R.H. Bhutani vs Miss Mani J. Desai & Ors on 23 April, 1968

Equivalent citations: 1968 AIR 1444, 1969 SCR (1) 80, AIR 1968 SUPREME COURT 1444, 1969 (1) SCR 80, 1968 2 SCWR 637, 1968 CURLJ 980, 1970 MAH LJ 148, 1970 MPLJ 137

Author: J.M. Shelat

Bench: J.M. Shelat, S.M. Sikri, Vishishtha Bhargava

PETITIONER:
R.H. BHUTANI

Vs.

RESPONDENT:
MISS MANI J. DESAI & ORS.

DATE OF JUDGMENT:
23/04/1968

BENCH:
SHELAT, J.M.
BENCH:
SHELAT, J.M.
SIKRI, S.M.
BHARGAVA, VISHISHTHA

CITATION:
1968 AIR 1444 1969 SCR (1) 80
CITATOR INFO :
E 1981 SC 18 (6)

ACT:
Code of Criminal Procedure (Act 5 of 1898), s.145-Satisfaction of the Magistrate under sub-s. (1)-Requirement for recording reasons when satisfied--Calling for police report whether necessary before recording preliminary order--Completion of dispossession before date of preliminary order whether means that there is no existing dispute with in the meaning of sub-s. (1).

HEADNOTE:
The appellant occupied an office cabin in Bombay on leave and licence from respondent No. 1. In an application under s. 145 of the Code of Criminal Procedure the appellant -alleged that on June 11, 1966 respondent No. 1 wrongfully

took possession of the cabin and gave in to respondents 2 and 3 who forcibly presented his re-entry. He also lodged a report of the incident with the, police as a result of which respondent No. 1 was arrested for an offence under s. 351 Indian Penal Code but was released on bail. Respondent No.1 filed a civil suit and took out a notice of motion for restraining the appellant from interfering with the possession of the cabin, but the same was dismissed. The Magistrate trying the application under s. 145 -of theCode of Criminal Procedure passed a preliminary order on June 20, 1966 recording his satisfaction that a dispute existed. After considering the affidavits and the evidence led by the parties the Magistrate accepted the appellant's version of facts and on June 22, 1967 passed the final order under sub-s. (6) directing restoration of possession to the appellant tin evicted in due course of law. The High Court in revision set aside the order ,of the Magistrate on the following grounds : (i) That the Magistrate had not recorded his reasons for passing the preliminary order; (ii) that the Magistrate had passed the said order without calling for a police report, merely on the basis of the appellant's allegations; (iii) That the dispossession of the appellant was completed and a report of assault was lodged by the appellant with the police before the preliminary order was passed, and therefore there was no longer any dispute on the day of the order likely to lead to a breach of the peace.

HELD : (i) The satisfaction under sub-s. (1) of s. 145 is that of the Magistrate. The question whether on the materials before him be should initiate proceedings or not is, therefore, in his discretion which, no doubt, has to be exercised in accordance with the well recognised rules in that behalf. The High Court in the exercise of its revisional jurisdiction would not go into the question of sufficiency of material which had satisfied the Magistrate. [86A-B]

In the present case the Magistrate had expressed his satisfaction on the basis of the facts set out in the application before him after he had examined the appellant on oath. That means that those facts were prima facie sufficient and were the reasons leading to his satisfaction [86C-D]

(ii) The jurisdiction under s. 145 being of an emergency nature, the Magistrate must 'act with caution but that does not mean that where on an application by one of the parties to the dispute he is satisfied that the requirements of the section 'are existent he cannot initiate proceedings

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without a police report. The other view limits the discretion of the Magistrate and renders the words , other information' in s. 145(1) either superfluous or qualifies them to mean other- information verified by the police. 187D-E]

Phutania v. Emperor, (1924) 25 Cr. L.J. 1109, Ganesh v.

