

IN THE HIGH COURT OF SINDH
Circuit Court, Hyderabad.

Cr. Misc. Application No.S-182 of 2017

Ch. Azeem Ahmed ----- Applicant

Versus

S.H.O P.S Sanjar Chang
District Tando Allahyar & 17
others ----- Respondents

Date of hearing: 01.03.2019

Mr. Abdul Hameed Bajwa, Advocate for the applicant.
Mr. Shahid Ahmed Shaikh, D.P.G. Sindh.

ORDER

ADNAN-UL-KARIM MEMON, J:- The applicant has assailed the order dated 30.06.2017 passed by the learned Additional Sessions Judge Tando Allahyar, in Criminal Revision Application No.07/2016 preferred against the order dated 08.11.2016 passed by the learned Judicial Magistrate-I, Tando Allahyar in Case No.05 of 2015.

2. The facts of the case in nutshell are that SIP Mohammad Panyal Solangi filed an application under Section 145 Cr.P.C, stating therein that there is a dispute between the parties over agricultural land admeasuring 67-28 acres; that both the parties are claiming ownership of the disputed land and lengthy process of litigation is pending between them; that due to dispute over such land, the crops of wheat and mustered etc. have been ruined and currently crop of sugarcane is cultivated which is in its full swing and despite of pending litigation both the parties are using their head and toe to harvest the crop. On 31.03.2015 both the parties attempted to harvest the crop and became offensive, compelling the police to take precautionary measures to maintain law and order situation as both the parties were very aggressive and there was likelihood of breach of peace and imminent danger due to which human lives were at stake. The matter was brought to the notice of learned Magistrate to take the disputed land into Government custody till the final disposal of litigations over disputed land. Learned Magistrate vide order dated 01.04.2015 by exercising the powers under section 144 Cr.P.C. took over the land into Government

Custody. Learned trial Court on the same day issued notice to the parties wherein deposition of witness No.1 namely Muhammad Paryal was recorded as Ex.1 on 30.01.2016, statement of applicant was recorded as Ex.2 on 31.03.2016 and statement of respondent Abdul Samad was recorded as Ex.3 on 12.04.2016. Thereafter, learned Judicial Magistrate called fresh report from the concerned SHO and passed order dated 08.11.2016 with the observation that possession may be retained by the private respondents. The applicant being aggrieved by and dissatisfied with the aforesaid order filed Criminal Revision Application before learned Additional Sessions Judge, Tando Allahyar which too was dismissed. Petitioner being aggrieved by and dissatisfied with the order dated 08.11.2016 passed by the learned Judicial Magistrate-I, Tando Allahyar in Case No.05 of 2015 and order dated 30.06.2017 passed by the learned Additional Sessions Judge Tando Allahyar, in Criminal Revision Application No.07/2016 filed the instant Criminal Miscellaneous Application.

3. Mr. Abdul Hameed Bajwa, learned counsel for the applicant, has argued that the impugned orders suffer from legal infirmity inasmuch as the learned Judicial Magistrate while deciding the proceeding under Section 145 Cr.P.C skipped from the basic point of jurisdiction vested in him under the law and decided the matter in arbitrary manner without applying his judicial mind; that learned Courts below have committed gross illegality and irregularity while deciding the matter and passed the impugned order without going through the material, application, pleading of the parties, evidence on record as well as reports submitted by the police officials; that learned Courts below violated the provision of Section 144 Cr.P.C although inquiry as to possession was made, statements of witnesses were recorded but same were not considered; that the impugned orders are based upon misreading ad non-reading of evidence; that the applicant approached to the SHO and stated that he is in possession of suit land since 04.12.2012, he cultivated the land and crop of wheat as well as mustard and due to non-performance of contract by the other party, he approached the competent court of law by filling civil suit; that learned trial Court in flimsy manner ordered the private respondents to retain possession and learned Revisional Court maintained the same order without appreciating the evidence and legal aspect of the case; that learned Courts below failed to appreciate the fact that applicant constructed/installed the computerized weight-bridge

