

CASE NO.:  
Appeal (civil) 10906 of 1996

PETITIONER:  
Shanti Kumar Panda

RESPONDENT:  
Shakuntala Devi

DATE OF JUDGMENT: 03/11/2003

BENCH:  
R.C. LAHOTI & ASHOK BHAN.

JUDGMENT:  
J U D G M E N T

R.C. LAHOTI, J.

Shanti Kumar Panda, the appellant before us lodged a complaint with Station Officer, Line Bazar, Jaunpur, whereupon the police filed a report before the Sub-Divisional Magistrate (S.D.M.) Sadar, Jaunpur, who made a preliminary order under Section 145(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code', for short) recording his satisfaction that a dispute, likely to cause a breach of the peace, exists concerning the shop, which is the subject matter of dispute (hereinafter referred to as 'the shop', for short) between the appellant and one Kamta Prasad (not a party in this appeal) and requiring both of them to attend his court and put in the written statements of their respective claims as respects the fact of actual possession of the shop. The learned S.D.M. also found that the case was one of emergency and therefore he directed the shop to be attached under Section 146(1) of the Code. The preliminary order under Section 145(1) and the order of attachment under Section 146(1) were both made on 16.5.92. Kamta Prasad appeared and stated that he had nothing to do with the shop and the owner of the property, who was also in possession thereof, was one Shakuntala Devi (respondent No.1 herein, hereinafter referred to as 'the respondent', for short). Kamta Prasad also submitted that the appellant had deliberately not impleaded the respondent as a party to the proceedings as he was in collusion with the police and wanted to deprive Shakuntala Devi of her lawful possession over the shop. Shakuntala Devi, on becoming aware of the proceedings (obviously on the information provided by Kamta Prasad), moved an application before the learned S.D.M. stating that she was a party interested in the subject matter of dispute and as she was in peaceful possession of the shop, she ought to have been joined as party to the proceedings and as that not done, she prayed for her impleadment and an opportunity of being heard.

The learned S.D.M. kept the application filed by the respondent pending till 6.7.92 when the proceedings were directed to be disposed of by a final order. No opportunity was allowed to the respondent to join in the proceedings and to file her own claims as to the possession of the shop. The learned S.D.M. held that the appellant was in possession over the disputed shop on the date of the passing of the preliminary order as also in the two months prior thereto. Having made that declaration the learned S.D.M. directed that until the rights were determined by the competent court, the shop shall be released in favour of Shanti Kumar Panda, the appellant.

Shakuntala Devi, the respondent and Kamta Prasad both preferred revision petitions against the order of the learned S.D.M. By order dated 27.2.93 the learned Additional Sessions Judge directed the

revision to be dismissed by holding that the order of the learned S.D.M. did not suffer from any infirmity. Both these orders were put in issue by the respondent and Kamta Prasad by filing a petition under Article 226 of the Constitution in the High Court which too was dismissed on 6.12.93. One of the reasons which has prevailed with the High Court for dismissing the petition is that the respondent had already approached the Civil Court and the jurisdiction of the Civil Court having been invoked, which was an efficacious alternative remedy available to the respondent, it was not appropriate for the High Court to entertain the writ petition and exercise its jurisdiction under Article 226 of the Constitution.

