Mathuralal

Vs

Bhanwarlal and Another

Criminal Appeal No. 10 of 1979

(D. A. Desai, O. Chinnappa Reddy, Syed M. Fazal Ali, A. D. Koshal JJ)

13.09.1979

JUDGMENT

CHINNAPPA REDDY, J. –

1. On the report of the Station House Officer, Manak Chowk, Ratlam, that there was a dispute between Mathuralal and Bhanwarlal concerning a house situated in Kambalpatti Ghas Bazar, Ratlam, which was likely to cause a breach of the peace, the Sub-Divisional Magistrate, Ratlam, passed a preliminary order under Section 145(1) of the Code of Criminal Procedure, 1973, on March 1, 1978. On March 2, 1978, the learned Magistrate attached the subject of dispute under Section 146(1) Criminal Procedure Code considering the case to be one of emergency. Thereafter, when the learned Magistrate wanted to proceed with the enquiry under Section 145 Criminal Procedure Code, an objection was raised by Mathuralal that such an enquiry was incompetent once the subject of the dispute had been attached under Section 146 Criminal Procedure Code. The objection was overruled by the learned Magistrate. Successive Revisions taken before the Session Judge and the High Court having borne no fruit, Mathuralal has filed the present appeal by special leave of this Court. The High Court, we may mention here, thought that the matter was concluded against the appellant by the decision of this Court in Chandu Naik v. Sitaram B. Naik ((1978) 2 SCR 353 : (1978) 1 SCC 210 : 1978 SCC (Cri) 100 : 1978 Cri LJ 356).

2. Shri Mukherjee, learned counsel for the appellant urged that under Section 146 of the Criminal Procedure Code of 1973, an attachment of the subject of dispute could be effected in three situations : (i) if the Magistrate at any time after making the order under Section 145(1) considered the case to be one of emergency, or (ii) if he decided that none of the parties was then in such possession as was referred to in Section 145, or (iii) if he was unable to satisfy himself as to which of them was then in such possession of the subject of dispute. The attachment so effected, regardless of the situation consequent upon which it was effected, was to subsist until a competent court determined the rights of parties with regard to the person entitled to possession. This, he urged, clearly indicated that after an attachment was effected it was the Civil Court and not the Magistrate that was to have further jurisdiction in the matter. He contrasted the provisions of Section 146(1) of the present Code with the provisions of Section 146(1) and the third proviso to Section 145(4) of the Criminal Procedure Code of 1898 as amended by Act 26 of 1955. He drew our attention to the circumstance that the third proviso to Section 145(4) of the old Code empowered the Magistrate, if he considered the case one of emergency, to attach the subject of dispute pending his decision under that section, while Section 146(1) of the previous code empowered the Magistrate to attach the subject of the dispute if the Magistrate was of the opinion that none of the parties was then in possession or if the Magistrate was unable to decide as to which of them was in such possession and thereafter to refer to the Civil Court for decision the question whether any and which of the parties was in possession of the

subject of dispute. Therefore, he said, under the previous Code, in the case of attachment because of emergency the Magistrate was himself competent to decide the question of possession and in the other two cases he was to refer the dispute to the Civil Court, whereas, under the present Code, in all the three situations the Magistrate was to leave the matter for adjudication by the Civil Court. Thus, the submission of Shri Mukherjee was that while under the previous Code it was permissible to attach the subject of dispute pending enquiry by the Magistrate as contemplated by Section 145, such attachment pending decision by the Magistrate was not permissible under the provisions of the present Code. According to him so soon as the Magistrate effected an attachment he had nothing further to do except await the decision or the direction of the Civil Court.

3. Though at first blush there appeared to be force in the submissions of Shri Mukherjee, a closer scrutiny of the provisions of Sections 145 and 146 exposes their unsoundness. It may perhaps be desirable, at this stage to extract the provisions of Sections 145 and 146, to the extent that they are relevant, in the Code of 1898 before it was amended in 1955, in the Code of 1898 after it was amended in 1955 and in the Code of 1973 :

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1898 Code before it was amended in 1955	1898 Code after the amendment of 1955	1973 Code
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145(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report or 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,	145(1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class is satisfied from a police report or 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,	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,

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146(1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the right of the parties and forward the record of the proceedings to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the

146(1) If the Magistrate is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the right of the parties and forward the record of the proceedings to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the

146(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 is of opinion that none of the parties was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the right of the parties and forward the record of the proceedings to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the

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(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court by any Civil Court appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure :

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit and no receiver of the property, the subject of dispute, has been appointed by any Civil Court by any Civil Court appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure :

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such property, the subject of dispute, has been appointed by any Civil Court, make such arrangement as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the Code of Civil Procedure, 1908 (5 of 1908) :

