Daya Ram Sharma Vs. U.P. State and anr.

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Court : Allahabad

Decided On : Aug-23-1974

Reported in : 1975CriLJ885

Judge : D.S. Mathur, C.J., K.B. Srivastava and; Onkar Singh, JJ.

Appellant : Daya Ram Sharma

Respondent : U.P. State and anr.

Judgement :

K.B. Srivastava, J.

1. This rer ference to the Full Bench raises as important question as to the interpretation of Sub-section (1) of Section 146 of the Code of Criminal Procedure, 1898 with respect to which there is some conflict of opinion.

2. The facts giving rise to the reference, may now be stated in brief:

In proceedings under Section 145, after the parties had put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute, and their documents, and their own affidavits, and had adduced, by putting in_ affidavits, the evidence of such persons, as they relied upon in support of their claims, the Sub-Divi- sional Magistrate, without drawing up 'a statement of the facts of the case' and without giving his reasons as to how he was 'unable to decide as to which of them' was in possession on the date of the preliminary order or within two months next before that date, forwarded the record of the proceeding to the Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the preliminary order, or within two months next before it, and directed the parties to appear before the Civil Court on the date fixed by him. The' reference to the Civil Court was based on the following order:Case taken up today. Heard arguments. I could not reach any decision on the question of possession of the subject of dispute at the date of the preliminary order or within two months next before it. Hence the case is referred to the Court of the Munsif-Magistrate, Bara-banki, under Section 146.

3. The petitioner Daya Ram Sharma challenged the validity of the order i# a revision before the Sessions Judge on two grounds, namely (1) that the jurisdiction of a Magistrate to make a reference to the Civil Court of competent jurisdiction comes into existence when he-

(1) is of opinion that none of the parties was then in such possession, or

(ii) is unable to decide as to which of them was then in such possession, and

(2) in case the foundation for assumption of jurisdiction is there, he must 'draw up a statement of the facts of the case' before forwarding the record of the proceeding to a Civil Court of competent jurisdiction, and a failure to observe either of these two requirements, would render the reference invalid and jiable t be set aside. The learned Sessions Judge overruled these two contentions and that gave rise to a criminal revision in this Court.

4. The revision came up for hearing before one of us and due to conflict in decisions, the matter has been placed before this Full Bench for an authoritative pronouncement.

5. The decision will turn on the interpretation qf Sections 145 and 146 and, therefore, it is necessary to reproduce them, in so far as they are relevant, for the solution of the controversy.

145 (1) Whenever a District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class is satisfiad from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof,...he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court...and to put in_ written statements of their respective claims as respects the fact of .actual possession of the subject of dispute and further requiring them to put in such -documents, or to adduce, by putting in affidavits, the eyidence of such persons, as they rely upon in support of such claims.

145 (4) The Magistrate shall then... peruse the statements, documents .and affidavits, if any, so put in, hear the parties and conclude the inquiry... and, if possible, decide the question whe-,ther any and which of the parties was at the date of the order before mentioned in -.such possession of the said subject:

Provided...Further that, if it appears to the Magistrate that any party has within two smonths next before the- date of such order 'been forcibly and wrongfully dispossessed, 'he may treat the party so dispossessed as if he had been in possession at such date.145 (6) If the Magistrate decides that one of the parties was or should under the second proviso to Sub-section (4) be treated as being in such possession of the said subject, he shall issue an order -declaring such party to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction and when he proceeds under the second proviso to Sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

146 (1) - If the Magistrate is of opin-don that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the iacts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of /dispute at the date of the order as explained under Sub-section (4) of Section 145; and he shall direct the parties to ap-rpear before the Civil Court on a date to be fixed by him.

6. Section 145 (1) thus provides ,the procedure to be followed where the ; Magistrate is satisfied that - (1) a dispute exists concerning any land or water or the boundaries thereof, and (2) such dispute is likely to cause a breach of the peace. Where he is so satisfied, he has to pass a preliminary order and direct the parties to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute and further to put in sucn documents, or produce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims. .'The Magistrate has thereafter to make an enquiry under Sub-section (4} of Section 145. The inquiry is, however, limited to the question as to who was in possession in fact on the date of the order, irrespective of the question as to the rights of the parties. A party forcibly and wrongfully dispossessed within two months next before the date of the order, may for this purpose be treated as if he had been in possession on the date of* the order. The procedure to be adopted in the inquiry is also prescribed by this sub-section itself and is limited to the perusal ol (1) the written statements, (2) documents, (3) affidavits, if any, (4) hearing the parr-ties, and (5) conclusion of the inquiry and, if possible, decision of the question whether any and which of the parties was at the date of the order in possession oil the subject of dispute. If the Magistrate is able to decide.that one of the disputing;/ parties was in possession on the date ol the preliminary order, he should pass a final order declaring that such party is entitled to possession of the property until evicted in due course of law, and forbidding all disturbance of such possession until such eviction. The Magistrate, has not, however, any statutory obligation to decide the question. The words 'if possible', occurring in subjection (41 clearly show that it is not mandatory on his part to formulate a decision on the question of possession if it should present insurmountable difficulties. On the happening of this, that is to say, if he is of opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession, he may take advantage of Section 146 (1), and may attach the property, and refer the dispute to Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the preliminary order or within two months next before it. Section 146 is thus a corollary to Section 145 and can be considered as a part or a complement of it. Proceedings under Section 146 (11 are thus proceedings in continuation of those under Section 145; and Section 146 can have no independent existence.

