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## **Gulabchand Vs State of U.P. and Another**

### **Criminal R. No. 292 of 1996**

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**Court:** Allahabad High Court

**Date of Decision:** Dec. 10, 2003

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) â€” Section 146, 397(2)

**Citation:** (2004) CriLJ 2672 : (2004) 3 RCR(Criminal) 678

**Hon'ble Judges:** Umeshwar Pandey, J

**Bench:** Single Bench

**Advocate:** P.K. Yadav and J.J. Munir, for the Appellant; Ghanshyam Joshi, AGA, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

Umeshwar Pandey, J.

Revisionist Gulab Chandra has approached the Court u/s 397 read with Section 401 of the Code of Criminal

Procedure (for short the "Code") assailing the order dated 13-2-1996 passed by the II Additional Sessions Judge, Aligarh.

2. The revisionist moved the Sub Divisional Magistrate concerned through application dated 11-4-1994 for initiating proceedings u/s 145 of the

Code in respect of a building raised on a peace of land stating that there was likelihood of breach of peace on the dispute of possession over the

building between him and the opposite party Smt. Ashok Kumari. A report from the police, on the said application was called by the Magistrate

and the police in its report dated 15-6-1994 gave out that there were four rooms in the building under the residential occupation of opposite party

Smt. Ashok Kumari. Gulab Chand claims to have purchased it from Satya Dev father of Smt. Ashok Kumari on 26-7-1993. On this report, the

Magistrate passed the preliminary order u/s 145(1) of the Code on 26-7-1993 and Smt. Ashok Kumari was called upon to submit her written

statement which was actually submitted on 10-10-1994 stating that she has been all through in peaceful possession over the said building and the

proceedings may be dropped. The revisionist Gulab Chand prior to that on 16-8-1994 had also submitted an application for passing an order of

attachment u/s 146(1) of the Code stating that Smt. Ashok Kumari with the help of her father was trying to oust him from the building. Against this

application also objections were submitted from the side of opposite party Smt, Ashok Kumari. The learned Magistrate however, vide order dated

22-7-1995 passed the order for attachment of the building and directed the police to give it in Supurdgi of a third person.

3. The opposite party Smt. Ashok Kumari being aggrieved with the aforesaid order of attachment dated 22-7-1995, preferred criminal revision

before the learned Sessions Judge, which was ultimately decided by the II Additional Sessions Judge, by the impugned Judgment. The lower

revisional Court holding that an order of attachment u/s 146(1) of the Code was wholly uncalled for under the facts and circumstances of the case,

allowed the revision and the said order u/s 146(1) of the Code dated 22-7-1995 was set aside. Smt. Ashok Kumari was permitted to continue her

occupation of the disputed residential house till the proceedings were finally decided between the parties.

4. I have heard learned counsel for the parties and perused the material on record.

5. It is contended by the learned counsel for the revisionist that the lower revisional Court has erred in entertaining a revision u/s 397 of the Code

against an order passed u/s 146(1) of the Code as it is an interlocutory order within the meaning of Section 397(2) of the Code. A revision against

such an order is barred.

6. Learned counsel for the revisionist has cited the case of Kalloo v. State of U. P., reported in 1997 AC 832 : 1997 All LJ 2165 : 1963 Cri LJ

648. In para 17 of the Judgment, the learned Single Judge has held as following :

If the revision itself against an order u/s 146(1) Cr.P.C. was not maintainable, the illegality of that order could not be gone into by the revisional

Court and partly allowing of such revision and partly dismissing it again amounts to an action without jurisdiction and also an illegal action.

7. In reply to the aforesaid submission of the learned counsel the citation of case law of Ranbir Singh Vs. Dalbir Singh and Others, Gopal v. State

of U.P., reported in (XXXXVI) (2001) ACC 496 and Ram Lachhan v. State of U.P. reported in (2000) AC 859 : 2000 All LJ 1003 : 2000 Cri

LJ 2770 have been referred before me.

8. In the case of Ranbir Singh (supra), the Supreme Court in a case of like nature where the revisional orders of the High Court against an order

passed by Sub Divisional Magistrate under Sections 145(1) and 146(1) of the Code had been challenged in an SLP held that quashing of

preliminary order u/s 145(1) of the Code and order for attachment of property u/s 146(1) of the Code by the High Court under the facts and

circumstances of the case could not be challenged and the Apex Court maintained the order passed by the High Court of Delhi. Though the Apex

Court in Paragraph 9 has observed and held as following :--

On perusal of the relevant papers on the record and on consideration of the contention raised, by learned counsel for the parties, we are of the

view that in the context of the facts of this case, the order passed by the High Court setting aside the order dated 11-7-2000 passed u/s 145(1) as

well as the order dated 14-11-2000 passed u/s 146(1) Cr.P.C. is unsustainable.

