IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Revision No. 185 of 2016

Akhlaq Hussain ..... Revisionist

Vs.

State of Uttarakhand and others ..... Respondents

Present:
Mr. Bhupesh Kandpal, Advocate for the revisionist.
Mr. S.S.Adhikari, Deputy Advocate General assisted by Mr. P.S.Uniyal, Brief Holder for the State.
Mr. Lokendra Dobhal, counsel for the private respondent n. 2.
Mr. K.P.Upadhaya, Senior Advocate, assisted by Mr. Hemant Pant, counsel for the respondent no.3.

JUDGEMENT

Hon'ble Ravindra Maithani, J. (Oral)

Instant revision is preferred against the impugned order dated 31.05.2016, passed in Case No. 59 of 2015, under Sections 145 of the Code of Criminal Procedure, 1973 (for short, "the Code"), Smt. Shami Farzana vs. Israr Hussain, by the court of learned Sub-Divisional Magistrate, Pithoragarh (for short "the case"). By the impugned order, a notice issued under Section 145 of the Code dated 07.06.2012 was withdrawn, but subsequent to it, directions were issued that the tenant shall give rent to both the parties equally, which is impugned herein.

2. It appears that a premises was given on rent by the revisionist to an Engineering College and a hostel runs in that premises (hereinafter referred to as "the rented premises"). Some dispute arose between the parties. Private respondent no.2 Smt. Shami Farzana filed an application before the Sub Divisional Magistrate, Pithorogarh with the averments that she is owner of the rented premises, but the rent is not being paid to her. The impugned order records that the rented premises was purchased jointly by the revisionist and Late Jakir Hussain, who was husband of respondent no. 2 Smt. Shami Farzana. This was made basis of the claim made by the respondent no. 2 Smt. Shami Farzana. The

impugned order also records that the rent-deed was executed by the revisionist with the Engineering College. Parties had no objection that the rented premises be leased out to the Engineering College, but the dispute is with regard to the payment of rent. Recording all these facts, the learned Magistrate by the impugned order, on the one hand withdrew the notice under Section 145 of the Code dated 07.06.2012, but thereafter proceeded to direct that the rent be paid to the revisionist and to the responded no. 2 in equal share.

3. Heard learned counsel for the parties through Video Conferencing and perused the record.

4. Learned counsel for the revisionist submits that the impugned order is illegal. The proceedings were under Section 145 of the Code, which is restricted to the questions of possession only; any issue related to rent and title may not be adjudicated in these proceedings under Section 145 of the Code. It is argued that admittedly, the rent deed was executed by the revisionist and he was receiving the rent; he is admittedly the landlord. Respondent no.2 is free to make his claim before the civil court and only a competent court can pass such order regarding the rent. Therefore, it is argued that the order is bad in the eye of law. It requires to be set aside.

5. In support of his contention, learned counsel placed reliance upon the principles of law, as laid down in the case of Bhinka and others vs. Charan Singh, AIR 1959 SC 960 and Ashok Kumar vs. State of Uttarakhand and others, (2013) 3 SCC 366.

6. In the case of Bhinka *(supra)* with regard to the scope of Section 145 of the Code, the Hon'ble Court observed as hereunder:-

> "13. Can it be said that the appellants had taken possession in accordance with the provisions of Section 145 of the Code of Criminal Procedure? The short answer is that Section 145 of the said Code does not confer on a Magistrate any power to make an order directing the delivery of possession to a person who is not in possession on the date of the preliminary order made by him under Section 145(1) of the Code. "Under Section 145(1) of the Code, his jurisdiction is confined

only to decide whether any and which of the parties was on the date of the preliminary order in possession of the land in dispute. The order only declares the actual possession of a party on a specified date and does not purport to give possession or authorise any party to take possession. Even in the case of 'any party who has been forcibly and wrongfully dispossessed within two months next before the date of the preliminary order, the Magistrate is only authorised to treat that party who is dispossessed as if he had been in possession on such date. If that be the legal position, the appellants could not have taken possession of the disputed lands by virtue of an order made under the provisions of Section 145 of the Code of Criminal Procedure. They were either in possession or not in possession of the said lands on the specified date, and, if they were not in possession on that date, their subsequent taking possession thereof could not have been under the provisions of the Code of Criminal Procedure."

7. In the case of Ashok Kumar *(supra),* the Hon'ble Court further discussed the scope of Section 145 of the Code and observed as hereunder:-

"6. We are of the view that the SDM has not properly appreciated the scope of Sections 145 and 146(1), CrPC The object of Section 145 CrPC is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.

9. The above order would indicate that the SDM has, in our view, wrongly invoked the powers under Section 146(1), CrPC. Under Section 146(1), a Magistrate can pass an order of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession. Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145, CrPC. It can only be read in the context of Section 145, CrPC. If after the enquiry under Section 145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

10. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other

> words, to infer a situation of emergency, there must be a material on record before Magistrate when the submission of the parties filed, documents produced or evidence adduced.
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> 11. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant – Ashok Kumar, whether it is legal or not, is not for the SDM to decide."

