

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 980 OF 2009
[Arising out of SLP (Crl.) No. 5121 of 2008]

M.P. Peter

...Appellant

Versus

State of Kerala & Ors.

...Respondents

JUDGMENT

S.B. SINHA, J :

1. Leave granted.

2. This appeal is directed against the judgment and order dated 19.06.2008 passed by a learned Single Judge of the High Court of Kerala in Criminal M.C. No. 1709 of 2008 whereby and whereunder an order dated 3.04.2008 passed by the Sub-Divisional Magistrate was affirmed.

3. Appellant is said to be the owner and in possession of 13 ¼ cents of land in Survey No. 412/1 of Kizhakambalam Village. On or about 09.01.1996, a complaint was filed by the respondent No. 3 alleging that the property in question belonged to him. A report was submitted by the Sub-Inspector of Police on 12.04.1996 before the Sub-Divisional Magistrate under Section 145 of the Code of Criminal Procedure stating that there existed a dispute over title of the said property by and between the appellant and the respondent No. 3. Before the Sub-Divisional Magistrate the appellant herein was arrayed as ‘the B party’ and the respondent No. 3 herein was ‘the A party’. By an order dated 9.10.1997, the Sub-Divisional Magistrate held:

“As B party is stated to be residing in the building constructed in the disputed property, he is directed to handover the property to A party within two weeks from today failing which A party is entitled for restoration of possession of the property with police assistance.”

4. Aggrieved thereby, the appellant filed a criminal revision petition, marked as Criminal; Revision No. 41 of 1997 before the Sessions Court, Ernakulam which by reason of an order dated 6.03.1999 was allowed. Respondent No. 3 filed Criminal Revision Petition No. 308 of 1999 before the High Court of Kerala challenging the said order dated 6.03.1999. By

reason of an order dated 25.09.2007, the revision petition was allowed by the High Court, holding:

“...In the circumstances, I find that the decision of the Sessions Judge reversing the finding of the Sub Divisional Magistrate is liable to be set aside; and I do so. The decision of the Sub Divisional Magistrate is restored. All the same, considering the fact that the respondents/ B party has constructed house and is residing therein, execution of the order of the Sub Divisional Magistrate is only to be initiated after six months from today onwards...”

5. A Special Leave Petition filed thereagainst by the appellant was dismissed by this Court by an order dated 11.02.2008.

6. In the meantime, however, a suit, which was marked as O.S. No. 383 of 2007, was filed by the appellant in the Court of Munsif, Perumbavoor on 1.12.2007 for a declaration that the appellant was the owner and in possession of 13.25 cents of land in Old Survey No. 412/1 of Kizhakkambalam Village. An interim application was filed therein seeking a prohibitory injunction against dispossession which was dismissed by the Munsiff Court by an order dated 24.03.2008.

7. Appellant preferred an appeal thereagainst which was marked as C.M.A. No. 12 of 2008 challenging the said order dated 24.03.2008 and by an order dated 7.04.2008 an order of injunction was passed prohibiting

eviction of the appellant from the plaint scheduled property until further orders. However, an application for clarification of the said order was filed by the respondent No. 3 and by an order dated 11.04.2008, it was allowed in the following terms:

“The respondent seeks a clarification that the order is not against the R.D.O. The order of the court is clear. The respondent alone is restrained.”

8. By an order dated 26.08.2008, while dismissing the said C.M.A. No. 12 of 2008, the matter was remitted to the lower court with a direction to the parties to maintain the status quo.

9. On or about 3.04.2008, the Sub Divisional Magistrate directed the appellant to hand over possession of the suit property to the respondent No. 3 within three days of the receipt of the said notice.

10. Aggrieved thereby and dissatisfied therewith, the appellant filed a Criminal Miscellaneous case bearing No. CrI. M.C. No. 1709 of 2008. Though an interim stay was granted, the High Court dismissed the Criminal Miscellaneous Case by reason of the impugned judgment dated 19.06.2008.

11. Mr. Roy Abraham, learned counsel appearing on behalf of the appellant, would contend that the learned Trial Judge as also the High Court

committed a serious error insofar as they failed to take into consideration that the appellant being in possession of the property in question, an order of injunction should have been passed in his favour.