In these circumstances we are of the view that while maintaining the order of the High Court, quashing the preliminary order passed by the Sub-

Divisional Magistrate u/s 145(1) and the order of attachment of the property u/s 146(1) Cr.P.C. leave should be granted to the parties to

approach the Civil Court for appropriate interim order and the Civil Court should deal with the application for interim order without being

influenced by the observations made/findings recorded by the High Court in the impugned Judgment. It is ordered accordingly.

9. In the case of Ram Lachhan (supra), the learned Single Judge of this Court has specifically observed that an order passed by the Magistrate u/s

146(1) of the Code is not an interlocutory order, but it is an intermediary order and a revision against such order is not barred u/s 397(2) of the

Code. In Para 5 of the Judgment, the learned Single Judge has observed as follows :--

It has been contended before me that the revision was not maintainable before the learned Sessions Judge as the order passed by the learned

Magistrate is an interlocutory order. With due regard, I do not agree with this contention of the learned counsel for the appellant. It was an

intermediary order, in my opinion, it is not an interlocutory order. By this order the attachment of the property Could easily have been effected to

and the respondent would have been divested of his possession. It is common knowledge that such proceedings are generally initiated by persons,

who are desirous of dispossessing someone out of his lawful possession.

10. In the case of Gopal (supra) also the subject matter of challenge before this Court was an order passed by the Special Judge in a revision

where the orders passed under Sections 146(1) and 145(1) of the Code could not be characterized as the interlocutory orders.

11. There are certain other citations of the Hon"ble Supreme Court and other High Courts which need to be referred.

12. A Division Bench Judgment of Madhya Pradesh High Court given in the case of Keshavprasad Bhatt Vs. Rameschandra, overruled the two

decisions of the Single Judge of the same Court given in the cases of Mohammad Rafi v. Mohammad Azizur Rehman, reported in 1983 MPWN

171 and Ratan Lal v. Vijay Singh reported in 1976 MPLJ 14 and held as following:--

A learned Single Judge of the Bombay High Court in Hasmukh v. Sheila, 1981 Cri LJ 958, had held that order passed u/s 146(1) directing

attachment and sealing of a flat was not an ""interlocutory order"" and the bar of Section 397(2) was not attracted.

16. For all the foregoing reasons we are of the view that the holding in Gajadhar, (1978 Cri LR (Madh Pra) 324) (supra) that order passed u/s

146(1), Cr.P.C. was not revisable u/s 397(1) Cr.P.C. is not sustainable. That is over ruled. We answer, accordingly, in the negative, the question

referred for the opinion of this Bench. In our view an order passed u/s 146(1), Cr.P.C. is not an "interlocutory order" within the meaning of Section

397(2) Cr.P.C.

13. In the case of Smt. Prameshwari Devi v. The State reported in AIR 1977 SC 103 : 1977 Cri LJ 245 the Apex Court while addressing on the

scope of the bar of revision as contemplated u/s 397(2) of the Code, has explained the scope of an "interlocutory order" and has held that an

order passed in a proceeding adversely affecting a party could not be said to be an interlocutory order so far as it operates against that party and

the bar of Section 397(2) of the Code could not be raised. In the case of Madhu Limaye Vs. The State of Maharashtra, the Hon"ble Apex Court

while dealing on the scope of an order being interlocutory or not has observed as following:--

In such a situation it appears to us that the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being

converse of the words "final order". These may be an order passed during the course of a proceeding which may not be final in the sense noticed

in Kuppuswami's (supra), but, yet it may not be an interlocutory order -- pure or simple. Some kinds of order may fall in between the two. By a

rule of harmonious construction, we think that the bar in Sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate

orders. They may not be final orders for the purposes of Article 134 of the Constitution, yet it would not be correct to characterize them as merely

interlocutory orders within the meaning of Section 397(2).

... ..

Yet for the reasons already alluded to. we feel no difficulty in coming to the conclusion, after due consideration, that an order rejecting the plea of

the accused on a point which, when accepted will conclude the particular proceeding, will surely be not an interlocutory order within the meaning

of Section 397(2).

