(1990) 11 AHC CK 0137

Allahabad High Court

Case No: Criminal Revision No. 885 of 1988

Mustafa		APPELLANT
	Vs	
Gulba and Others		RESPONDENT

Date of Decision: Nov. 15, 1990

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145, 145(5), 146, 148, 148

Citation: (1990) 14 ACR 795

Hon'ble Judges: R.K. Saksena, J

Bench: Single Bench

Advocate: S D.N Singh, for the Appellant; V.S. Sharma and Rajiv Sharma, for the Respondent

Final Decision: Allowed

Judgement

R.K. Saksena, J.

The litigation in respect of plot No. 1001 measuring 2 biswas, 7 biswansis of village Deola, police Station Kotwali Dehat, district Sabaranpur (hereinafter referred to as the disputed land), both, in revenue and criminal courts between Mustafa, the applicant (Revisionist) and Gulba and Chaman Lal opposite parties No. 1 and 2, the former claiming it on the basis of a sale deed executed by the latter in 1967 A.D. has had a chequered history, covering over 11 years and it is almost certain that even this order will not bring a final curtain upon it. As is usual with this type of litigation where the alleged vendees (opposite parties No. 1 and 2) deny the execution of sale deed, it is being fought to a bitter end. For a proper appreciation of the points involved for determination, it is necessary to detail such facts in a chronological order, which emerge from record and admit of no controversy

2. Village Deola of district Saharanpur came under consolidation-scheme before July 1979. In village records, name of opposite parties No. 1 and 2 was recorded over the disputed land. An objection was filed by Mustafa, revisionist, before the

consolidation authorities, asserting bhumidhari rights in the disputed land on the basis of a sale deed executed by opposite parties No. 1 and 2 in April 1967. It was prayed that his name be mutated in village papers after expunction of the name of opposite parties No. 1 and 2. Indisputably, there are two pucca rooms and a Hall on this land and a flour mill is installed in the Hall. Mustafa claimed 40 have raised these constructions after purchasing the disputed land and asserted that he was in possession thereof. The opposite parties No. 1 and 2 denied to have transferred their bhumidhari rights in the disputed land to Mustafa and asserted that the said constructions belonged to them and they were in possession thereof. The, then, Assistant consolidation officer visited the spot and submitted report on the 24th July 1979 to the effect that Mustafa was in possession of the disputed land and constructions thereon. The consolidation officer, by his order dated the 1st of July, 1980, accepted the claim of Mustafa and directed for mutation of his name, on the basis of the sale deed, over the disputed 1and, observing that he was in possession thereof. The order was assailed by opposite parties No. 1 and 2 by means of an appeal, but they were unsuccessful. The Settlement Officer Consolidation, by his order dated the 22nd of August, 1980, upheld the findings of the Consolidation officer. The unsuccessful party, namely, opposite parties No. 1 and 2, then filed a revision before the Deputy Director of Consolidation, who also, by his order dated the 15th of October, 1980, affirmed the findings recorded by the Consolidation Officer and Settlement Officer consolidation. The opposite parties No. 1 and 2 have invoked the writ jurisdiction of this Court challenging the final order passed by the Deputy Director of Consolidation, Saharanpur and in this writ petition numbered as 822 of 1981 (Annexure CA III filed with the objections by opposite parties No. 1 and 2 in this proceeding), an interim order was passed on 26-3-1982 suspending the operation of the order dated 1-7-1980 passed by the consolidation officer provided it had not been given effect to in village records.

3. To some up the consolidation courts have consistently held that :

(a) The sale deed relied on by Mustafa, revisionist, in respect of the disputed land is genuine;

(b) Mustafa is bhumidhar of the disputed land and is in possession thereof; and

(c) Chaman Lal and Gulba (opposite parties No. 1 and 2) are not in possession and have no right in the disputed land.

4. The next phase of the litigation, this time in criminal court, began about two and a half months after the filing of the writ petition referred to above. A report was submitted by the police to the Sub-Divisional Magistrate, in whose jurisdiction the disputed land lies, that there was a dispute between the revisionist and opposite parties No. 1 and 2 in regard to possession over the disputed land and that the same was likely to cause the breach of the peace. On the basis of this report, the Sub -- Divisional Magistrate passed the preliminary order on 9-6-1982, initiating