over the disputed property after Sale Agreement and same is running at site since 4 years, this fact was not rebutted by the private respondents but said fact has not been taken into consideration by both the Courts below; that learned trial Court failed to take into consideration Rob-Kari No.189 dated 24.7.2015; that learned Court below gave very much weight to the title of disputed land but ignored that title is under consideration before Civil Court as F.C. Suit No.20 of 2014, was pending, private respondent filed application for rejection of plaint and such application was dismissed, the private respondents preferred Civil Revision Application which was allowed and the same order has been challenged through C.P No.D-3392/2016, such matter is still pending before this Court; that learned Courts below ignored that every dispute between the parties claiming possession or ownership of certain property does not give rise to proceeding under Section 145 Cr.P.C unless the same is genuinely and reasonably apprehended to lead to breach of peace. He lastly prayed for setting aside the orders passed by the learned Courts below. In support of his contentions he has relied upon case law reported as PLD 2007 Supreme Court 189 (Chaudhary Munir versus Mst. Surriya and others), 2004 SCMR 667 (Saleem-ur-Rehman versus Faqir Hussain and others), PLD 2003 Lahore 683 (Fazal Hussain versus Asad Abbas and others) and PLD 2004 Peshawar 87 (Abdur Razaq and 3 others versus The State and 2 others).

4. Mr. Shahid Ahmed Shaikh, learned Deputy Prosecutor General, submits that learned courts below have rightly passed the impugned orders and there is no illegality in the orders. He prays for dismissal of the instant Application.

5. I have heard the parties and perused both the judgments of courts below, which are impugned in this Application. Before I proceed to record my finding on merits, it is relevant to have a glance on the powers of Magistrate to deal with the preset issue. Section 144 to 148 Cr.P.C deal with the absolute powers of Magistrate to issue certain orders in urgent cases of nuisance or apprehended danger. Section 145 Cr.P.C Provides complete mechanism with regard to dispute concerning land, etc., which is likely to cause breach of peace. An excerpt of Section 146(1) Cr.P.C is reproduced as under:-

"Power to attach subject of dispute and to appoint receiver-

(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 such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute. "

6. From the bare reading of aforesaid provisions, it is clear that in a case of emergency, the Magistrate can pass an order if he is satisfied that there exists an apprehension of breach of peace as it has been done in the instant case. The Magistrate while passing the order dated 08.11.2016 has recorded his satisfaction on the basis of police report that there are no chances of criminal breach of peace in respect of the disputed land and has, therefore, no other option but to pass an order in this regard as discussed in his order. The proviso to Section 146(6) Cr.P.C. clothes the Magistrate with jurisdiction to order for retaining the property by any of the parties in last possession if he is satisfied that there is no longer any apprehension of breach of peace with regard to the subject matter of dispute. It is, therefore, evident that while passing the impugned order, learned Magistrate has clearly recorded his satisfaction that no apprehension of breach of peace exists and in the circumstances, he exercised powers under the proviso of Section 146(6) Cr.P.C. and also recorded a finding that there is no likelihood of breach of peace. The subjective satisfaction was arrived at by the learned Magistrate after taking into consideration all the aspects and after hearing the parties and decided that private respondents in the present proceedings, who are not in attendance despite of service of notice, were in physical possession of the said disputed land and entitled to retain possession until ousted by due course of law, and restrained them from any disturbance of their possession in the meantime.

7. I have gone through the order passed by learned Additional Sessions Judge, who has dismissed the revision by a well reasoned judgment. The learned Magistrate is fully empowered to order for handing over possession of the property to the real owners who were actually in possession at the relevant time if he comes to a conclusion that there is no apprehension of breach of peace and does not warrant attachment of property in dispute any

more. An excerpt of order dated 08.11.2016 passed by learned 1st Civil Judge and Judicial Magistrate Tando Allahyar is reproduced as under:-