14. Following the aforesaid principles, the Apex Court has further held in the case of V.C. Shukla Vs. State through C.B.I., that before a final

order passed in a criminal proceeding there could be some orders affecting the interest of either of the party which may not be termed as pure and

simple interlocutory orders. Thus, the Hon"ble Apex Court gave a new nomenclature being an "intermediate order" which appears to have worked

upon the learned Single Judge in the case of Ram Lachhan 2000 All LJ 1003 : 2000 Cri LJ 277 (supra) to hold and characterize an order passed

u/s 146(1) of the Code by the Magistrate to be an "interlocutory order". The concept of intermediate order" appears to have been borrowed by

the learned Single Judge of Bombay High Court also in the case of Hasmukh J. Jhaveri Vs. Shella Dadlani and another, from the case of V. C.

Shukla (supra) and it has been held that;

Irrespective of the order bearing stamp of finality, there may be an intervening stage which can be called as "intermediate stage" at which in turn

may be called as "intermediate order" which neither gives the finality to the proceeding nor is purely interim or temporary and as such is not an

"interlocutory order", but would fall in between and in certain cases such order can be said to be not interlocutory.

15. With the aforesaid observation, the Bombay High Court held that an order passed u/s 146(1) of the Code is an order, which can be termed as

"intermediate order", and it cannot be termed as an interlocutory order as to attract the bar of Section 397(2) of the Code.

16. In the aforesaid view of the matter, the order of the Magistrate passed u/s 146(1) of the Code and challenged before the learned Sessions

Judge in a revision u/s 397 of the Code thus, could not be termed as interlocutory order and the contention of the learned counsel for the revisionist

that the impugned order of the learned Additional Sessions Judge could be termed as illegal, appears to have absolutely no force.

17. A perusal of the impugned Judgment of the Additional Sessions Judge makes, it clear that the revisionist Gulab Chand preferred his application

before the Sub-Divisional Magistrate concerned about the urgency in the matter and initiations of the proceedings u/s 145 of the Code as back as

on 11-4-1994. The order of attachment u/s 146 of the Code was passed on 22-7-1995 i.e. after a lapse of more than one year and three months.

Keeping the aforesaid factor in mind when this order of attachment was challenged and the revision was heard by the lower revisional Court it was

found that such an order passed by the Sub-Divisional Magistrate was bad in law as per the principles laid down by this Court in the case of

Jawahar Lal and Another Vs. Awadh Bihari and Others,

18. In Para-5 of the Judgment of the aforesaid case, the learned Single Judge has held as follows :-

5. The provisions of emergency attachment as envisaged u/s 146 Cr.P.C. may be invoked only in cases where the Magistrate records satisfaction

that but for the attachment of the disputed property, the breach of peace is eminent. On the facts of the present case, it sounds too high to expect

that in a proceeding u/s 145 Cr.P.C. which commenced on 11-3-88, the attachment should be directed now i.e. exactly about 2 years of the

initiation of those proceedings. The materials existing before the Magistrate do not justify today, the directing of the attachment to proceed further.

On the facts, existing materials may not be interpreted as now a case of emergency. Consequently, the impugned direction of the Magistrate as

contained in his order dated 13-3-89 directing the attachment of the property has to be set aside. But this does not mean that the proceedings u/s

145 Cr.P.C. should not come to its logical end in accordance with law.

19. Following the aforesaid principles, the learned Additional Sessions Judge appears to have rightly allowed the revision against the order dated

20/22-7-1995 passed by the Sub Divisional Magistrate concerned. The emergency provisions of Section 146 of the Code were definitely not

worth invoking. There was absolutely no material available before the Magistrate on 20/22-7-1995 to record his satisfaction about the likelihood

of breach of peace being eminent when a long period of 15 months had already elapsed in between the presentation of application for taking

cognizance u/s 145 of the Code upto the date of passing of the order for attachment. The Magistrate had already taken cognizance in the matter as

back as on 26-7-1994 when he passed an order u/s 145(1) of the Code after obtaining the police report in the matter. Then also there was no

emergency about the passing of order for attachment u/s 146(1) of the Code. The material before the Magistrate actually did not justify directing

attachment. As such keeping in view all these aspects of the matter the lower revisional Court appears to be fully justified while it entertained the

revision and allowed it and consequently set aside the impugned order of attachment. Since, the order of attachment passed by the Magistrate was

bad in law it cannot be said that such an order was an interlocutory order attracting bar as envisaged u/s 397(2) of the Code.

20. In the aforesaid facts and circumstances of the case, I do not find any illegality in the Judgment and order passed by the lower revisional Court

and the present revision appears to have no force.

21. The revision is hereby dismissed. The Sub-Divisional Magistrate concerned is however, directed to proceed in the matter expeditiously and

decide it, if the same had not been concluded, within a period of two months from the date of presentation of a certified copy of this judgment.