

**HIGH COURT OF JAMMU AND KASHMIR  
AT SRINAGAR**

**OWP No.1105/2011**

Date of decision: **25.04.2014**

---

**Mohammad Afzal Khan & anr.**

Vs.

---

**Nazir Ahmad Mir & ors.**

---

**Coram:-**

***Hon'ble Mr. Justice Mohammad  
Yaqoob Mir, Judge***

---

**Appearing counsel:-**

**For the Petitioner(s):** Mr. R. A. Jan, Sr. Adv. with  
Mr.

Anis-ul-Islam.

**For the Respondent(s):** Mr. Manzoor A. Dar.

---

i) Whether to be reported  
in Digest/Journal: **YES**

ii) Whether to be reported  
in Digest/Journal: **OPTIONAL**

---

**1.** Petitioners seek quashment of the proceedings initiated under Section 145 Cr. P. C and the consequent orders passed by the Court of Judicial Magistrate 1<sup>st</sup> Class(Additional Munsiff) and the Court of Chief Judicial Magistrate, Srinagar.

**2.** Petitioner No.1 claims to be the owner of land measuring 11 marlas and 239 Sq.fts covered by Survey No.405 along with structure(shed) existing thereon situated at Rampora Chattabal. Petitioner No.2 claimed to have entered into an agreement for purchase of the said property whereas respondent No.1 also claimed to have entered into an agreement with the petitioner No.1 for purchase of same property and claims to have paid substantial consideration amount.

- 3.** A dispute arose, as a result of which Police Post, Bagiyas, submitted a report for action under Section 145 Cr. P. C to the Court of Judicial Magistrate 1<sup>st</sup> Class(1<sup>st</sup> Additional Munsiff), Srinagar, mentioning therein imminent breach of peace in view of respective grievances of the petitioners, respondents No.1 and 3.
- 4.** Prior to such situation, a suit was pending before the Court of 1<sup>st</sup> Civil Judge, Srinagar, which pertained to the land (pathway) of respondent No.1 and one Gh. Mohammad Gujri, allegedly adjacent to the land in dispute.
- 5.** Learned Judicial Magistrate, on receipt of the report, recorded statements of police officials who had visited the spot, thereafter derived satisfaction about the imminent breach of peace, initiated proceedings under Section 145(1) Cr. P. C, as such, summoned the parties to establish their respective claims regarding the fact of actual possession of the subject matter of dispute. Detailed order has been passed on 23<sup>rd</sup> April, 2008. On the same day, order has also been passed under Section 145(4) Cr. P. C, where-under the property has been attached.
- 6.** During pendency of the proceeding, an application has been filed by the Nazool Department claiming interest in the property. Learned Magistrate, vide his order dated 12.06.2008, directed Tehsildar, Nazool, to identify and to see whether any portion of the

State land falling under Survey No.397 has come under the attachment. Tehsildar has submitted a detailed report on 30<sup>th</sup> September, 2008.

**7.** Finally, case has been assigned to Chief Judicial Magistrate, Srinagar, and Chief Judicial Magistrate vide his order dated 06.11.2009, has taken notice of all events and thereafter has passed a detailed order concluding therein that the Court was unable to decide as to which of the party was in possession of the subject matter of dispute on the date of passing of preliminary order or within two months next before passing of the preliminary order recorded under Section 145(1) Cr. P. C. Finally, resorting to procedure under Section 146 Cr. P. C, has submitted the record of the proceedings to learned District Judge, Srinagar, so that the question as to which of the parties was in possession, is decided on civil side. Thereafter, on civil side, case has been assigned to the Court of Sub Judge (Judge Small Causes), Srinagar.

**8.** The subordinate record would reveal that the respondent No.1 has led evidence, now it is the petitioners who have to lead the evidence. Before that could be done, petitioners filed the instant writ petition.

**9.** Learned counsel for the petitioners would contend that the order passed under Section 145(1) Cr. P. C by the Court of Judicial Magistrate

is without jurisdiction because there was no dispute regarding fact of possession as, admittedly, petitioner No.1 is the owner in possession of the said property.