Soon after the decision by the learned Additional Sessions Judge on 27.2.93, Shakuntala Devi, the respondent, filed civil suit No.283 of 1993 based on title, seeking a permanent preventive injunction against Shanti Kumar Panda, the appellant herein. Kamta Prasad who alone was impleaded by the respondent as the party in the proceedings under Sections 145/146 of the Code was not impleaded as a party in the civil suit filed by the respondent Shakuntala Devi, inasmuch as the impleadment of Kamta Prasad who was not claiming any interest and not even possession over the shop was considered to be unnecessary. The respondent also sought for an ad-interim preventive injunction so as to protect her possession over the shop. By order dated 5.8.95 the learned Civil Judge allowed the application filed by the respondent and directed the appellant to remain restrained from interfering with the possession of the respondent over the shop. The learned Civil Judge also directed a court officer to go at the site of the shop and after opening the locks to put the respondent in possession of the shop. It would be relevant to note some of the observations, pungent to some extent, made by the learned Civil Judge during the course of his order. The learned Civil Judge observed that the proceedings under Sections 145/146 of the Code had proceeded in the absence of the respondent who was not even allowed an opportunity of being heard though she was the real person claiming possession and also title over the shop. The learned Judge said - "She was not even offered the opportunity of being heard. The real fact is that after the death of Smt. Tapesara the anti social elements conspired to grab her house and shop and under that conspiracy the sister of Tapesara, i.e., Shakuntala Plaintiff whose possession was over the disputed house and shop wanted to eject her forcibly and the administration fully helped in evicting the plaintiff from her house and shop\005\005..it is clear that the plaintiff was in possession and still she is in possession. Merely by taking advantage of the condition of the plaintiff the Sub-Inspector and the S.D.M. under the proceeding under Section 145 Cr.P.C. got locked the shop and house and the plaintiff is again entitled to live therein. If it is not so any one could take possession of any one's house in collusion with the administration. The day it is done that day will become a symbol of injustice in the society\005\005\005\005The one who is not a party to the proceeding under Section 145 Cr.P.C. the finding given under Section 145 Cr.P.C. is not binding on him."

The appellant preferred a miscellaneous appeal. The learned District Judge, vide his order dated 15.11.95, allowed the same and set aside the order dated 5.8.95 passed by the learned Civil Judge. The principal reason which has prevailed with the learned District Judge was that the proceedings under Section 145 of the Code having terminated in favour of Shanti Kumar Panda, the appellant, the trial



parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute :

Provided that, if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed, within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the 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 proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid in sub-section (3)."

146. Power to attach subject of dispute and to appoint receiver. \026

(1) If the Magistrate at any time after making the order under sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof :

Provided that in the event of a receiver being subsequently appointed in relation to the

subject of dispute by any Civil Court, the Magistrate \026

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him.

(b) may make such other incidental or consequential orders as may be just.

Possession is nine points in law. One purpose of the enforcement of the laws is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc. as defined in sub-section (2) of Section 145 having arisen, causing a likelihood of a breach of the peace, Section 145 of the Code authorizes the Executive Magistrate to take cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings under Sections 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive or police action. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in proviso to sub-section (4) of Section 145, and maintain the status quo as to possession until the entitlement to possession was determined by a court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned.

There is a difference between a case where the subject-matter of dispute is not attached by the Executive Magistrate under Section 146(1) and the case where it is so attached. Under sub-section (1) of Section 145 a preliminary order taking cognizance of the dispute having been passed, the Magistrate would under sub-section (4) decide who was in possession of the disputed property on the date of the passing of the preliminary order. Consistently with such finding, a declaration by Magistrate in favour of such party would follow under sub-section (6) entitling it to retain possession over such property until evicted therefrom in due course of law. And until such eviction all disturbances in its possession shall be forbidden. If any party is found to have been forcibly or wrongfully dispossessed within two months next before the date on which the report of a police officer or other information setting the Magistrate in motion was received by him or between such date and the date of order under sub-section (1), then the party dispossessed has to be fictionally treated as one in possession on the date of preliminary order under sub-section (1). The declaration of entitlement to possession under proviso to sub-section (4) read with sub-section (6) shall be made in favour of such party and the party found to have been so dispossessed forcibly and wrongfully may also be restored into possession. The declaration

having been made, it would be for the unsuccessful party to approach the competent court and secure such order as would enable his entering into possession and evicting the party successful in proceedings under Section 145.

What is an eviction "in due course of law" within the meaning of sub-section (6) of Section 145 of the Code? Does it mean a suit or proceedings directing restoration of possession between the parties respectively unsuccessful and successful in proceedings under Section 145 or any order of competent court which though not expressly directing eviction of successful party, has the effect of upholding the possession or entitlement to possession of the unsuccessful party as against the said successful party. In our opinion, which we would buttress by reasons stated shortly hereinafter, ordinarily a party unsuccessful in proceedings under Section 145 ought to sue for recovery of possession seeking a decree or order for restoration of possession. However, a party though unsuccessful in proceedings under Section 145 may still be able to successfully establish before the competent court that it was actually in possession of the property and is entitled to retain the same by making out a strong case demonstrating the finding of the Magistrate to be apparently incorrect.