Venkataswara (1964) 2 Cr. L.J. 100 and Raja of Karyentnagar v. Sowcar Lodd Govind Doss, (1906) I.L.R. 29 Mad. 561, disapproved

(iii) The High Court erred in holding that merely because dispossession of the appellant was completed before June 20, 1966, there was no dispute existing on that day which was likely (to lead to breach of peace or that the Magistrate was, therefore, prevented from passing the preliminary order and proceeding thence to continue the enquiry and pass his final order. This reasoning would mean that if a party takes the law into his hands and deprives forcibly and wrongfully the other party of his possession and wrongfully completes his act of dispossession, the party so dispossessed cannot have the benefit of s. 145. as by the time he files his application and the Magistrate passes his order, the dispossession would be complete and therefore, there would be no existing dispute likely to cause a breach of the peace. Such a view does not take into consideration the second proviso to sub-s. (4) which was introduced precisely to meet such cases. [87F-H; 88A]

The word 'dispossessed' -in the second proviso means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise than in due course of law, it would be a case of both forcible and wrongful dispossession. [88 D-

Reading s. 145 as a whole it is clear that even though respondent 1 had taken over possession of the cabin, since that incident took place within the prescribed period of two months next before (the date of the preliminary order, the -appellant was deemed to be in possession on the date of that order and the Magistrate was competent to pass the final order as he did. [89 D]

Edwick v, Hawkes, 18 Ch.D. 199, Jiba v. Chandulal, A.I.R. 1926 Bom. 91, A. N. Shah v. Nageswara Rao, A.I.R. 1947 Mad. 133 and Subarna Sunami v. Kartika Kudal, (1954) I.L.R. Cuttk. 215, applied.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 17 of 1968.

Appeal by special leave from the judgment and order dated August 17, 1967 of the Bombay High Court in Criminal Revision Application No. 668 of 1967.

S. Bhutani and Urmila Kapur, for the appellant. B. R. L. Iyengar and P. C. Bhartari, for the respondents. The Judgment of the Court was delivered by Shelat, J. At all material times respondent I had her office premises in Nawab Building, Fort, Bombay, which consisted of two cabins. On July

10, 1964, she entered into an agreement with the appellant permitting him, to occupy one of the cabins on leave and licence for a period of eleven months. On June 9, 1965, the agreement was extended for a period of eleven months. The appellant's case was that it was further extended for another eleven months as from May 10, 1966 and respondent 1 accordingly accepted Rs. 450 as compensation for May 1966. Respondent I thereafter demanded higher compensation which he refused to pay and thereupon respondent 1 refused to execute the renewal and threatened to eject him forcibly if he did not vacate. His case further was that in the morning of June 11, 1966 respondent 1 broke open the staple of the cabin, removed the door from its hinges, removed all his belongings lying in the cabin and dumped them in the passage outside. She then handed over possession of the cabin to respondents 2 and 3 purporting to do so under an agreement of licence dated June 1, 1966. When he went to the cabin he found the cabin occupied by respondents 2 and 3. On his asking them to place back his belongings and to restore possession to him, the respondents threatened him with dire consequences. He, therefore, went to the police station but the police refused to take action and only recorded his N.C. complaint. From the police station he and his friend, Mahomed Salim returned to the cabin when, on their demanding possession of the cabin, the respondents attacked them. In the course of that attack, the said Salim received injuries. He and the said Salim once again went to the police station but the police again refused to take action and recorded another N.C. complaint and sent Salim to the hospital for examination. Due to the persistent refusal by the police to help him to get back the cabin, the appellant approached higher authorities in consequence of which the police at last recorded a case of assault against respondent 1. They then arrested respondent 1 but released her on bail. Respondent 1, however, kept some persons near the cabin to prevent the appellant from recovering possession. There was, therefore, every likelihood of a breach of the peace had he gone to the cabin to regain possession. In these circumstances he filed an application before the Additional Chief Presidency Magistrate under s. 145 of the Code of Criminal Procedure.