**10.** Contention of the learned counsel for the petitioners has to be rejected because the petitioner No.1 had challenged the order dated 23.04.2008, passed by the Court of Judicial Magistrate(1<sup>st</sup> Additional Munsiff), by medium of a revision petition before the Court of Sessions Judge, Srinagar, wherein question of jurisdiction was also agitated. Vide detailed judgment dated 3<sup>rd</sup> May, 2008, learned Sessions Judge has finally concluded that the order recorded under Section 145 Cr. P. C is an interlocutory order. In addition thereto, the petitioner No.1 has not opted to challenge the preliminary order recorded under Section 145(1) Cr. P. C. The revision petition has been dismissed as not maintainable with the direction to learned Magistrate to take steps to ensure expeditious disposal of the matter, preferably within two weeks.

**11.** When the order was earlier challenged, can same order again be challenged by medium of a writ petition. Answer has to be 'no' because the ground, that the order has been passed without jurisdiction as the possession was not in dispute, is without any basis as the factum of possession is also in dispute. Report of the Tehsildar Nazool, as has been submitted to the Judicial Magistrate,

coupled with the pleadings of the parties as they have filed before learned Magistrate, amply demonstrate that the factum of possession is in dispute. Same position is also fortified by the conclusions as arrived at by learned Chief Judicial Magistrate by opining that for ascertaining the actual position, matter is required to be dealt with under Section 146 Cr. P. C and then has submitted the proceedings of the case to the learned District Judge for being assigned to the Court on civil side.

**12.** By now in the said proceedings on civil side, respondent No.1 adduced evidence. Petitioners instead of adducing evidence have filed the writ petition, as a result thereof proceedings have been protracted un-necessarily.

**13.** It is the petitioners who had filed another Criminal Revision No.39/2008 seeking direction to the Judicial Magistrate to expedite the finalization of the proceedings. Same petition was disposed of on 19.09.2008 with a direction to the learned Magistrate to decide the matter within a period of 45 days. Prior thereto, State had also filed Civil Revision No.27/2008, which was disposed of with a direction that the learned Magistrate shall at the first instance specify/identify the land attached under his order dated 23.04.2008 and further if attached land is found to include portion of State land under Survey No.397, then he would reconsider

the prayer of the petitioner/Estates Officer, Nazool for his impleadment in the proceedings under Section 145 Cr. P. C. Magistrate was expected to conduct the proceedings with due dispatch. It is in pursuance to this order dated 31st May, 2008, Tehsildar, Nazool, was asked to identify the land who thereafter has filed a detailed report.

**14.** Learned counsel for the respondents was right in highlighting that the proceedings under Section 145 Cr. P. C, as initiated in the year 2008 which were unsuccessfully challenged by medium of revision petition before learned Sessions Judge, are not now open to be challenged without challenging the order of learned Sessions. Furthermore, learned counsel has rightly projected that now validity of the preliminary order cannot be questioned when the parties have availed the opportunity of filing documents, producing witnesses and contesting the case on merits. In support whereof, has placed reliance on the judgment of this Court rendered in **Sattar Rather and three others Vs. Mst. Khatji**, reported in **KLJ 1986 677**.

**15.** In the instant case, admittedly, parties have submitted their rival statements, have also led evidence before the Magistrate and now when the factum of possession is being ascertained in view of the proceedings having been initiated under Section 146 Cr. P. C, it shall be too late, for

the petitioners, now to question the preliminary order as well as the order of attachment passed in the year 2008.

**16.** Un-necessarily this writ petition has been filed, which, for the stated reasons, is dismissed being devoid of merit.

**17.** Since the parties have been on loggerheads for last more than five years, the proceedings have got protracted beyond proportions, in the overall view of the matter, to advance the cause of justice, it would be quite appropriate to direct learned Sub Judge(Judge Small Causes Court), Srinagar, to ensure final decision in the matter at an earliest, preferably within two months by scheduling the case on weekly basis.

**18.** The parties shall, without delay, ensure production of witnesses, whatever required, in accordance with the orders of the trial court. Learned counsel shall ensure presence of the parties, in person or through counsel, before the trial court on **5<sup>th</sup> May, 2014.**

**19.** Trial court record along with copy of this order be sent to the trial court(Sub Judge(Judge Small Causes Court), Srinagar) so as to reach there well before the date fixed.

**Mir)** **(Mohammad Yaqoob**  
**Judge**  
Srinagar

25.04.2014  
**"Mohammad Altaf"**