12. Mr. U.U. Lalit, learned senior counsel appearing on behalf of the respondent No. 3, on the other hand, urged :-

- (i) A finding of fact having been arrived at by the learned Executive Magistrate that the respondent No. 3 was dispossessed by the appellant within a period of two months from the date of initiation of the proceedings under Section 145 of the Code of Criminal Procedure, 1973 (for short 'the Code') and, thus, entitled to restoration of possession, the impugned judgment should not be interfered with.
- (ii) Appellant having raised a contention that he was a co-sharer in respect of the plot in question, which having not been found favour with by the courts below, he cannot be said to have any prima facie case and, thus, the impugned order is unassailable.

13. The proceeding under Section 145 of the Code indisputably remained pending for a long time. It was initiated on or about 9.01.1996 when a complaint was filed by the respondent No. 3. As noticed hereinbefore, the

Sub Divisional Magistrate directed the appellant to handover the property to the respondent No. 3. However, the order of the Sub Divisional Magistrate was reversed by the learned Sessions Judge, which in turn was set aside by the High Court by an order dated 25.09.2007.

14. The correctness or otherwise of the said order of the learned Sub Divisional Magistrate attained finality as the Special Leave Petition filed against the order of the High Court dated 25.09.2007 was dismissed by this Court by an order dated 11.02.2008. Indisputably, the suit was filed thereafter.

15. An order passed by an Executive Magistrate in exercise of its jurisdiction under Section 145 of the Code of Criminal Procedure is subject to the ultimate decision of the suit filed in the civil court.

16. Even a decision of the learned Magistrate on possession of the parties may have some evidentiary value but the same is not binding on a civil court. In a proceeding under Section 145 of the Code of Criminal Procedure, the learned Magistrate would not be entitled to go into a disputed and in particular complicated question of title. Despite an order passed under Section 145 of the Code of Criminal Procedure, the Civil Court may in a suit pass an order of injunction. In this case, however, admittedly

during pendency of the said proceedings under Section 145 of the Code of Criminal Procedure, the appellant had constructed a house. Prima facie, the respondent No. 3 stood thereby. In the proceedings before the learned Magistrate, he could have filed an application for attachment. He could have also filed an application for appointment of a receiver. The question as to whether the constructions were raised only during pendency of the said proceeding would be considered in the suit by the Civil Court.

17. The High Court in its judgment dated 25.09.2007 while reversing the order of the learned Sessions Judge noticed that the appellant had constructed a house and been residing therein. It was in that view of the matter, he interfered with the order of the Sub Divisional Magistrate directing that the restoration of possession may be effected after six months from the said date.

18. It is, therefore, not denied or disputed that the appellant is in possession of a house and has been residing therein. It also stands admitted that the respondent No. 3 is not entitled to the superstructure on the land in suit. Neither the High Court while passing the said order dated 25.09.2007 nor the courts below took this factor into consideration. If, as conceded by Mr. Lalit that the respondent No. 3 would not be entitled to the

superstructure standing on the said land, with a view to give full effect to the order passed by the learned Sub Divisional Magistrate which provides for handing over of possession only on the land in question, the superstructure would be required to be demolished.

19. Should the Civil Court have granted an order of injunction in the peculiar facts and circumstances of the case is the question.

20. We have noticed hereinbefore that whereas the learned Munsiff in his order dated 24.03.2008 proceeded on the basis that the appellant could not claim a right over the suit land belonging to a third party unless a case of adverse possession is made out, the learned first appellate court, in its order dated 7.04.2008, opined:

“This is a petition filed by the Petitioner/ Appellant U/o 39 r 1 C.P.C. Heard the counsel for the petitioner. Perused the appeal records. The respondents are restrained by an order of temporary injunction from forcibly evicting the petitioner from the plaint schedule property until further orders.”

21. As noticed hereinbefore, a clarification was sought for and by an order dated 11.04.2008, it was stated that “order is not against the RDO” and “the respondent alone is restrained”.

22. Before, however, we advert to the correctness and/ or justifiability of the said order, we may notice that the learned Subordinate Judge, Perumbavoor in his order dated 26.08.2008 held as under:

“7. When the matter came up for hearing, the counsel for the appellants stated that the property obtained by the appellant is in old Sy. No: 411/2 B 3 and he has filed a petition for amending his petition and the plaint. He also pointed out that the petition to amend the plaint is filed before trial Court. The right claimed in the plaint is filed before trial Court. The right claimed in the plaint and the petition is in Sy. No: 412/1. But now the appellant had sought the petition to amend the petition and claimed right in Sy. No: 411/2 B 3. So, it can be seen that the case now pleaded by the plaintiff is different from what has between the case set up on the general plaint and the new case pleaded. Hence, the appellant should be given an opportunity to file a petition before the trial court to set up his claim separately.