7. The primary duty in relation to the decision of the question of possession under Section 145 is that of the Magistrate. The law requires him to comply with the procedure specified in Sub-section (4) and decide the question of possession himself and then proceed further; and pass the final order under Sub-section (6). However, if it is not possible for him to do so, in the two contingencies referred to above, he has to draw up a statement of the facts of the case and forward the record to the Civil Court of competent jurisdiction to decide the question of possession and subsequently,on the receipt of the finding and record to proceed further and dispose of the proceedings wider' {Section 146 (1-B), read with Section 145 (6) in conformity with the decision of the Civil Court. He has thus the jurisdiction to decide the question himself; he has also the jurisdiction to leave it undecided, if it is not possible for him to decide it; and he has the further necessary and consequential jurisdiction, in the latter event, to refer the matter to the Civil Court of competent jurisdiction for decision.

8. Now, as to what are the requirements of law under Sub-section (1) of Section 146 which must be fulfilled, before a Magistrate forwards the proceedings to a Civil Court

of competent jurisdiction. Section 146 (1) states that - (1) if the Magistrate is of opinion that none of. the parties was then in such possession, or (2) if the Magistrate is unable to decide as to which of them was then in such possession, (3) he may forward the proceedings to a Civil Court of competent jurisdiction to decide the question of possession. He can thus suspend his jurisdiction temporarily but that is dependent on the existence of either of these two basic facts. If none of them exists, he cannot forward the proceedings to the Civil Court. The argument advanced by the learned Counsel for the petitioner was that a Magistrate must make A genuine attempt to arrive at a conclusion on the question of possession himself and in case of his difficulty in arriving at any conclusion with regard to the two basic facts, he must give reasons and the omission or failure on his part to give the reasons is a fatal defect which not only vitiates the reference but all subsequent proceedings arising thereunder. He placed reliance on a large number of cases dealing with the interpretation, of Sub-section (1} of Section 146, both before and after its amendment by Section 19 of the Code of Criminal Procedure (Amendment) Act) 26 of 1955. The cases prior to the amendment are Khedan Mahto v. Hussaini Kalal,. (1921) 22 Cri LJ 323 (Pat); Lachmi Ojha v. Brija Misser (1921) 22 Cri LJ 616 (Pat) and Lakshmi Narain v. Jugeshwar AIR 1954 Pat 169 : (1954 Cri LJ 443)(the first two being single Judges decisions and the last a Division Bench decision of the Patna High Court): and on Ayodhya Nath v. Ganga Prasad AIR 1953 AU 751 : (1953 Cri LJ 1717), a decision of Single Judge of this Court. In all these cases, the ordsr of attachment under Section 146 (1) was set aside on the ground that reasons for inability were not given. In Khedan Mahto's case, it was held that in order to show the Magistrate's inability to decide the question of possession, he ought to have discussed the evidence in the case and given reasons for his inability. The observation made in Lachhmi Ojha's case (1921) 22 Cri LJ 616 was that the general remark that the oral evidence1 is not reliable, without referring to it and without giving any reasons, is not a> disposal of the evidence upon the records; and it amounts to a refusal to exercise-the jurisdiction vested in a Magistrate and is remediable by the High Court in revision. In Lachhmi Narain's case AIR 1954 Pat 169 : (1954 Cri LJ 443) the order was set aside because the Magistrate had1 made no real effort to analyse the evidence between the parties and determine the question of possession one way or the other. In Ayodhya Nath's case : AIR1953All751 Beg. J.. delivered himself thus:

The order itself need not be long,, but it should contain sufficient material to indicate to the revisional Court that the Court of enquiry had applied its mind to the case, and had made a genuine attempt to give a decision in the matter, and, in spite of it, had found itself unable to come to a definite conclusion in favour of either party....In such a case the order should cqntain some reasons to indicate that the Magistrate had applied his. mind to it, and had not shirked his responsibility in the matter....

