to Mr. Naresh Rajwani.

(SMT. BHARATI DANGRE, J.)