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4. Quite obviously, Sections 145 and 146 of 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 constructed 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 constructions. Let us therefore look at Section 145 and considers Section 146 in that context. 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 to lawyers practising in the criminal courts 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. A preliminary order is considered so basic to a proceedings under Section 145 that a failure to draw up a preliminary order has been held by several High Courts to vitiate all the subsequent proceedings. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Section 145 and 146. In fact, the first of the situations in which an attachment may be effected under Section 146 of the 1973 of 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 proceedings 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. Sub-section (3) of Section 145 prescribes the mode of service of the preliminary order on the parties. Sub-section (4) casts a duty on the Magistrate to peruse the written statements of the parties, to receive the evidence adduced by them, to take further evidence if necessary and, if possible, to decide which of the parties was in possession on the date of the preliminary order. If the Magistrate decides that one of the parties was in possession he is to make a final order in the manner provided by sub-section (6). Provision for the two situations where the Magistrate is unable to decide which of the parties was in possession or where he is of the view that neither of them was in possession is made in Section 146 under which he may attach the subject the dispute until the determination of the rights of parties by a competent court. 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 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 appears. 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 proceedings initiated by a preliminary order under Section 145(1) must run its full course. Now, 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. Suppose a Magistrate draws up a preliminary order under Section 145(1) and immediately follows up with an attachment under Section 146(1), the whole exercise of stating the grounds of his satisfaction and calling upon the parties to appear before him and submit their written statements becomes futile if he is to have no further jurisdiction in the matter. And yet he cannot make an order of attachment under Section 146(1) on the ground of emergency without first making a preliminary order in the manner prescribed by Section 145(1). There is no reason why we should

adopt a construction which will lead to such inevitable contradictions. We mentioned a little earlier that the only provision for stopping the proceedings 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. An emergency is the basis of attachment under the first limb of Section 146(1) and if there is an emergency, none can say that there is no dispute likely to cause a breach of the peace.

5. Let us examine if a comparative study of the provisions as they stood before 1955 and after 1955 under the old Code and as they now stand under the 1973 Code lead us to a conclusion other than that indicated in the preceding paragraph. From the comparative table of the provisions, it is seen that there were two principal changes made by the 1955 amendment. The first was that the preliminary order was also to require the parties to put in documents and the affidavits of such persons as they intended to rely upon in support of their claims. The Magistrate was to decide the case on a consideration of the written statements, the documents and the affidavits put in by the parties and after hearing them. The position earlier was that the parties had the right to adduce evidence and the Magistrate could take further evidence if he so desired. The second change was that in the two situations where he was unable to satisfy himself as to which of the parties was in possession or where he decided that none of the parties was in possession, after attaching the property, the Magistrate was himself to refer the dispute to the Civil Court instead of leaving it to the parties to go to the Civil Court. He was to obtain the finding of the Civil Court and thereafter conclude the proceedings under Section 145, Criminal Procedure code in conformity with the decision of the Civil Court. The revised procedure introduced by the 1955 amendment was not found to work satisfactorily and therefore, it was, apparently, thought desirable to revert to the old procedure. The provisions of Section 145 and 146 of the 1973 Code are substantially the same as the corresponding provisions before the 1955 amendment. The only noticeable change is that the second proviso to Section 145 (4) (as it stood before the 1955 amendment) has now been transposed to Section 146 but without the words "pending his decision under this section" and with the words "at any time after making the order under Section 145(1)" superadded. The change, clearly, is in the interest of convenient draftsmanship. All situations in which an attachment may be made are now mentioned together in Section 146. The words "pending his decision under this section" have apparently been omitted an unnecessary since Section 145 provides how the proceeding initiated by a preliminary order must proceed and end and therefore an attachment made 'at any time after making under Section 145(1)' can only continue until the termination of the proceeding. At the termination of the proceeding, if he finds one of the parties was in possession as stipulated, the Magistrate must make an order as provided in Section 145(6) and withdraw the attachment as provided in Section 146(1) since there can be no dispute likely to cause a breach of then peace once an order in terms of Section 145(6) is made.

6. In our view, it is wrong to hold that the Magistrate's jurisdiction ends as soon as an attachment is made on the ground of emergency. A large number of cases decided by several High Courts some taking one view and the others a different view were read to us. We do not consider it necessary to refer to them except to acknowledge that we derived considerable assistance from the judgment of Lahiri, J., in Kshetra Mohan Sarkar v. Paran Chandra Mandal (1978 Cri LJ 936 (Gauhati HC), in arriving at our conclusion. We may also add that the question now at issue did not arise for consideration in Chandu Naik v. Sitaram B. Naik ((1978) 2 SCR 353 : (1978) 1 SCC 210 : 1978 SCC (Cri) 100 : 1978 Cri LJ 356). What was decided there was that a proceeding under Section 145 Criminal Procedure Code did not abate because of Section 8 of the Maharashtra Vacant Land

(Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975. In the result the appeal is dismissed.

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