“9. Perusal of evidence recorded by this court gone through the documents and reports available on record so far and after hearing the applicant as well as both parties and their counsels. I have come to conclusion that it was party No 2 who was in possession of Disputed Land on the date of passing of preliminary order dated 01.04.2015 or two months before such order, as applicant neither produce any document to show his possession over the Disputed Land nor he could produce any witnesses before the undersigned at the time of inquiry/hearing to show that party No 1 was in possession of the same. Although counsel for the Applicant and party No1 in rebuttal to arguments of counsel for party No 2 had submitted that fresh report from S.H.O. may be called and he may be called upon to record statements of area persons but I am not inclined with such submission as under Section 145(4) Cr.P.C. it is the Magistrate who has to make inquiry and not S.H.O. Applicant did not bring forward any of the witnesses nor made prayer for summoning of any witness in terms of Section 145(9) Cr.P.C. to show the possession of party No 1. On the other hand, party No 2 have placed on record series of documents, which firstly show that party No 2 is in possession of whole land admeasuring about 67 to 28 acres including therein Disputed Land. Perusal of police report dated 01.04.2015 shows that not only crop of wheat and Mustard belongs to party No 2 were destroyed, crop of sugar cane belongs to party No 2 was existing in ripen form, Applicant himself had admitted before this court that series of litigation is pending between the parties no 1 and 2 Moreover he also admitted that he was unaware regarding the possession of suit land at the time of filling application under section 145 Cr.P.C but farmers of party No 2 were busy in cutting of sugarcane crop, Moreover the Roobkari report is also submitted by the Mukhtirkar Taluka chambar wherein he recorded the statements of two notables of locality they stated that party no1 had purchased some piece of land from few shareholders on the basis of power of attorney and possession of land in question is also lying with the party No 1. Moreover as per the roobkari report computerized kanta is also installed at land in question at almost 10 Ghuntas is also belongs to party no 1 but no documentary proof viz photograph is produced before this court at the time of evidence, Furthermore the Tapedar of area also reported that due to dispute over land in question police were also deployed in such land for some time but currently crop of sugar cane is standing at some area of land but due to non-availability of water instant crop has ruined, however it is admitted that no party is paying the cess or water tax, he also contended that civil litigation is also pending between the parties and revenue record does not recognize the agreement on the basis of power of attorney etc and there is no such entry available in revenue record regarding the agreement on the basis of power of attorney. Whereas during evidence party No2 denied the fact regarding the purchase of land by the

party no 1 from one Yousif Ali, he also denied the fact party No 1 is cultivating the land, moreover he also admitted that there is no apprehension of danger or fight on the land. Moreover he deposed that instant crop of sugarcane standing on land is grown by him. Furthermore he denied that kanta is installed on land in question belongs to party No 1. Lastly he deposed that party No 1 in connivance with the applicant/SHO had filed instant application and restrained the party no 2 to take away their crop. He also deposed that he moved many applications to police officers regarding harassment by the party No 1 but police is reluctant to take action against them. He deposed that land in question is in his possession and he used to visit the same but party No 1 is restraining them to cultivate such land due to pendency of civil litigation.

10. In the light of above facts and circumstances it is hereby declared and ordered in terms of Section 145(6) Cr.P.C. that it appeared to me, on the grounds duly recorded in preliminary order dated 01.04.2015 that a there is no dispute, likely to induce a breach of the peace existed between Parties concerning Disputed Land situated within local limits of my jurisdiction; all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said Disputed Land, and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to legal right of possession, that the claim of actual possession by the party No 2 is true;

I do decide and declare, that party no 2 was in possession of the said Disputed Land and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of their possession in the meantime.”

8. I have given careful consideration to the arguments advanced by counsel for the Applicant and learned D.P.G, and also gone through the record. I am not in agreement with the submission of Mr. Bajwa that the impugned orders suffer from legal procedure provided by the Code. The learned Magistrate has rightly passed the order for handing over possession of the property to the real owners who were in possession at the relevant time as there was no apprehension of breach of peace on the subject land. Perusal of the both orders explicitly show that the entire matter was thrashed out after hearing both the parties and the aforesaid order was passed only after the Magistrate was satisfied that there is no likelihood of breach of peace. The Revisional Court has also discussed the entire matter in detail while concurring with the view of learned Magistrate and there appears no illegality in the impugned orders. The relevant portion of order

dated 30.06.2017 passed by learned Additional Sessions Judge, Tando Allahyar is reproduced as under:-

“From perusal of the record, it appears that private respondents have produced several documents in support of their claim that they are in possession of the land in question. It is pertinent to mention here that in the report of SHO it is crystal clear that on 31.03.2015 the private respondents started cutting of sugar cane crop due to that the applicant became offensive. The applicant has not produced any oral as well as documentary evidence in support of his claim that he remained in possession of the land in question. It is settled law that sale agreement would not create any title or vested right in favour of Vendee. It is worthy to mention here that the said sale agreement was not executed by the owner of the land in question. The applicant is claiming the possession over the land in question on the basis of sale agreement but the same was found to be bogus and his plaint was rejected.