In a case where attachment has been made under Section 146(1) of the Code, it is not necessary for the unsuccessful party to seek the relief of possession from the court; a mere adjudication of rights would suffice inasmuch as the attached property is held custodia legis by the Magistrate for and on behalf of the party who would be successful from the competent court by establishing his right to possession over the property.

Mr. Sunil Gupta, the learned Senior Counsel for the appellant submitted, reading literally the sub-section (6) of Section 145 of the Code, that declaration of the successful 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" means that the Parliament intended to confer a binding efficacy on the Magistrate's order not only qua the parties to the proceedings but also qua all concerned to respect and abide by the order of the Executive Magistrate and such order and the possession of the successful party protected thereunder shall continue to survive and hold valid and good unless at the final adjudication of civil rights the competent court has directed the party successful in proceedings before the Magistrate to be evicted, whence and whence alone that party shall lose possession and bound to hand over the same to the party successful in the Civil Court.

It is well-settled that a decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court (See Sarkar on Evidence, Fifteenth Edition, page 845). A decision given under Section 145 of the Code has relevance and is admissible in evidence to show :- (i) that there was a dispute relating to a particular property; (ii) that the dispute was between the particular parties; (iii) that such dispute led to the passing of a preliminary order under Section 145(1) or an attachment under Section 146(1), on the given date, and (iv) that the Magistrate found one of the parties to be in possession or fictional possession of the disputed property on the date of the preliminary order. The reasoning recorded by the Magistrate or other findings arrived at by him have no relevance and are not admissible in evidence before the competent court and the competent court is not bound by the findings arrived at by the Magistrate even on the question of possession through, as between the parties, the order of the Magistrate would be evidence of possession. The finding recorded by the Magistrate does not bind the Court. The competent court has jurisdiction and would be justified in arriving at a finding inconsistent with the one arrived at by the

Executive Magistrate even on the question of possession. Sections 145 and 146 only provide for the order of the Executive Magistrate made under any of the two provisions being superseded by and giving way to the order or decree of a competent court. The effect of the Magistrate's order is that burden is thrown on the unsuccessful party to prove its possession or entitlement to possession before the competent court.

In *Bhinka & Ors. Vs. Charan Singh*, AIR 1959 SC 960, this Court held that the Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. His order is a temporary order irrespective of the rights of the parties, which will have to be agitated and adjudicated upon by a competent forum and in the manner provided by law. The life of the said order is coterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. The orders under Section 145 of the Code are thus merely police orders and do not decide any question of title.

We would like to clarify that in the case of *Bhinka and Ors.* (supra) the question \026 what is a competent court, did not arise for determination; nor did the question as to what is the weight and value to be assigned to or what is the efficacy of the order of the Magistrate in a subsequent suit or proceeding initiated before a competent court directly arise for consideration. This we say because it is also well-settled that Sections 145 and 146 nowhere specifically provide for the order of the Magistrate being subject to and superseded by only a decree of 'Civil Court'. The words 'competent court' used in Section 146 (1), in the context in which they have been used, only mean "any court which has jurisdictional competence to decide the question of title or rights to the property or entitlement to possession based on right or title to the property though the court is not necessarily a Civil Court". The words 'until evicted therefrom in due course of law' as occurring in sub-section (6) of Section 145' mean the eviction of the party successful before the Magistrate, consequent upon the adjudication of title or right to possession by a competent court; that does not necessarily mean a decree of eviction. The party unsuccessful before the Magistrate may dispute the correctness of the finding arrived at by the Magistrate and is at liberty to show before the competent court that it had not dispossessed the successful party or that it is the unsuccessful party and not the successful party who was actually in possession and the finding to the contrary arrived at by the Magistrate was wholly or apparently erroneous and unsustainable in law.