The Magistrate then directed the parties to file affidavits and to adduce such further evidence as they desired. Accordingly, the parties filed affidavits of various persons who had their offices in the same building. The appellant, besides other affidavits, also filed an affidavit of one Nathani, the Manager of his company at whose instance, it was the case of respondent 1, the appellant had agreed to hand over and actually did hand over possession of the cabin in the morning of June 11, 1966. That affidavit, however, did not support respondent 1 but, on the contrary, denied that Nathani had agreed that the appellant could vacate or that the appellant at his instance had agreed to do so.

In her written. statement, respondent I denied that the said licence was renewed a second time in May 1966. Her case was that at the request of the appellant she had permitted him to continue in possession, till May 1966 on his promising to vacate by the end of that month, that on June, 11, 1966, the appellant vacated the cabin, kept his belongings in the passage and thereupon she permitted respondents 2 and 3 to occupy it as, relying on the appellant's promise that he would vacate by the end of May 1966, she had already entered into an agreement of licence on June 1, 1966 with respondent

3. She denied that any incident, as alleged by the appellant, had occurred on that day or that the appellant or the said Salim was assaulted by her or by respondent 2 or 3. She, therefore, denied that

any dispute existed on that day or that there was any likelihood of a breach of the peace. Respondents 2 and 3 also filed their written statements on the lines taken by respondent 1. But after filing them, they did not participate any more in the proceedings as they had since then vacated the said cabin. Possession, therefore, of the cabin since then remained with respondent 1. Respondent 1 in the meantime filed a suit in the City Civil Court and took out a notice of motion for restraining the appellant from, interfering with her possession of the cabin. The Court dismissed the notice of motion refusing to rely on the said agreement.

In the proceedings before the Magistrate the main question was whether the appellant was in actual possession on June 11, 1966 and whether he was forcibly and worngfully dispossessed by respondent 1 or whether he had vacated and surrendered the cabin to respondent 1. After considering the affidavits and the evidence led by the parties, the Magistrate reached the following findings. (1) that respondent 1 started harassing the appellant from the beginning of June 1966 and gave threats to forcibly dispossess him if he did not vacate; (2) that the appellant's version that the respondents had forcibly and wrongfully taken possession of the cabin in the morning of June 11, 1966 was true; and (3) that when the appellant and the said Salim went to the cabin, the respondents manhandled them as a result of which Salim received injuries. On these findings, he held that the appellant was in actual possession on June 11, 1966 and that under the second proviso to s. 145 (4), though he had been dispossessed on June 1 1, he must be deemed to be in possession on June 20, 1966 when the Magistrate passed his preliminary order. By his final order dated' June 22, 1967 passed under sub-s. (6), the Magistrate directed restoration of possession to the appellant till he would be evicted' in due course of law and -prohibited the respondents from interferring with his possession till then.

In the revision before the High Court, the respondents raised two contentions : (1) that the Magistrate, in entertaining the said application and passing the said preliminary order,. misconceived the scope of proceedings under s. 145, and (2) that he had no jurisdiction to pass the said preliminary order as in the events that had happened there was no existing dispute likely to result in a breach of the peace. , The High Court accepted these contentions .and set aside the order of the Magistrate. In doing so, it observed that the object of s. 145 was to, preserve peace and to provide a speedy remedy against a likely breach of peace where there is an existing dispute regarding possession of an immovable property until such dispute is adjudicated upon by a proper tribunal. That section, therefore, can be invoked where these two conditions exist, namely, an existing dispute and an apprehension of breach of peace. The Magistrate, therefore, had to be satisfied as to the existing of these two conditions when he passed the preliminary order. The High Court then observed that assuming that the appellant was forcibly and wrongfully dispossessed and the said Salim was assaulted by respondent 1 and her men, it could not even then necessarily mean that there was an existing dispute relating to possession of the cabin which was likely to cause breach of peace on June 20, 1966 when the Magistrate passed his preliminary order. The acts of respondent I might constitute an offence, for which the appellant had filed a complaint under s. 341 of the Penal Code and the police had arrested respondent 1. and released her on bail, In the light of these facts the Magistrate ought to have held that on that day there did not any longer exist any dispute regarding possession of the said cabin which was likely to lead to a breach of the peace. The High Court, further, observed that the preliminary order did not also record the reasons for the Magistrate's satisfaction as to the two conditions and that all that it stated was that on the facts