The cases which deal with interpretation: of Section 146 (1), after its amendments may now be noticed. The cases of this Court are Kumari Om Kumari v. Shri-mati Lajjawati, 1966 All WR (HC) 546 and Sarju Narain v. Lachhmi Narain, 1970 Cri LJ 614 (All). In Om Kumari's case 1966 All WR (HC) 546, C. B. Kapoor, J., observed that a mere ipse dixit of a Magistrate that he is unable to arrive at a definite finding on the question of possession is not a compliance with the provisions of law; and unless a Magistrate enters into a critical and detailed examination of the affidavits, he cannot arrive at a finding that a reference to the Civil Court is warranted; and it must appear from the order that he had applied his mind to the evidence. In Sarju Narain's' $ case, H.C. P. Tripathi, J., observed thus:

The impugned order...shows that he had not applied his mind to the evidence before him and had abdicated his functions in favour of the Civil Court. He has not given any reasons as to why he was not in a position to decide the- question of possession....Instead of exercising his mind, he has adopted an easy course of referring the matter to the Civil Court for deciding for him as .to which of the two parties was in possession....It must be remembered that proceedings under Section 145, Criminal Procedure Code, are. to be primarily decided by the Magistrate...and onlyr in extreme cases where complicated questions of law and fact arise making it extremely difficult for him to arrive at a conclusion that he should take advantage of Section 146....The reference of the question in a routine manner....Is not intended by the provisions of Section 146.

The case of Ramjilal v. Jawahar, 1974 Cri LJ 726 (Rail was decided by a Single Judge of the Rajasthan High Court, and it has taken the same view. The Patna High Court has come to the same conclusion in State of Bihar v. Hari : AIR1965Pat411 , which is a Division Bench decision. In all the above cases, the order of reference was challenged before the return of the finding, and all the references were quashed for the common infirmity that the Magistrate had not applied his mind, had not discussed the evidence, and had not given his reasons for his inability. In Ayodhya Prasad Tewari v. Hopal Manjhi, 1970 Cri LJ 115 (Pat) a learned single Judge of the Patna High Court went further and not only set aside the order of reference but also the finding given by the Civil Court on the ground of the incompetency of the reference. In Abdul Noor v. Sirai Ali AIR 1965 Tripura 35 : ((1963) 2 Cri LJ 326), it was held that reasons must be given but the order of reference made by the Magistrate was not quashed on the ground that the Civil Court had already returned its finding and the revision was not instituted at the appropriate stage, namely, when the order of reference was made and that it was too late a stage to quash it, for it had remained unchallenged and after the party had submitted to the jurisdiction of the Civil Court and had participated in the proceedings before it.

9. We shall now deal with cases cited by the learned Counsel for the opposite side for the proposition that the Magistrate need give no reasons and an order of reference cannot be considered to be incompetent on failure to give reasons. Bharosa v. State, 1951 All WR (HC) 507, is a decision by Desai, J,, (as he then was) and the observation is that there is no justification statutory or otherwise, for requiring the Magistrate to give the reasons for ah order passed by him under Section 146. This was a decision prior to the amendment. Reliance has also been placed on two decisions of the Patna High Court, namely, Shreedhar Thakur v. Kesho Sao : AIR1962Pat468 and Kartik Sahu v. Nand Kishore, 1964(2) Cri LJ 112 (Pat). Kartik Sahu's case (1964) 2 Cri LJ 112 (Pat) can be easily distinguished. In that case the Magistrate made the reference, after examining the respective cases of the parties and considering the materials available before him. The Civil Court, however, returned the record to the Magistrate as he found that the disputed land had not been properly described. The Magistrate then started fresh proceedings and sent back the case, but this time without giving any reasons for his inability. It js in these circumstances, that. it waa held that the reference was not incompetent because the second reference was not the real order of reference. In Shreedhar Thakur's case, strong disapproval was expressed on the failure of the Magistrate to give his reasons, but the remark that the reference was not incompetent merely for that reason appears to be a casual one because the entire reference was: quashed on another ground. This case was distinguished in Ayodya Prasad Te-wai's case also. The last case cited id Chandi Prasad y. Chandra Pratap : AIR1970All119 a Division Bench decision of this Court. The order of reference made

by the Magistrate is not quoted in the judgment to indicate whether he had or had not applied his mind to the,evidence; and indeed, it appears that he had merely failed to say that he was unable to decide. This will appear from the observa--tions of the Bench in the following terms:

It is true that he did not, in so many words, state that he was making the reference because of his inability to determine as to which of the parties was in possession....Nevertheless, it is perfectly plain from the order passed by him that he found difficulty in reaching a definite conclusion as to whi,ch of them was really in possession. Under the circumstances, he was, in our opinion, perfectly justified in making a reference' tu the Civil Court. In judging whether the Magistrate had sufficient ground to refer the dispute to the Civil Court, what has to be seen is the substance and not the. form of the order.

