(1983) 06 SIK CK 0002

Sikkim High Court

Case No: None

Tshering Wangchuk Bhutia and Others		APPELLANT
	Vs	
Naksingh Bhutia and Others		RESPONDENT

Date of Decision: June 15, 1983

Citation: (1983) CriLJ 1904

Hon'ble Judges: Anandamoy Bhattacharjee, Acting C.J.

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

A.M. Bhattacharjee, Actg. C.J.

1. In reporting this case u/s 438 of the Code of Criminal Procedure, 1898, that being the Code still applying in Sikkim the learned Sessions Judge has confessed his inability to understand the nature of the proceeding initiated by the lower Court, the procedure followed therefore and the provisions of law applied and invoked therein. All the learned Counsel appearing before him for the parties, including the learned Public Prosecutor appearing for the State, however submitted that the proceeding, which was initiated, purported to be u/s 145 of the Code and the learned Sessions Judge also having decided to proceed on that basis, reported the case to this Court for necessary orders, as according to him, not only the impugned order was passed in utter non-compliance with the provisions of Section 145 of the Code, but was also of a nature which could not be passed under that section.

2. After hearing the learned Counsel for the parties and also the learned Public Prosecutor for the State, I have no doubt that the learned Magistrate, if he intended or purported to proceed u/s 145 of the Code had no clear idea as to when and how to proceed under that Section and as to what types of order can be passed thereunder. I would, however, like to note that when Rules in Revisional matters are issued and copies of the revisionsl applications are sent to the Magistrates for the

purpose of ascertaining what they might have to say regarding the allegations made in such applications, then,,as pointed out, among others, in the Calcutta decision in Upendra Nath Paul v. Bankim Chatterjee 1947 Cri LJ 785 it is the duty of the Magistrates below to peruse such applications and to give such explanation; as are necessary regarding the points raised or at least to state that they have nothing to add if they are of opinion that their orders and the records of the proceedings contain all that can be said by them on the points raised. Such a course, if adopted, would go a long way to save the Revisional Courts from being landed in confusion, as has happened in this case.

3. u/s 145 of the Code of Criminal Procedure, the Magistrate is] required to decide which party was in possession and to issue,an order declaring such party to be entitled to possession until evicted therefrom in due course of law, but the Magistrate cannot direct a party to take possession of the property which was not in his possession or restore a party to possession of the disputed property, unless the Magistrate proceeds under the Second Proviso to Sub-section (4) of the section and finds such a person to have been forcibly and wrongfully dispossessed from the property within two months next before the order. But a bare perusal of the last sentence of the impugned order of the learned Magistrate, dated 20-4-82, reading as "the possession of the disputed area be taken by the O/P as both the parties state that this portion is not being possessed by either since the dispute", would leave no manner of doubt that the learned Magistrate went entirely beyond and jumped too far away from his jurisdiction u/s 145 by ordering restoration of possession to one of the parties simply and solely on the ground that none of them was in possession.

4. But that apart the impugned proceeding must also be regarded to be incompetent u/s 145 as there is no material on record to show that, concerning this disputed land there was at any point of time any "dispute likely to cause a breach of the peace". Accepting, as one m,ay, that absence of a formal record by the Magistrate as to his being satisfied as to the existence of a dispute likely to cause a breach of the peace, does not, by itself, vitiate a proceeding, it must also be accepted that absence of anything on the record to suggest any likelihood of such dispute would render the entire proceeding without jurisdiction. While it is true that if a Magistrate proceeds to take action u/s 145 and there are materials on the record to show that there were grounds for his satisfaction as to the likelihood of a breach of the peace,,a mere failure of the Magistrate to formally record his satisfaction and the grounds therefore cannot vitiate the final order. If the Revi-sional Court is satisfied from the materials on record that the Magistrate had reasons to be satisfied as to the likelihood of a breach of the peace concerning any land and was, therefore, justified in taking action under the section, it would not set aside the proceeding or the final order simply on the ground that the Magistrate failed to record the proceeding in a formal manner as required by the section, because the failure of the Magistrate to make a formal record of his satisfaction and set out the grounds therefore would not- by itself, affect his jurisdiction. But the foundation of

the jurisdiction to proceed u/s 145 being an apprehension of the breach of the peace, as pointed out by the Supreme Court in Bhinka and Others Vs. Charan Singh, if the materials on record do not disclose such jurisdictional facts the proceeding cannot but be without jurisdiction.