In *Jhunamal alias Devandas Vs. State of Madhya Pradesh & Ors.*, (1988) 4 SCC 452, this Court has held that a concluded order under Section 145, Cr.P.C., made by the Magistrate of competent jurisdiction should not be set at naught merely because the unsuccessful party has approached the civil Court. An order made under Section 145, Cr.P.C., deals only with the factum of possession of the party as on a particular day. It confers no title to remain in possession of the disputed property. The order is subject to decision of the civil Court. The unsuccessful party therefore must get relief only in the civil Court. He may move the civil court with a properly constituted suit. He may file a suit for declaration and prove a better right to possession. The civil Court has jurisdiction to give a finding different from that which the Magistrate has reached. Here again we may hasten to add that the expression 'civil court' used by this Court in *Jhunamal's* case (supra) means competent court and not necessarily a civil court as commonly understood.

At what stage may the competent court arrive at a finding

inconsistent with the one given by the Magistrate? Is it correct to say that the finding recorded by the Magistrate can be dislodged only at the time of and by passing a final decree terminating the suit? Or, whether the competent court can, depending on the facts and circumstances of a given case, arrive at a finding different from the one recorded by the Magistrate even at the state of interlocutory order such as one of injunction or appointment of receiver during the pendency of the suit?

We have already indicated hereinabove the extent of relevance of an order under Sections 145/146 of the Code in a subsequent civil action between the parties. In a civil action between different parties the finding of a criminal court cannot be treated as binding except to the extent of being evidence of the factum of a particular judgment having been delivered by the particular criminal court on a particular date as already indicated hereinabove. In Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & ors., AIR 1955 SC 566 this Court has held that in a proceeding for revocation of a grant of probate under Section 263 of the Succession Act the previous judgment of the Criminal Court convicting the son of the murder of his father and sentencing him to transportation for life is not admissible in evidence of the fact that the son was the murderer of the testator. That is a question to be decided on evidence. The judgment of the Criminal Court is relevant only to show that there was such trial resulting in such conviction and sentence of the son to transportation for life.

The order of the magistrate under Section 145/146 of the Code is not only an order passed by Criminal Court but is also one based on summary enquiry. The competent Court in any subsequent proceedings is free to arrive at its own findings based on the evidence adduced before it on all the issues arising for decision before it. At the stage of judgment by Civil Court the order of the magistrate shall be of almost no relevance except for the purpose of showing that an enquiry held by the magistrate had resulted into the given declaration being made on a particular date. The competent Court would be free to record its own findings based on the material before it even on the question of possession which may be inconsistent with or contrary to the findings arrived at by the magistrate.

At the stage of passing an interlocutory order such as on an application for the grant of ad interim injunction under Rule 1 or 2 of Order 39 of the CPC, the competent Court shall have to form its opinion on the availability of a prima facie case, the balance of convenience and the irreparable injury — the three pillars on which rests the foundation of any order of injunction. At that stage material in the shape of affidavits, documents and pleadings is placed before the Court for its consideration. The order of the Executive Magistrate may also be placed before it, who having held an enquiry, though summary in nature, has arrived at a finding on the question of possession which the Code intends to be sustained unless the Court of competent jurisdiction by its judicial order supersedes the finding or the effect of such finding and till then all disturbances in possession of the successful party are intended by the Code to be forbidden. The Civil Court shall also respect such order and will be loath to arrive at an interim arrangement inconsistent with the one made by the Executive Magistrate. However, this is far from holding that the Civil Court does not have jurisdiction to make an order of injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an exception. There may be cases such as one where the order of the Executive Magistrate can be shown to be without jurisdiction, palpably wrong or containing self-contradictory findings. For example, the Magistrate may have made an order treating the party dispossessed beyond two months to be as in possession. There may be cases where in spite of the order made by the Executive Magistrate