The applicant neither produced any witness nor produced any documentary evidence to show that he remained in possession of the disputed land.

In these circumstances, there is no illegality or irregularity in the impugned order passed by learned Magistrate-1, Tando Allahyar. I have respectfully gone through the case law cited by learned counsel for applicant, but facts and circumstances of the present case as discussed above are different and distinguishable.

In view of above facts and discussion, I come to the conclusion that instant criminal revision merits no consideration and same is dismissed.”

9. From the perusal of record it also appears that on 25.01.2014 present Applicant & another filed F.C. Suit No.20 of 2014 for Specific Performance of Contract & Permanent Injunction regarding abovementioned property. In the said proceedings defendants filed an application under Order VII Rule 11 CPC which was dismissed by learned 1st Senior Civil Judge, Tando Allahyar vide order dated 26.03.2016 with following observations:-

“Reverting to the case-in-hand it cannot be said that plaint does not disclose the cause of action. Even otherwise plaint can only be rejected in piecemeal, where even one prayer was maintainable plaint could not be rejected U/O 7 Rule XI CPC. Reliance may be placed on PLD 2008-Karachi page 458, 2004 MLD page 1081, PLD 2009-Karachi page 38. Further reliance may be placed on a case law reported in

2013-CLC page 1641, the matter will be decided after examination of all necessary witnesses of both sides accordingly, at this stage matter can't be decided as the plaintiff has shown the cause of action for the suit and after filing the suit defendants have filed written statements and no any oral or documentary evidence have been recorded by both party, hence, present application U/O 7 Rule 11 CPC merit no consideration and same is hereby dismissed with no order as to cost accordingly.”

10. The said defendants assailed the aforesaid order by filing Civil Revision No.24 of 2016 which was allowed by learned Additional District Judge, Tando Allahyar vide order dated 07.11.2016 on the premise that the reports and documents produced by Sub-Registrar that the applicants/defendants No. 5 to 19 have not executed general power of attorney in favour of Yousif Ali Khan, therefore Yousif Ali Khan was not competent to execute sale agreement in favour of plaintiffs/respondents No. 1 and 2. Hence the plaintiffs/ respondents No 1& 2 have no cause of action to file the suit. An excerpt of the order is reproduced as under:-

“From perusal of above documents, it is crystal clear that the applicant/defendants No. 5 to 19 did not execute Register General power of attorney in favour of defendant No. 20, namely Yousif Ali Khan s/o Liaqat Ali Khan. The reports and the documents produced by Sub-Registrar are very important and legally sufficient to completely refute the claim of the plaintiffs. The documents produced by Sub-Registrar cannot be ignored and court cannot shut eyes.

Since it has been brought on record through the reports and documents produced by Sub-Registrar that the applicants/defendants No. 5 to 19 have not executed general power of attorney in favour of Yousif Ali Khan, therefore Yousif Ali Khan was not competent to execute sale agreement in favour of plaintiffs/respondents No. 1 and 2. Hence the plaintiffs/respondents No 1& 2 have no cause of action to file the suit.

In the light of above discussion the above revision application is allowed and the order of learned Senior Civil Judge Tando Allahyar dated 26.03.2016 is set-a-aside and the plaint of plaintiffs/respondents No. 1 and 2 rejected under order V11 R 11 CPC.”

11. The applicant being aggrieved by and dissatisfied with the aforesaid order filed C.P. No.D-3392 of 2016 before this court which is still pending.

12. The case law cited by learned counsel for the applicant are quite distinguishable from the present case.

13. For the reasons discussed above, I do not find it a fit case for interference under Section 561-A Cr.P.C. The impugned orders are absolutely legal and do not call for any interference. The Application is accordingly rejected.

JUDGE

Irfan Ali