(1982) 11 AHC CK 0047

Allahabad High Court

Case No: Criminal Revision No''s. 1265 of 1981 and 197 of 1984

Mazharul Haq		APPELLANT
	Vs	
Qamaruddin		RESPONDENT

Date of Decision: Nov. 18, 1982

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 107, 116, 117, 145, 145(6)
- Penal Code, 1860 (IPC) - Section 188, 406, 420

Hon'ble Judges: V.N. Misra, J

Bench: Single Bench

Advocate: A.S. Divakar, for the Appellant; Bhagwati Prasad, V.P. Srivastava, B.M. Singh and O.P. Srivastava, for the Respondent

Final Decision: Allowed

Judgement

V.N. Misra, J.

This is an application in revision by Mazharul Haq against the judgment and order dated 7-7-1981 by Sri. N.S. Shamshery, 5th Additional Sessions Judge, Varanasi, in Criminal Revision No. 197 of 1981 which was allowed by him and the order of the Additional City Magistrate for restoration of possession over the property to the applicant was set aside.

2. Briefly stated, the facts involved in this case were that proceedings u/s 145. Code of Criminal Procedure were drawn up by the City Magistrate. Varanasi, in respect of plot No. 222/2, situate in Mohalla Reori Ta''ab, Police Station Bhelupur, Varanasi on 10-4-1972. Final orders in the case were passed u/s 145(6) by the City Magistrate on 6-4-1973 in favour of applicant Mazharul Haq. The opposite party, however, went up in revision to the Court of Session, who dismissed the revision and ultimately this Court decided on 10-9-1980 that the applicant was entitled to possession over the property and the order of the learned Magistrate u/s 145 Code of Criminal Procedure was confirmed. On receipt of the order of this Court the Additional City

Magistrate, Varanasi, directed the police on 30-10-1980 to deliver possession over the disputed plot of land to the applicant and possession was actually given to the applicant on 12-11-1980. The applicant was, however, dispossessed by the opposite party merely six days later on 18-11-1980 forcibly. Then he made an application to the City Magistrate, Varanasi for restoration of possession. His application was dealt with by the Additional City Magistrate, Varanasi, who heard the parties and then directed the police to hand over possession to the opposite pany again. Against this order of the Additional City Magistrate Criminal Revision No. 197 of 1981 was brought in the Court of the Sessions Judge and by means of the impugned order the Additional Sessions Judge to whom the revision was transferred directed that the Magistrate could make no such order because he has become functus officio and he set aside the order. It is against this judgment of the learned Additional Sessions Judge that the present revision has been brought in this Court.

3. According to the learned Counsel for the opposite party when the Magistrate made orders u/s 145(6) and delivered possession under the orders of the High Court to Mazharul Haq applicant he exhausted his powers and after that he had become functus officio and he could not again put the applicant in possession even if he was wrongfully dispossessed by the opposite party and if the applicant had been forcibly dispossessed by the opposite party then the applicant could initiate proceedings u/s 145, Code of Criminal Procedure or get proceedings under Sections 107/116, Code of Criminal Procedure initiated or if he so liked he could prosecute the opposite party u/s 188, IPC, but no further order u/s 145(6) could be made by the learned Magistrate since he had already become functus officio. This argument of the learned Counsel for the opposite party may be considered.

4. To my mind, fresh proceedings u/s 145, Code of Criminal Procedure would have become necessary if besides the applicant some other party had started claiming this land and if because of their rival claims to this property apprehension of breach of peace had arisen, but so far as the opposite party is concerned if the opposite party against whom an order was made after eight years of litigation, forcibly dispossessed the applicant without any rhyme or reason then this could certainly be dealt with in the same case and fresh case u/s 145, Code of Criminal Procedure was not necessary.

5. It also seems to me that proceedings under Sections 107/117 could also not be drawn up in this case even if the applicant was forcibly dispossessed after being put in possession. Proceedings u/s 107 Code of Criminal Procedure are drawn up when the Executive Magistrate receives information that any person is likely to commit a breach of peace or is likely to disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, but in this case the opposite party had already done a wrongful act and had dispossessed the applicant who had been put in possession by the Magistrate under the orders of this Court and, therefore, there was nothing to indicate that the act of

the opposite party was likely to commit a breach of peace or to disturb public tranquillity.

6. There can be no doubt that no being forcibly dispossessed the applicant could bring a case against the opposite party u/s 188, IPC because he had disobeyed an order passed by the Court u/s 145(6), Code of Criminal Procedure, but that was only an alternative remedy available to the applicant. Very often it so happens that on certain facts civil proceedings can be brought and a criminal case can also be brought and it is for the party affected to decide whether he would proceed in the civil case or bring a criminal case or whether he would proceed against the other party in both the cases. For instance, when there is a criminal misappropriation and a person is cheated he may either proceed against the other party in a civil suit and he may ask for return of the money or he may bring a complaint against him under Sections 406 and 420, IPC. Similarly, in this case when the opposite party disobeyed orders of the Court passed u/s 145(6), he had the alternative remedies of either proceeding u/s 188, IPC and bringing a complaint against the opposite party for disobedience of the orders of the Court or he could merely ask for restoration to be put in possession again over the property.

7. Section 145(6), Code of Criminal Procedure is the provision under which final orders are made in a case u/s 145, Code of Criminal Procedure. Then it has been interpreted to be also the provision in which those final orders are implemented. It would not be necessary to refer to several decisions, but in Khudiram Mandal Vs. Jitendra Nath and Another, , the Judges of the Calcutta High Court held that a person dispossessed can apply to the Court u/s 145(6) for restoration of possession to him and the order u/s 145(6) would be some-what of an auxiliary order and if an analogy was permitted in the nature of execution. Therefore, all that has to be seen in this case is whether the order passed by the Magistrate u/s 145(6) was subsisting at the time when he ordered restoration of possession or whether he had become functus officio and he could not order any restoration of possession in the case in which he had already made final orders u/s 145(6). In the final order made u/s 145(6) it was said that the applicant was entitled to possession thereof until evicted therefrom in due course of law and the opposite party was forbidden all disturbance of such possession until such eviction. There were several facets of this order. It said that the applicant was entitled to possession over the property. It also said that his possession shall not be disturbed by the opposite party till he is evicted in due course of law, but in this case the applicant was put in possession on 12-11-1980 and merely six days after that the opposite party forcibly dispossessed him. He, therefore, clearly committed a breach of the law. The Magistrate had made an order in respect of property involved before him in proceedings u/s 145. If his order was subsisting then he could certainly implement that order u/s 145(6) and put the applicant again in possession. After this litigation which lasted for eight years the applicant was put in possession and the direction to the opposite party was that he shall not distrub the possession of the applicant and inspite of it within six days the

opposite party disturbed the possession of the applicant. The only question would be whether the order of the learned Magistrate was subsisting till then and whether under his orders made u/s 145(6) he could put the applicant again in possession on his being forcibly dispossessed. To my mind, this could certainly be done, because the order, which the learned Magistrate was required to make u/s 145(6) was in the nature of an order of execution where the direction given to the opposite party had been disobeyed. The order of the Magistrate was clearly subsisting, because the applicant had not been evicted in due course of law, and, therefore, while this order was subsisting if he was forcibly thrown out of possession, possession could certainly be restored to him u/s 145(6) by way of implementation of the order passed and since the order was subsisting the learned Magistrate had not become functus officio. In my view, therefore, the order passed by the learned Additional Sessions Judge is not correct and must be set aside.

8. This revision is, therefore, allowed and the order of the learned Additional Sessions Judge is set aside.