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(1979) 01 BOM CK 0059

Bombay High Court

Case No: Criminal Application No. 1310 of 1977

Dhondiba and Others — APPELLANT

Vs

Sandu and Others — RESPONDENT

Date of Decision: Jan. 15, 1979

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145, 145(1), 145(6), 146(1)

Hon'ble Judges: P.S. Shah, J; M.P. Kanade, J

Bench: Division Bench

Advocate: R.M. Agarwal, for the Appellant; B.Y. Deshpande, Public Prosecutor, V.Z. Kanakaria, for the Respondent

Judgement

P.S. Shah, J.

This criminal application under Article 227 of the Constitution of India arises out of proceedings commenced under sections 145 and 146 of the Code of Criminal Procedure. There is a dispute between the petitioners, on the one hand, and the respondents 1 to 3 on the other, about possession of a piece of land admeasuring 2 acres and 23 gunthas out of Survey No. 239 of Kumbhari Village in Taluka Bhokardan, District Jalna. On August 22, 1975, the Sub-Inspector of Police, Bhokardan, submitted his report to the Sub-Divisional Magistrate, Jalna, for commencing proceedings u/s 145 of the new Criminal Procedure Code of 1973, as there was a likelihood of breach of piece on account of the dispute between the parties relating to the said piece of land. He also submitted that the said land be attached and the parties be restraining from entering the said land. Acting on this report, on October 22, 1975, the Sub-Divisional Magistrate passed a preliminary order u/s 145 Criminal Procedure Code directing the parties to appear before him to submit their say and evidence, if any. After the parties had filed their written statement, on June 12, 1976, the Sub-Inspector submitted another report that the dispute had taken a serious turn and that there was likelihood of commission of a serious offence and breach of the peace. On June 22, 1976, the Sub-Divisional Magistrate passed an order directing attachment of the land u/s 146(1) of the Code and also

appointed the Revenue Inspector as a receiver of the land. After considering the evidence led by the parties, on October 5, 1976, the Sub-Divisional Magistrate passed a final order holding that petitioner No. 2 was in actual possession of the land in dispute. In this view of the matter, he directed respondents 1 to 3 not to obstruct the possession of petitioner No. 2 over the land in dispute till he is evicted by a due course of law.

2. Aggrieved by the order of attachment passed on June 22, 1976, the petitioners had preferred Revision Application No. 56 of 1976, in the Sessions Court at Aurangabad. The respondents has also preferred Revision Application No. 113 of 1976 challenging the final order dated October 5, 1976, in favour of petitioner No. 2. Both the revision applications were heard together and disposed of by a common judgment by the learned Additional Sessions Judge, Aurangabad, by his judgment and order dated June 1, 1977. He dismissed the revision application preferred by the petitioners but allowed that filed by the respondents and set aside the order dated October 5, 1976, passed by the Sub-Divisional Magistrate and directed that the proceedings be sent back to him for decision according to law. Thereafter, on August 30, 1977, the Sub-Divisional Magistrate passed an order continuing the order of attachment till the parties got their claim decided in a Civil Court as regards the right of possession to the disputed land.

3. Mr. Agarwal, the learned Counsel appearing for the petitioners, informed us that having regard to the final order dated October 5, 1976, passed by the Sub-Divisional Magistrate in favour of the petitioners, the Revision Application No. 56 of 1976 was not pressed even before the Additional Sessions Judge. He however, contended that the view taken by the learned Judge, regarding the interpretation of the provisions of section 145 read with section 146(1) of the Code was erroneous in law, and in support of his contention he relied on a decision of the Division Bench of this Court in Cajitan A. D''Souza v. The State, 79 BomLR 175. In our view, the contention of the Counsel is well founded.

4. The learned Judge has taken the view that once an order of attachment u/s 146(1) of the Code is passed, the proceedings u/s 145 must come to a close because after making an order of attachment the Magistrate passing the order becomes Functus Officio and cannot decide the fact of possession, and the only order that he can pass is to direct the parties to get the dispute regarding the possession determined by a competent Court. In this view of the matter, the learned Judge held that the final order dated October 5, 1976 passed by the Sub-Divisional Magistrate is without jurisdiction. On this preliminary ground alone, the revision application made by the respondents, was allowed by the learned Judge. A similar question came up for consideration before a Division Bench of this Court in Cajitan A. D''souza case referred to above, and the Division Bench on interpretation of the revisions of sections 145 and 146 of the Criminal Procedure Code has held that the Magistrate does not become Functus Officio merely because of his passing an order of attachment during the pendency of the proceedings, because he considers the case to be one of emergency. In the event of the Magistrate attaching the subject of dispute on the ground of emergency at any time after making the preliminary order under the sub-section (1) of section 145, he would be bound to proceed with the inquiry and pass

final orders under sub-section (6) of section 145. On his passing such final orders the emergency attachment would naturally come to an end. In case however, the Magistrate cannot come to a definite conclusion regarding the particular party being in possession of the property, the emergency attachment would continue until adjudication by the competent Court, that is a Civil Court, determining the rights of the parties to the dispute relating to the subject matter of the dispute. Under the circumstances the learned Judge was in error in taking the view that the Magistrate becomes functus officio on his passing an order of emergency attachment after the preliminary order under sub-section (1) of section 145 is passed by him. The magistrate continues to have jurisdiction over the subject matter of the dispute and, therefore, it cannot be said that the order dated October 5, 1975 passed by him was without jurisdiction. In this view of the matter, the order allowing the Revision Application No. 113 of 1976 must be quashed and set aside and the matter sent back to the Additional Sessions Judge, Aurangabad for disposal according to law on merits. The consequential order dated August 30, 1977, passed by the Sub-Divisional Magistrate will also have to be set aside.

5. In the result, the rule is made absolute the impugned order dated June 1, 1977 allowing the Revision Application No. 113 of 1976 and quashing the order dated October 5, 1976 passed by the Sub-Divisional Magistrate is quashed and set aside, and the matter is remanded back to the Additional Sessions Judge, Aurangabad, for disposal according to law on merits. The consequential order dated August 30, 1977 is also quashed and set aside.