stated in the said application, he was satisfied that there was a dispute which was, likely to cause breach of the peace. The High Court also observed that all that the application showed was that there was forcibly dispossession and an attempted assault; that from these two facts it was difficult to see bow, without any further enquiry, the Magistrate could come to the conclusion that there was likelihood of breach of peace unless it was assumed that in every case of a dispute over possession of an immoveable property and forcibly dispossession there would be continuous possibility of breach of peace. The High Court complained that the Magistrate did not call for a police report and simply relied on the bare allegations of an interested party. On this reasoning, it held that the Magistrate had misconceived the scope of proceedings under s. 145 and passed the preliminary order as if it was a process issued by him in a non-cognisable case. The High Court also noted that respondent I had placed respondent (3) in possession, that respondent 3 had remained in possession for nearly a year by the time the Magistrate passed his final order, that the final order would, therefore, affect his vested rights, and that this fact coupled with the fact of the appellants complaint under s. 341 of the Penal Code on June 13, 1966 ought to have been considered by the Magistrate before passing the final order. As aforesaid, the High Court set aside the Magistrate's order whereupon the appellant obtained special leave and filed this appeal challenging the correctness of the High Court's order.

Before proceeding further, we may mention that respondents 2 and 3 had vacated the premises long before the Magistrate passed the final order. There was, therefore, no question of the Magistrate having to consider the question of their having been in possession for about a year or their having any vested rights under the agreement dated June 1, 1966. It may also be recalled that the City Civil Court had refused to rely on the said agreement and to pass an interim injunction restraining the appellant from disturbing the possession of respondent 1.

The object of s. 145, no doubt, is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the court and ascertaining who of them was in actual possession and to maintain status quo until their rights are determined a competent court. The section requires that the Magistrate must be satisfied before initiating proceedings that a dispute, regarding an immoveable property exists and that such dispute is likely to cause breach of peace. But once he is satisfied of these two conditions, the section requires him to pass a preliminary order under sub-s. (1) and thereafter to make an enquiry under sub-s. (4) and pass a final order under sub-s. (6). It is not necessary that at the time of passing the final order the apprehension of breach of peace should continue or -exist. The enquiry under s. 145 is limited to the question as to who was in actual possession on the date of the preliminary order irrespective of the rights of the parties. Under the second proviso, the party who is found to have been forcibly and wrongfully dispossessed within two months next preceding the date of the preliminary order may for the purpose of the enquiry be deemed to have been in possession on the date of that order. The opposite party may of course prove that dispossession took place more than two months next preceding the date of that order and in that case the Magistrate would have to cancel his preliminary order. On the other hand, if he is satisfied that dispossession was both forcible and wrongful and took place within the prescribed period, the party dispossessed would be deemed to be in actual possession on the date of the preliminary order and the Magistrate would then proceed to make his final order directing the dispossessor to restore possession and prohibit him from interfering with that possession until the applicant is evicted in due course of law. This is broadly the scheme of 145.