5. But even that apart, the impugned proceeding is also to be regarded to have been vitiated u/s 530(j) of the Code as the learned Magistrate does not appear to be empowered to invoke Section 145 of the Code and initiate proceedings thereunder which can only be done by a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class. The learned Magistrate who has passed the impugned order appears to have been designated as "Deputy District Magistrate" an expression unknown to the Code of Criminal Procedure and the learned Public Prosecutor appearing for the State has frankly conceded that the learned Magistrate was neither a District Magistrate nor a Sub-Divisional Magistrate nor a Magistrate of the First Class. If that is so, and the learned Public Prosecutor should know it better then the impugn-ed proceeding, if the same is purported to be u/s 145 of the Code, was also bad on that ground.

6. It has, however, been urged by Mr. B. C. Sharma the learned Counsel for the petitioners that even if the proceeding was incompetent as one u/s 145 of the Code, the application filed by the petitioner, on which the present proceeding was initiated, was very much a complaint in writing disclosing commission of offences like trespass theft and the like and therefore Mr. Sharma has urged that even if the present proceeding is quashed as one u/s 145, the complaint should be remitted to -the District Magistrate for taking cognizance and/or other actions according to law. If there was a complaint within the meaning of Section 4 (h) of the Code, but the learned Magistrate confused the whole thing by purporting to proceed u/s 145 without any justification in law or in facts, I would have while quashing the proceeding, sent back the complaint to the District Magistrate for proceeding according to law. It appears from the record that on receipt of the application, the learned District Magistrate sent it for an enquiry by the Officer-in-Charge of the Sadar Police Station and after the enquiry report was received, the Deputy District Magistrate proceeded with the proceeding and disposed of the same in the manner rioted hereinbefore, though I am yet to understand, and learned Counsel appearing for the parties and the State could not make me understand as to how the Deputy District Magistrate could in any way be in seisin of the matter without any order of transfer to that effect by the District Magistrate. Mr. Kharga the learned Public Prosecutor, has also conceded that he is not in a position to contend that at the relevant time the Deputy District Magistrate temporarily succeeded to the office of the District Magistrate and was accordingly entitled under the provisions of Section 11 of the Code to exercise the jurisdiction of the District Magistrate u/s 145 of the Code. Be that as it may, on a perusal of the application filed by the petitioner, I am not satisfied that the same discloses commission of any offence to justify any further action. All that the petition discloses is that some boundary dispute was going on

between the parties for a long time and on a written complaint being made by the petitioner in 1979 the matter was referred to the Police for enquiry and report and that during such enquiry it was felt that the dispute could not be settled unless some surveyor investigated the matter and demarcated the boundary. It is alleged in the application that it w,as agreed in writing by and between the parties in the presence of the Police and the village elders that until the boundary dispute was resolved, by a Surveyor or otherwise, none of the parties would use the disputed area or its produce and the crux of the allegations of the petitioner in the application appears to be that the respondent has violated such agreement as aforesaid. The enquiry report submitted by the Police under the order of the District Magistrate in this case also shows that all that has been reported to have been done by the respondent was to use the portion of the land, about which there was a bona fide boundary dispute, in violation of the agreement not to do so until the boundary was determined by the Surveyor. The Police report further shows that no one, including the village elders, Is certain about the boundary line. It also appears from the record that under the order of the Deputy District Magistrate, a Government Surveyor was deputed to inspect and report and that it is stated in his report that the disputed area forms part of Plot purchased by the respondent from its previous owner as early as in 1965. It is true that it may not be possible to make free use of or to treat these reports as evidence at this stage; but as already noted, even if the application lodged by the petitioner is examined without the aid of these reports, it only discloses the existence of a long standing boundary dispute between the parties and the user of the disputed area and its produce by the respondent in disregard of some agreement between the parties not to do so until the boundary was ascertained by the Surveyor, This cannot,and does not disclose commission of any criminal trespass or theft or any other offence which would justify taking cognizance of this application as a criminal complaint and therefore there can be no justification for remitting the same to the District Magistrate with the direction to treat the same as such a complaint and to proceed accordingly. The prayer made by Mr. B. C. Sharma on behalf of the petitioners cannot therefore be allowed and is rejected.