proceedings u/s 145 of the Code of Criminal Procedure (hereinafter referred to as the code) in respect of the disputed land and required the parties to file written statement. This is important to note that the preliminary order does not speak about the constructions, which stand in the diputed land and also about the Chakki, which is, admittedly, installed in the Hall and is being run almost regularly. An order for attachment of the disputed land without making any reference to the constructions thereon was also passed by the Magistrate, but the same has not yet been given effect to. Its operation was suspended and the pro ceedings were stayed in view of an order passed in the criminal revision riled by Mustafa (revisionist), before the Sessions Judge, Saharanpur. Shortly after the disposal of that revision, Mustafa gave an application on 26-12-1983 purporting to be one u/s 145(5) of the Code of Criminal Procedure. It was asserted though this application that no apprehension of breach of peace exists. He claimed that he was in peaceful possession of the disputed land and the constructions thereon. An objection was filed by the contesting opposite parties controverting this allegation. The parties appear adduced oral and documentary evidence in support of their respective contentions. In the proceeding an application was moved by Mustafa on 27-10-1987 for spot-inspection The Magistrate seized of the matter inspected the disputed site on the 12th of February, 1988 and prepared an inspection note, which was brought on record Thereafter, by his order dated 2-4-1988, he on the basis of the findings :
(a) that there was no apprehension of the breach of peace; and

(b) that Mustafa was in peaceful possession of the disputed land and the constructions thereon, dropped the proceedings and in the same continuation directed the contesting opposite parties not to interfere with the possession of Mustafa on the disputed land. Aggrrieved by this order, the opposite parties filed criminal revision in the court of Sessions Judge, Saharanpur, which was numbered as 167 of 1988. The revision was allowed on the 11th of May, 1988 by the learned VI Additional Sessions Judge, Saharanpur. The order of the Executive Magistrate was set aside and the case was remanded to him for disposal afresh in the light of the observations made in the revisional order. The learned Additional Sessions Judge has given these reasons for arriving at the said conclusion :

(a) The Sub-Divisional Magistrate seized of a proceeding u/s 145 of the Code of Criminal Procodure is not entitled to make local inspection himself. The revisional court has referred to the provisions of Section 148 of the Code in this connection;

(b) The inspection note prepared on the spat by the Sub-Divisional Magistrate could not be considered at all for the reason that the inspection was made on the back of Gulba and Chaman Lal, contesting opposite parties No. 1 and 2, who were not informed about it,

(c) When the proceedings were dropped by the Magistrate, exercising powers u/s 145(5) of the Code, no further finding on any point including that ot possession was

required to be given, in view of the fact that attachment ot the disputed land had not been effected,

(d) The evidence adduced by the parties on the point as to whether or not the breach of peace exists wag not properly discussed.

5. This criminal revision has been filed by Mustafa challenging the order dated 11-5-1988 passed by the learned VI Addl. Sessions Judge, Saharanpur.

6. 1 have heard the Learned Counsel for the parties and have carefully considered the points canvassed before me. The reasons numbered as (a) and (b), shown above, given by the learned Additional Sessions Judge were halfheartedly assailed before me on behalf of the applicant. It was urged that the Magistrate could make local inspection as provided u/s 310 of the Code of Criminal Piocedure. In my opinion, Section 310 confers powers on a Judge or a Magistrate tor making local inspection at any stage of any enquiry, trial or other proceeding, after due notice to the parties. The word Magistrate refers to Judicial Magistrates as indicated by Section 3 of the code. An Executive Magistrate is excluded from its purview. It has rightly been pointed out by the learned Additional Sessions Judge that if a Sub-Divisional Magisttate wants to make any local enquiry he may depute any Magistrate subordinate to him vide Section 148 of the Code. In the instant case, the dub-Divisional Magistrate not only made a local inspection but proceeded to make local enquiry also as is evident from the order passed by him. Apart, in view of the tact that he did not give any notice to the contesting opposite parties about the date of the inspection to be made on the spot, the inspection was obviously exparte is behind their back, and their is no doubt in the least that it offends the principles of natural justice. Therefore, the inspection note or the material collected on the spot has to be completely ignored. The observation of the learned Additional Sessions Judge in this reipect is just and legal.

7. As to the reason numbered as (c), there is hardly any controversy. It is well settled that alter recoiding a conclusion that the proceedings be dropped u/s 145(5) of the Code and the subject Is not placed under attachment i.e. it is not in custodia-legal the magistrate is not empowered to proceed with the discussion of the point as to who was in possession of the subject of dispute on the material date. This conclusion of the revisional court too does not sutler from any infirmity. From the discussions made above, it is abundantly clear that the Magistrate did commit some jurisdictional error; he committed some illegality in exercise of such jurisdiction which was not vested in him, but, at the same time it is equally true that the Magistrate had jurisdiction to dispose of the application given by Mustafa u/s 145(5) of the Code for dropping the proceeedings. I am of the opinion that if in the disposal of that application, he entertained such material which was inadmissible or determined a point which was un-called for, the order, in its entirety, shall not be declared illegal or without jurisdiction. If the point which could be legally dealt with by the Magistrate can be effectively disposed of on the basis of the conclusion