8. On the other hand, learned counsel for the respondent no. 2 would submit that initially, on 16.06.2012, an order was passed in the case, by which directions were issued that rent be not paid to the revisionist. This order was challenged unsuccessfully in the revision by the revisionist. Not only this, it is argued that at one stage, order dated 16.06.2012 was challenged before this Court in Criminal Misc. Application No.275 of 2014, Akhlaq Hussain vs. State of Uttarakhand and others, which was dismissed. It is argued that revisionist concealed all these facts in his revision. There is a dispute regarding the rent, which makes occasion to breach of peace, therefore, the order may be passed under Section 145(8) of the Code.

9. Apart from it, learned counsel also argued that the revision could have been maintained in the court of Sessions and not before this Court directly.

10. In support of his contention, learned counsel for respondent no.2 placed reliance upon the principles of law, as laid down in the case of Padamnath Keshav Kamath vs. Shri Anup R. Kantak and others, 1999

CRLJ 122. In the case of Shri Padamnath Keshav Kamath *(supra)*, the Hon'ble Bombay High Court under the facts and circumstances of that case, returned the original petition for its presentation before the Sessions court.

11. First and foremost, the question of maintainability may be seen. This is a revision, which is filed under Section 397 of the Code. It reads as hereunder: It reads as hereunder:

> "397. (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.
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> Explanation:- All Magistrates, whether Executive or Judicial and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.
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> (2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutor order passed in any appeal, inquiry, trial or other proceeding.
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> (3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

12. A bare perusal of the provision reveals that it makes no distinction; it makes no hierarchy of courts, in which the revision may be maintained; Section 397 of the Code also does not provide for any impediment in the jurisdiction of the High Court to entertain any revision. In fact, in the case of Central Bureau of Investigation vs. State of Gujarat, 2007 (6) SCC 156, the same argument was raised before the

Hon'ble Supreme Court, as is being raised on behalf of respondent no.2 with regard to maintainability of the revision directly before the High Court. The Hon'ble Court, *inter alia*, observed that "it is pointed out that under Section 397 Cr.P.C., either of the Sessions Court or the High Court should be approached. In that sense, the High Court was not justified in holding that the CBI has bypass the remedy". *(emphasis supplied)*

13. In view of the settled law, it may very safely be concluded that revision may be filed before the High Court and the party need not first file the revision before the Sessions court and only thereafter to approach the High Court.

14. On behalf of respondent no.2 reference has been made to Section 145(8) to justify the impugned order. Section 145 (8) of the Code reads as hereunder:

> "145 (8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale- proceeds thereof, as he thinks fit."

15. A bare perusal of Section 145 (8) of the Code reveals that in cases of urgency, particularly of the articles existing on the disputed property, orders regarding their safe and proper custody may be passed including sale of it; the articles may be of speedy and natural decay in nature. Instant is not in the case. Here the dispute relates to the rent. It is not disputed as to who is the landlord. The rented premises is leased by the revisionist. He has been receiving the rent. Directions were issued on

16.06.2016 to the engineering college not to pay the rent to the revisionist and finally by the impugned order the directions were issued that the rent be paid in equal share to the revisionist and private respondent no.2. Can it be done in the proceeding under Section 145 of the Code? This is the sole question which falls for determination.

16. Scheme of Sections 145 and 146 of the Code categorically reveals that it deals with the situation regarding maintenance of public order and tranquillity. Under these provisions, the only questions which are to be determined are related to possession only and not related to the title or share or even interest for that matter. These are issues which are left to be decided by the competent civil court. Of course, in case of much urgency after initial order under Section 145 (1) of the Code, actions may be taken under Section 146 (1) of the Code. In such situation, the property in dispute may be attached and this order of attachment may only be passed once the condition as given under Section 146 (1) of the Code are satisfied that it if none of the party is in possession or it is not clear as to which of the parties is in possession. Instant in not such a case. Here attachment order has not been passed.

17. In the cases of Bhinka and Ashok Singh (*supra*), the scope of jurisdiction under Section 145 of the Code has been discussed in detail, as quoted hereinbefore. It is very important to note that by the impugned order, the learned Magistrate firstly withdrew the notice under Section 145 of the Code dated 07.06.2012. If the notice itself is withdrawn, nothing survives. In the proceedings under Section 145 of the Code, the question of possession may only be decided. As stated, in case

of urgency, the property in dispute may also be attached, but in this case, it is not done. But directing that the rent be paid in equal share to the parties is something determining the rights of the parties, which is beyond the domain of the court exercising jurisdiction under Section 145 of the Code. Therefore, this court is of the view that the impugned judgment and order is not in accordance with law and it deserves to be set aside.

18. The impugned judgment and order dated 31.05.2016 passed in the case is set aside.

19. The revision is allowed accordingly.

20. Let a copy of this Judgement be sent to the learned Court below for compliance.

(Ravindra Maithani, J.)
31.12.2020

Kaushal