7. One word more. It appears that during the pendency of the Revision before the Court of Session, the original petitioner died and was substituted by his heirs, the present petitioners. The learned Sessions Judge allowed such substitution as he thought that "the matter in question is not exactly a criminal proceeding" and as the respondents, including the State, consented to such substitution.I do not think that the learned Sessions Judge was required to designate a proceeding u/s 145 of the Code of Criminal Procedure, 1898, as "not exactly a criminal proceeding" and to obtain the consent of the respondents to effect substitution of the deceased petitioner by his legal representatives, to enable the learned Judge to proceed with the Revision before him. It is true that the Supreme Court in Nandlal Misra Vs. K.L. Misra, and in Jagir Kaur and Another Vs. Jaswant Singh, has observed that

proceedings for maintenance u/s 488 of the Code of Criminal Procedure, 1898, "are in the nature of civil proceeding". But even though in the nature of civil proceeding, they are nevertheless criminal proceedings, being judicial proceedings governed by and under the Code of Criminal Procedure. I would like to think that a proceeding u/s 145, orders whereunder were described by the Privy Council in Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani ILR 1901 Cal 187 at 197 as "merely Police orders made to prevent breaches of the peace",and which observations were quoted with approval by the Supreme Court in Bhinka and Others Vs. Charan Singh, cannot be designated as "not exactly a criminal proceeding", as has been done by the learned Sessions Judge. The jurisdiction which is given to the Magistrate by this Section is a jurisdiction which is intended for the purpose of preserving the public peace, which is evidently a criminal jurisdiction and the proceeding thereunder which is regulated from beginning to the end by the provisions of the Code of Criminal Procedure, cannot but be a criminal proceeding, though not a criminal prosecution or a criminal trial, even though the nature of such proceedings may be described as civil quasi-civil, quasi-criminal and all that and in fac has been described in some judicial decisions as quasi-civil and also as quasi-criminal. The expression "quasi", as has been pointed out by Bernard Schwartz in "American Administrative Law" 1950 Ed.&#65533; pages 57 58), is "a confession of vagueness". But even though these proceedings are criminal proceedings, the learned Sessions Judge failed to note that, under the law as finally settled by the Supreme Court in Pranab Kumar Mitra Vs. The State of West Bengal and Another, and the The State of Kerala Vs. Narayani Amma Kamala Devi, A Criminal Revision unlike a Criminal Appeal, does not abate by reason of the death of the petitioner and that, in the absence of a provision like Section 431 of the Code providing for the abatement of appeals in certain cases on the death of the parties, the inference must be that the power of revision remains unaffected by the death of the petitioner and the revisional Courts have been left with complete discretion to deal with a pending Revision even on the death of the petitioner, in accordance with the requirements of justice and may proceed to substitute the heirs of a petitioner for the ends of justice, if so required.

8. The revision is, therefore accepted and the entire proceeding culminating in the impugned order is quashed. This however would not prevent the petitioner from taking such action in respect of the dispute as would be available to rum under the law.