recorded by him, that part of the order should be upheld. What I mean to emphasise that if the material on record justifies an inference that there was no apprehension of the breach of the peace or that it had ceased to exist, the order dropping the proceedings should be maintained. Even the learned Additional Sessions Judge appears to have formed an impression that this aspect of the matter assumes importance but he retained satisfied by making a casual remark that the Magistrate did not discussed the evidence adduced by the parties on this point from a correct angle of vision. This was, in my opinion, not a correct approach of the revisional court. It should have applied its mind to the facts constituting real controversy and then should have seen whether the subjective satisfaction of the Magistrate that there was no apprehension of the breach of peace at all was correct. As a matter of fact, this sucjective satisfaction, it is well know, recorded after a discussion of the material on record, should not be disturbed by the revisional court, unless it is prima facie perverse.

8. In this connection, it is necessary to recall that in the disputed land there are two rooms and a Hall in which a Chakki is installed and is being run. The village was under consolidation scheme from before July, 1979 and the consolidation authorities were seized of the controversy about title to and possession over the disputed land. The Assistant Consolidation Officer had inspected the site on the 24th July, 1979 and he then found all these material existing on the site and Mustafa was found in possession thereof. There is not a word in the objection filed by the opposite parties in this Court against this &#65533;inspection&#65533; of the Assistant Consolidation Officer, which was, it is note worthy, accepted, rather could not be assailed even upto the stage of the determination of the matter by the Deputy Director of Consolidation and I doubt whether it is subject matter of issue in Civil Misc. Writ Petition No. 822 of 1981, referred to above.

9. The Learned Counsel for the contesting opposite-parties vehemently urged that the orders passed by the consolidation authorities are without jurisdiction inasmuch as the consolidation courts would not consider the dispute about &#65533;Abadl&#65533;. The Learned Counsel for the applicant on the contrary, contended that a bhumidhari plot, even after some constructions thereon continues to retain its character as such till demarcation proceedings are held under the U.P. Zamindari Abolition and Land Reforms Act and the portion occupied by the construction is declared as &#65533;Abadi&#65533;. He further urged that no such demarcation proceedings ever took place and, therefore, the &#65533;land&#65533; as a whole, shall be nothing but bhumidhari land and the consolidation authorities were competent to determine the title thereto in the light of possession also. I would not like to enter into this controversy in this proceeding for the reason that it is, in all probability, a subject matter for discussion in the said writ petition. For the purposes of this proceeding, it is just sufficient to indicate that the consolidation authorities consistently found Mustafa in possession over the disputed land, having title also.

10. Now when this peaceful possession in disturbed ? The contesting opposite parties above, in my opinion, made a false assertion that Mustafa wants to take forcible possession over the subject of dispute and, therefore, there is apprehension of the breach of the peace. This is only an ornamentation introduced only to get proceedings initiated u/s 146 of the Code, in collusion with the police. The learned Magistrate rightly remarked that although the property was not under attachment, there was never any assertion for over two years by the opposite parties that their possession was being disturbed. All these circumstances lend considerable support to the subjective satisfaction reached by the Magistrate that there was no apprehension, at all, of the breach of the peace and I am in perfect agreement with him on the point that it was a colourable device by the contesting opposite parties with the assitance of the police, finding its birth after the filing of the writ petition and it was only an un-real assertion on paper that Mustafa wanted to take forcible possession over the subject of dispute, the object being to some how bring the controversy in criminal court. The learned Additional Sessions Judge should have scrutinised the material on record and the circumstances of the case for setting at rest the controversy, which had been brought to the criminal court and which was pending for about 6 years. From this view of the matter the proceedings were rightly ordered by the Magistrate to be dropped.

11. The conclusion recorded to above is sufficient for allowing this revision and, therefore, I would not like to discuss the argument advanced before me on behalf of the revisionist that because the controversy in regard to title and possession over the disputed land had been determined by the consolidation courts and the matter is pending in this court vide civil Misc. Writ Petition No. 822 of 1981, parallel proceedings should not have been initiated in criminal court u/s 145 of the Code. Reliance was placed on a decision of Supreme Court in Mahant's case reported in 1985 ACrR 198.

12. In the result, the revision is allowed, the order dated 11-5-1988 passed in Criminal Revision No. 167 of 1988 remanding the case to the Magistrate concerned is set aside and the order passed by the Magistrate dropping the proceedings is up-held.