The satisfaction under sub-s. (1) is of the Magistrate. The question whether on the materials before him, he should initiate proceedings or not is, therefore, in his discretion which, no doubt, ,has to be exercised in accordance with the well recognised rules of law in that behalf. No hard and fast rule can, therefore, be laid down as to the sufficiency of material for his satisfaction. The language of the sub- section is clear and unambiguous that he can .arrive at his satisfaction both from the police report or "from other information" which must include an application by the party dispossessed. The High Court, in the exercise of its revisional jurisdiction, would not go into the question of sufficiency of material which has satisfied the Magistrate. The question is whether the preliminary order passed by the Magistrate was in breach of s. 145(1), that is, in the absence of either of the two conditions precedent. One of the grounds on which the High Court interfered was that the Magistrate failed to record in his preliminary order the reasons for his satisfaction. The section, no doubt, requires him to record reasons. The Magistrate has expressed his satisfaction. on the basis of the facts set out in the application before him and after he had examined the appellant on oath. 'That means that those facts were prima facie sufficient and were the reasons leading to his satisfaction.

The other reason which, according to the High Court, vitiated the order was that the Magistrate acted only on the allegations in the appellant's application without making any further enquiry and issued the order as if he was issuing a process in a N.C. case. But counsel for the respondents conceded that before passing the order the Magistrate had examined the appellant on oath and it -was then only that he made the order recording his satisfaction. But apart from the allegations in the application as to his forcible and wrongful dispossession and assault, there was the fact that on ..June 11, 1966 the appellant had gone twice to the police station, requested the police to take action and had lodged two N.C. complaints. This material being before the Magistrate, it was hardly 'fair to blame the Magistrate that he had passed his preliminary order lightly or without being satisfied as to the existence of the 'two conditions required by the sub-section. Was the High Court next justified in observing that the Magistrate ought to, have got a police report on the allegations made in the application before he passed his said order ? Such a view has been taken in some decisions. In Phutania v. Emperor(1) the view -taken was that it was a safe general rule for a Magistrate to refuse to take action under s. 145 except on a police report and that the .absence of such. a report is almost conclusive indication of the absence of any likelihood of breach of peace. A similar opinion has also been expressed in Ganesh v. Venkataswara(2) where, (1) (1924) 25 Cr.L.J.1109.

(2) (1964) 2 Cr,L.J,100 relying on Raja of Karvetnagar V. Sowcar Lodd Govind Doss(1), the Mysore High Court observed that law and order being the, concern of the police it is but natural that the Magistrate should either be moved by the police or if moved by a private party, he should call for a police report regarding the likelihood of breach of peace. But the High Court of Madras in the case of Raja of Karvetnagar(1), did not lay down any such proposition but merely sounded a note of caution that in the absence of a police report the statements of an interested party should not be relied on without caution and without corroboration. '-the proposition that the Magistrate before proceeding under s. 145 (1) must, as a rule, call for a police report where he is moved by a private party or that the absence of a police report is a sure indication of the absence of possibility of breach of peace, is not warranted by the clear language of the section which permits the Magistrate to initiate proceedings either on the police report or "on other information". The words "other information"

are wide enough to include an application by a private party. The jurisdiction under s. 145 being, no doubt, of an emergency nature, the Magistrate must act with caution but that does not mean that where on an application by one of the parties to the dispute he is satisfied that the requirements of the section are. existent, he cannot initiate proceedings without a police report. The view taken in the aforesaid two decisions unnecessarily and without any warrant from the language of sub-s. (1) limits the- discretion of the Magistrate and renders the words "other information" either superfluous or qualifies them to mean other information verified by the police. In our view, once the Magistrate, having examined the applicant on oath, was satisfied that his application disclosed the existence of the dispute and the likelihood of breach of peace, there was no bar against his acting under s. 145(1).