based on the evidence adduced before it, the competent court, based on the material produced before such Court, may be inclined to hold that prima facie a very strong case for retaining or placing one of the parties in possession of the suit property is made out or where it will be totally unjust or inequitable to continue one party in possession of the property as ordered by the Executive Magistrate. In such exceptional situations, the competent court (which will mostly be a civil court) may have jurisdiction for granting an order of injunction in departure from the findings recorded and the declaration made by the Executive Magistrate under Section 145 of the Code of Criminal Procedure. The order under Section 146 of the Code would not pose a problem of that magnitude. Inasmuch as the property is under attachment and is placed in the hands of a receiver the Civil Court can comfortably examine whether it would be just and expedient to continue with the attachment and with the same receiver or to appoint another receiver or to make some other interim arrangement during the pendency of the civil suit.

For the purpose of legal proceedings initiated before a competent court subsequent to the order of an Executive Magistrate under Sections 145/146 of the Code of Criminal Procedure, the law as to the effect of the order of the Magistrate may be summarized as under:-

- (1) The words 'competent court' as used in sub-section (1) of Section 146 of the code do not necessarily mean a civil court only. A competent court is one which has the jurisdictional competence to determine the question of title or the rights of the parties with regard to the entitlement as to possession over the property forming subject matter of proceedings before the Executive Magistrate;
- (2) A party unsuccessful in an order under Section 145(1) would initiate proceedings in a competent court to establish its entitlement to possession over the disputed property against the successful party. Ordinarily, a relief of recovery of possession would be appropriate to be sought for. In legal proceedings initiated before a competent court consequent upon attachment under Section 146(1) of the Code it is not necessary to seek relief of recovery of possession. As the property is held custodia legis by the Magistrate for and on behalf of the party who would ultimately succeed from the court it would suffice if only determination of the rights with regard to the entitlement to the possession is sought for. Such a suit shall not be bad for not asking for the relief of possession.
- (3) A decision by a criminal court does not bind the civil court while a decision by the civil court binds the criminal court. An order passed by the Executive Magistrate in proceedings under Sections 145/146 of the Code is an order by a criminal court and that too based on a summary enquiry. The order is entitled to respect and weight before the competent court at the interlocutory stage. At the stage of final adjudication of rights, which would be on the evidence adduced before the court, the order of the Magistrate is only one out of several pieces of evidence.
- (4) The Court will be loath to issue an order of interim injunction or to order an interim arrangement inconsistent with the one made by the Executive Magistrate. However, to say so is merely stating a rule of caution or restraint, on exercise of discretion by Court, dictated by prudence and regard for the urgent/emergent executive orders made within jurisdiction by their makers; and certainly not a tab on power of Court. The Court does have jurisdiction to make an interim order including an order of ad-interim injunction inconsistent with the order of the Executive Magistrate. The jurisdiction is there but the same shall be exercised not as a rule but as an exception. Even at the stage of passing an ad-interim order the party unsuccessful before the

Executive Magistrate may on material placed before the Court succeed in making out a strong prima facie case demonstrating the findings of the Executive Magistrate to be without jurisdiction, palpably wrong or self-inconsistent in which or the like cases the Court may, after recording its reasons and satisfaction, make an order inconsistent with, or in departure from, the one made by the Executive Magistrate. The order of the court \026 final or interlocutory, would have the effect of declaring one of the parties entitled to possession and evicting therefrom the party successful before the Executive Magistrate within the meaning of sub-section (6) of Section 145.

In the present case, the trial Court has felt strongly against the police action taken under Section 145(1) of the Code. This can clearly be inferred from the observations contained in the order of the learned Civil Judge. The plaintiff-respondent herein was not allowed \026 in spite of her efforts \026 to participate in the proceedings under Section 145. The party proceeded against by the Executive Magistrate was not interested in contesting the proceedings. The first Appellate Court has not recorded any disagreement with the observations made by the learned Civil Judge but has proceeded on a different reasoning which reasoning has been found to be erroneous by the High Court. The High Court has agreed with the view taken by the learned Civil Judge. We do not think that any case for interference with the order of the High Court is made out.

The appeal is dismissed. No order as to the costs.