10. The consistent' trend of deci-t sions is that since ordinarily it is the duty of the Magistrate to decide the question of possession, he should decide it, and the extraordinary procedure of a reference under Section 146 (1) should be adopted when one of the two contingencies is in existence and the Magistrate gives his reasons, after discussion of the evidence, though it is not necessary that it shouW . be a detailed order. It may be mentioned that Section 146 (1> uses two expressions, that is to say, 'is of opinion' and 'or is unable to decide', the former having relation to the question that none of the parties was then in such possession^ and the latter to the question as to which of them was then in such possession. It is apparent that an opinion can be formulated by application of mind, by the consideration of the entire evidence, oral or documentary; and likewise inability to decide can also arise only after a similar application of mind and similar consideration of the evidence. The word 'unable' would mean unequal to the task of need; not able to do something specifiedetc. That being so, the duty of the Magistrate lies in narrating the respective cases of the parties, marshalling their respective evidence, and in expressing, his .difficulties in arriving at a conclusion. It should be obvious to Magistrates that by an order of reference, they suspend their jurisdiction for a short period, while the 'Civil Court assumes iurisdiction, and therefore, it is necessary that reasons should be given. Magistrates should not adopt an easy course of shifting their own responsibility, without giving reasons, and without even a superior court getting to .know as to the circumstances which operated in the making of the order of reference.

11. The next question is as to what is the legal effect of the failure or omission on the part of the Magistrate to give his reasons for his order forwarding the record under Section 146 (1) to the Civil Court of competent jurisdiction. Now, the '''existence' of jurisdiction is very different from the 'exercise' of jurisdiction. The failure to comply with statutory requirements in the assumption of jurisdiction and in the exercise of that jurisdiction entails very different consequences. The authority to deal with a matter at all is what makes up jurisdiction. When there is such jurisdiction, the decision of all other questions in the matter is only an 'exercise' of that jurisdiction. An error, omission, or irregularity in such exercise, which does not occasion a failure of justice, is cured by Section 537 (a), Code of Criminal Procedure. That section, in so far as it is relevant, says that no order passed by a Court of competent jurisdiction shall be reversed on revision on account of any euor, omission or irregularity in the order in any proceeding under the Code, unless such error, omission or irregularity has, in fact, occasioned a failure of justice. Undoubtedly, it does not authorise a subordinate criminal Court to commit an error, omission or an irregularity which does

not occasion a failure of justice for it is its duty k> faithfully comply with the procedure; nut where an error, omission or irregularity has been committed, and such matter -comes ud before the revisional Court; such error, omission, or irregularity will, in the absence of failure of justice, not be a ground which can be urged for getting the order reversed. The requirement of the section is that the failure of justice has, in fact, been occasioned. The .mere possibility or probability of a failure of justice will not be sufficient, when the law requires that the failure of justice must be established as a fact.

12. The matter has thus to be judged in the light of the discussion above. The Sub-Divisional Magistrate was undoubtedly a Court of competent jurisdiction, when he assumed iurisdiction under Section 145 (1). He had the jurisdiction to decide the question of possession under Section 145 (4) and to pass a final order under Section 145 (6). He has the alternative jurisdiction, in the case of his inability to decide the question, to forward the record to the Civil Court of competent jurisdiction. This alternative jurisdiction will be apparent from the use of the words 'if possible' in Section 145 (4), when they are read with the words 'unable to decide' used in Section 145 (1). The learned Magistrate exercised this alternative jurisdiction when he observed: 'Heard arguments, I could not reach any decision on the question of possession of the subject of dispute.' He thus complied with the statutory requirements in the assumption of jurisdiction. The failure to draw up a statement of the facts of the case or give reasons for his inability, is a failure which relates to matters of procedure, or a failure in the exercise of his jurisdiction, and not in the assumption of jurisdiction. That being so, such a failure in the matter of non-compliance with mere procedure will not be fatal, unless it has occasioned a failure of justice.

13. In short, in our view, Magistrate should give reasons for an order under Section 146 (1) referring a case for decision to Civil Court of competent jurisdiction; however, mere omission to give reasons will not be sufficient to invalidate the reference, unless failure of justice is, in fact, established.

14. The revision shall now go back to the learned Single Judge for decision in the light of our opinion.

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