The next ground for the High Court's interference was that assuming that the appellant was forcibly and wrongfully dispossessed and the said Salim was assaulted, the said dispossession was completed, a complaint of assault was lodged and the police had already taken action before the preliminary order was passed on June 20, 1966. Therefore, it was said, there was no longer any dispute on the date of the order likely to lead to breach of peace and consequently the order did not comply with the requirements of s. 145(1) and was without jurisdiction. This reasoning would mean that if a party takes the, law into his hands and deprives forcibly and wrongfully the other party of his possession and completes his act of dispossession, the party so dispossessed cannot have the benefit of s. 145, as by the time he files his application and the Magistrate passes his order, the dispossession would be complete and, therefore, there would be no existing, dispute likely (1) (1906) I.L.R .29 Mad.561.

to cause breach of peace. Such a construction of S. 145, in our view, is not correct, for it does not take into consideration the second proviso to sub-s. (4) which was introduced precisely to meet such cases. The Magistrate has first to decide who is in actual possession at the date of his preliminary order. If, however, the party in de facto possession is found to have obtained possession by forcibly and wrongfully dispossession the other party within two months next preceding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the dispossessor from interfering with that possession until eviction of that person in due course of law. The proviso is founded on the principle that forcible and wrongful dispossession is not to be recognised under the criminal law. So that it is not possible to say that such an act of dispossession was completed before the date of the order. To say otherwise would mean that if a party who is forcibly and wrongfully dispossessed does not in retaliation take the law into his hands, be should be at disadvantage and cannot have the benefit of s. 145.

The word "dispossessed" in the second proviso means to be out of possession, removed from the premises, ousted, ejected or Excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise than in due course of law, it would be a case of both forcible and wrongful dispossession : (of Edwick v. Hawkes(1) and jiba v. Chandulal) (2). Sub-section (6) of s. 145 in such a case permits the Magistrate to direct restoration of possession with the legal effect that is valid until eviction in due course of law. In Jiba v. Chandulal (2) the High Court of Bombay held that it would be unfair to allow the other party the advantages of his forcible and wrongful possession and the fact that time has elapsed since such dispossession and that the

dispossessor has since then been in possession or has filed a suit for a declaration of title and for injunction restraining disturbance of his possession is no ground for the Magistrate to refuse to pass an order for restoration of possession once he is satisfied that the dispossessed party was in actual or demand possession under the second proviso. Similarly, in A. N. Shah v. Nageswar Rao(") it was held that merely because there has been no further violence after one of the parties had wrongfully and forcibly dispossessed the other it cannot be said that there cannot be breach of peace and that, therefore, proceedings under s. 145 should be dropped. It may be that a party may not take the law in his hands in reply to the other party forcibly and wrongfully dispossessing him. That does not mean that he is not to have the benefit of the remedy under s. 145, The (1) 18 Ch. D. 199. (2) A.I.R. 1926 Bom. 91.

(3) A.I.R.1947 Mad. 133.

second proviso to sub-s. (4-) and sub-s. (6) contemplate not a fugitive act of trespass or interference with the possession of the applicant, the dispossession there referred to is one that amounts to a completed act of forcible and wrongful driving out a party from his possession: (of Subarna Sunami v. Kartika Kudal) (1) It is thus fairly clear that the fact that dispossession of the appellant was a completed act and the appellant had filed a criminal complaint and the police had taken action thereunder do not mean that the Magistrate could not proceed under s. 145 and give direction permissible under sub-s. (6).

In our view, the High Court erred in holding that merely be- cause dispossession of the appellant was completed before June, 20. 1966, there was no dispute existing on that day which was likely to lead to breach of peace or that the Magistrate was, therefore, prevented from passing his preliminary order and proceeding thence to continue the enquiry and pass his final order. In our view, reading s. 145 as a whole, it is clear that even though respondent 1 had taken over possession of the said cabin, since that incident took place within the prescribed period of two months next before the date of the preliminary order, the appellant was deemed to be in possession on the date of that order and the Magistrate was competent to pass the final order directing restoration of possession and restraining respondent 1 from interfering with that possession until the appellant's eviction in due course of law.

We, therefore, allow the appeal, set side the High Court's order and restore that of the Trial Magistrate.

G.C. Appeal allowed.
(1) (1954) I.L.R.Cuttak 215.
L10 Sup. C.I/68-7