8. As such there is no reason shown to interfere with the finding of the court below. Hence, this C.M.A. is dismissed. The matter is sent back to the lower court for considering the amendment petition and to decide the matter on merit. In the meanwhile the parties will maintain status quo. There shall no order as to costs.”

23. In the suit, the Sub Divisional Magistrate was not a party. No order of injunction could have been passed against him but then that would not mean

that the Civil Court could not pass an order of injunction against the defendant – respondent. If an order of injunction was passed against the defendant – respondent from obtaining possession, the question of RDO's executing his own order dated 9.10.1997 would not arise. Even where a court or a statutory authority may not be subjected to an order of injunction, a party can be enjoined from proceeding in the matter as is evident from the decision of this Court in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal [AIR 1962 SC 527].

24. Furthermore, there is no doubt or dispute that an application for amendment of the plaint has been filed and the same has been allowed. In the meanwhile, this Court by an order dated 28.07.2008 passed an order of status quo as regards possession. Relying on or on the basis of the said order, the learned Subordinate Judge by an order dated 12.11.2008 directed as under:

“5. The order in the C.M.A. is specifically stated that the matter is sent back to the lower court for considering the amendment petition and to decide the matter on merit. In the meanwhile the parties will maintain the status quo. It is evident from the order that the parties will maintain status quo till the matter is adjudicated by the Munsiff's Court and a decision is given on merit. The counter filed by the respondent also show that the matter is stayed by the Hon'ble Supreme Court of India. Hence, it is evident that

the parties have to maintain the status quo till the case is finally disposed of after the amendment of the plaint. This petition is closed as per the basis of the order.”

It was the correctness of the orders dated 7.04.2008 and 11.04.2008 which was questioned before the High Court. The High Court opined:

“21. The learned counsel for the petitioner submits that a civil suit having been filed and the civil Court having passed orders like the one passed on 7.04.2008 and 11.04.2008 it must now be held that there is no threat or breach of the peace and therefore the order under Sec. 145 of the Cr. P.C. does not deserve to be executed. I am unable to accept this contention also. Threat to breach of peace must certainly be there to invoke the jurisdiction under Sec. 145 of the Cr.P.C. But it would be myopic to come to the conclusion that such threat must continue every day during the continuation of the proceedings, after the orders are passed, after the challenge of the orders come to an end and till the execution of the order. I am unable to accept the said contention that the threat of breach of peace must exist until the order is executed. The parties need not be aiming the swords at each other during this entire period to justify execution of the order under Sec. 145 of the Cr.P.C.”

25. Except at the first instance, the matter had not been considered on merit. The effect of the order refusing to grant injunction had not been considered by the courts below. Whether an exceptional case has been made out or not did not fall for the consideration of the learned courts.

26. The very fact that a triable issue has been raised by the appellant for the purpose of grant of injunction was not noticed. Furthermore, the fact that the appellant is residing with his family on the structure raised by him also escaped the attention of the learned courts. Respondent No. 3 had been kept out of possession for a long time. In a case of this nature, interest of justice would have been sub-served if an order of injunction would have been passed in favour of the appellant, subject to such terms as the court might have thought fit and proper to impose..

27. Mr. Lalit would contend that there exists a distinction between forcible eviction and legal eviction. It is so. But, when an order of injunction was sought for by the plaintiff – appellant, his prayer was to obtain an order of injunction so that his possession is maintained.

28. The legality or validity of the order dated 9.10.1997 was in question in the suit. Even the identity of the suit land, viz., as to whether it falls within the Survey No. 412/1 is required to be determined.

Our attention has been drawn to a decision of this Court in Shanti Kumar Panda v. Shakuntala Devi [(2004) 1 SCC 438] wherein it was held:

“10. Possession is nine points in law. One purpose of the enforcement of the law is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc. as defined in sub-section (2) of Section 145 having arisen, causing a likelihood of a breach of the peace, Section 145 of the Code authorizes the Executive Magistrate to take cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings under Sections 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive or police action. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in the proviso to sub-section (4) of Section 145 and maintain the status quo as to possession until the entitlement to possession was determined by a court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the

time he was called upon to pronounce the final order so far as he was concerned.”

A distinction therein was noticed between a case where the subject matter of dispute is not attached by the Executive Magistrate and where it is so ordered. It was observed:

“12. What is an eviction “in due course of law” within the meaning of sub-section (6) of Section 145 of the Code? Does it mean a suit or proceedings directing restoration of possession between the parties respectively unsuccessful and successful in proceedings under Section 145 or any order of a competent court which though not expressly directing eviction of the successful party, has the effect of upholding the possession or entitlement to possession of the unsuccessful party as against the said successful party. In our opinion, which we would buttress by reasons stated shortly hereinafter, ordinarily a party unsuccessful in proceedings under Section 145 ought to sue for recovery of possession seeking a decree or order for restoration of possession. However, a party though unsuccessful in proceedings under Section 145 may still be able to successfully establish before the competent court that it was actually in possession of the property and is entitled to retain the same by making out a strong case demonstrating the finding of the Magistrate to be apparently incorrect.”

This Court further observed:

“15. It is well settled that a decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. (See Sarkar on Evidence, 15th Edn., p. 845.) A decision given under Section 145 of the Code has relevance and is admissible in evidence to show: (i) that there was a dispute relating to a particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment under Section 146(1), on the given date; and (iv) that the Magistrate found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession though, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate’s order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court.”

29. Correctness of some of the observations made therein although may be open to question, we need not enter into the said controversy at present.

30. We may, however, notice that this Court in Shanti Kumar Panda (supra) held:

“(3) A decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal court and that too based on a summary enquiry. The order is entitled to respect and wait before the competent court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the court, the order of the Magistrate is only one out of several pieces of evidence.

(4) The court will be loath to issue an order of interim injunction or to order an interim arrangement inconsistent with the one made by the Executive Magistrate. However, to say so is merely stating a rule of caution or restraint, on exercise of discretion by court, dictated by prudence and regard for the urgent/emergent executive orders made within jurisdiction by their makers; and certainly not a tab on the power of court. The court does have jurisdiction to make an interim order including an order of ad interim injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an exception. Even at the stage of passing an ad interim order the party unsuccessful before the Executive Magistrate may on material placed before the court succeed in making out a strong prima facie case demonstrating the findings of the Executive Magistrate to be without jurisdiction, palpably wrong or self-inconsistent in which or the like cases the court may, after recording its reasons and satisfaction, make an order inconsistent with,

or in departure from, the one made by the Executive Magistrate. The order of the court — final or interlocutory, would have the effect of declaring one of the parties entitled to possession and evicting therefrom the party successful before the Executive Magistrate within the meaning of sub-section (6) of Section 145.”

31. In Sh. Vishnu Dutt Sharma v. Smt. Daya Sapra [Civil Appeal arising out of SLP (C) No. 10997 of 2008, decided on 5.05.2009] and Seth Ramdayal Jat v. Laxmi Prasad, [2009 (5) SCALE 527] this Court held that ordinarily the judgment of a criminal court would not be binding on the Civil Court. However, the matter will stand on a different footing in a suit where the correctness of an order passed by an Executive Magistrate under Section 145 of the Code in question.

32. Apart from the fact that the civil court will have a primacy over the decision of a criminal court even for the purpose of grant of injunction, it is a case where an exceptional case has been made out. As admittedly the appellant has been residing in the suit premises and as furthermore it would not be practicable to dispossess the appellant upon demolishing the structure, both balance of convenience as also irreparable injury lie in favour of the plaintiff- appellant.

33. We, therefore, direct that the parties shall continue to maintain status quo till the decision of the civil court subject to the following conditions:

- (i) Appellant shall not transfer, alienate or create any third party interest in the property.
- (ii) The hearing of the suit shall be expedited and all attempts should be made to dispose of the suit within a period of six months from the date of receipt of a copy of this order.
- (iii) The court, save and except for cogent reasons, shall not grant any adjournment.
- (iv) This order would be subject to the final decision of the suit.
- (v) In the event, the suit is dismissed, the court would direct payment of such amount as it may be determined by way of compensation to the defendant for being kept out of possession from the suit premises from the date of commencement of the suit till the date of restoration of possession.

34. The appeal is allowed with the aforementioned observations. In the facts and circumstances of the case, there shall, however, be no order as to costs.

.....J.

[S.B. Sinha]

.....J.
[Dr. Mukundakam Sharma]

New Delhi;
May 11, 2009