

PETITIONER:
R.C. PATUCK

Vs.

RESPONDENT:
FATIMA A. KINDASA & ORS.

DATE OF JUDGMENT: 06/05/1997

BENCH:
S.B. MAJMUDAR, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:
Present:

Hon'ble Mr. Justice S.B. Majmudar

Hon'ble Mr. Justice Jagannadha Rao

Soli J. Sorabji and J.G. Shah, Sr. Advs., M.D. Adkar, S.D. Singh, R. Sathyanarayanan and Manoj K. Singh, Advs. with them for the Petitioner

Shivaji M. Jadhav, Adv. (NP) for the Respondent

J U D G M E N T

The following Judgment of the Court was delivered:

M. JAGANNADHA RAO, J.

This special leave petition has been filed by the petitioner against the Judgment of the High Court of Bombay dated 9.7.1996 dismissing the writ petition (criminal) No. 540/1996. The High Court refused to quash the order of the learned Chief Metropolitan Magistrate. 4th Court, Girgaum dated 26.4.1996. The Learned Chief Metropolitan Magistrate dismissed the application of the petitioner filed under Section 145 of the Code as Criminal Procedure on the ground that even as per the case of the petitioner, she was out of possession for a period more than two months before the date of the preliminary order of the magistrate dated 16.3.1993 passed under Section 145(1). The Court pointed out that as per the case of the petitioner, she had been out of possession from November 1992 and, therefore, she could not take advantage of the proviso to sub-clause (4) of Section 145. This order is challenged in this Special leave petition.

The brief facts of the case are as follows:

The petitioner is aged 75 years and is staying in one half of a house comprising 2500 sq. ft. in Malabar Hills. Bombay. She says that the first respondent approached her in November, 1991 for temporary accommodation to stay for two or three months. Subsequently, the second respondent, who is said to be the husband of the 1st respondent joined her and both of them were not willing to vacate premises i.e. the 2500 Sq. ft. on the ground floor of the house. Petitioner is in possession of the remaining 2500 sq. ft. It is the specific case of the petitioner that in the second week of November, 1992 when the petitioner was out of Station for sometime, the respondents Nos. 1 and 2 with the help of some

other persons constructed a cement wall in the suit premises and divided the ground floor consisting of 5000 Sq ft into half and half and that this amounted of illegal occupation of 2500 Sq. ft., i.e. One half of the property, by the respondents Nos. 1 and 2. It is stated that on 21/22.2.1993 the respondents threatened the petitioner with dire consequences and, therefore, petitioner gave a complaint to the Inspector of police, Gamdevi, Bombay on 26.2.1993. Thereafter the petitioner filed an application under Section 145 of the Cr.P.C. on 9.5.1993 before the learned Metropolitan Magistrate, 14th Court, Girgaum seeking restoration of possession of the of 2500 Sq. ft. on the ground floor.

The petitioner also refers to the filing of a civil suit for declaration and injunction, namely, RAD No. 346/1992 by the respondents claiming tenancy rights on the basis of alleged tenancy agreement and cheques on which the signatures of the petitioner were allegedly forged. It is stated that the Court granted an interim order initially in favour of the respondents but ultimately the same was vacated and the said order was confirmed in appeal holding that there was no prima facie proof of tenancy. It is also stated that in that case the documents relied upon by the second respondent were held to be prima facie forged documents. The petitioner also states that a complaint was made by the petitioner against the respondents for cheating and a case was registered and writ petition bearing No. 973/1993 dated 27.5.1992 was filed by the respondents for quashing the same.

It is also stated by the petitioner that respondent filed criminal application No. 973/1993 on 27.7.1993 for quashing the section 145 criminal proceedings launched by the petitioner but the said writ petition was dismissed. It appears that at the request launched proceedings against the respondents under the Maharashtra Vexatious Litigation (Prevention) Act, 1971 and the High Court of Bombay, after noticing that the respondents were illegally and forcibly occupying several premises and were instituting various proceedings, came to the conclusion that the said proceedings started by the respondents were vexatious and that they should not be permitted to initiate fresh proceedings, except with the sanction of the Advocate General. It is also stated that respondents made an application to the Metropolitan Magistrate for dropping of Section 145 proceedings and the said application was rejected on 25.4.1995. Respondents filed a revision before the Session Court bearing No. 189/1995, and the same was dismissed on 7.7.1995. It is said that the respondents filed writ petition No. 1050/1995 challenging the order dated 7.7.1995 and 25.4.1995 and the same was also dismissed by the High Court on 8.12.1995.

It was at that juncture that the learned Magistrate took up the Section 145 proceedings launched by the petitioner and dismissed the same on 26.4.1996 on the ground that the petitioner even as per her own case was out of possession for more than two month before the passing of the preliminary order dated 16.3.1993 under sub-clause (1) of Section 145. Against the order of the learned Chief Metropolitan Magistrate dated 26.4.1996 the petitioner filed writ petition bearing No. 540/1996 before the High Court of Bombay and the same was dismissed on 7.7.1996 holding that the petitioner was not in possession for more than two months before the date of passing of preliminary order under Section 145(1) on 16.3.1992. It is against this order of the High Court dated 9.7.12996 that this special leave petition

has been filed.

Notice was issued to the respondents in the special leave petition and notice was served and at one time Mr. S.M. Jadhav appeared for the first respondent. Separate notice was taken to the second respondent and was served on 9.9.1996. The matter was finally heard on 23.4.1997. Even on that day Mr. S.M. Jadhav, counsel for the first respondent did not appear nor was there any representation for the second respondent.

Learned senior counsel for the petitioner, Mr. Soli J. Sorabjee, contended that the orders passed by the Chief Metropolitan Magistrate dated 26.4.1996 and the further orders passed by the High Court on 9.7.1996 were liable to be set aside as the possession of the respondents was a continuing wrong. He also contended that this was a hard case in which an old lady aged about 75 years was being victimised by the respondents who were in the habit of illegally occupying various premises in Bombay and that in exercise of the powers of this Court under Article 842 of the Constitution of India. This Court could grant relief in spite of the fact that the dispossession was more than 2 months next before the preliminary order under Section 145(1).

So far as the first submission of learned counsel is concerned, it may be stated that as found by the learned Chief Metropolitan Magistrate in his order dated 26.4.1996 there was an earlier complaint lodged by the petitioner before the concerned police authorities at Bombay wherein she admitted that the first respondent was in illegal occupation even from 17.3.1992. In any event the subsequent complaint filed by the petitioner before the police authorities on 26.2.1993 showed that the respondents had constructed a temporary wall. Even earlier the petitioner had made a complaint to the Bombay Municipal corporation on 12.11.1992 in regard to the same, and therefore the dispossession, at any rate, was there by 12.11.1992. It is, therefore, clear that prima facie the alleged unauthorised occupation or construction of the wall was there atleast from November, 1992. It is, therefore, clear that prima facie the alleged unauthorised occupation or construction of the wall was there atleast from November, 1992. If not earlier. If that be so, the said occupation is clearly for a period in excess of 2 months next before the date of the preliminary order dated 16.3.1993 passed under Section 145(1) of the Cr. P.C. In this connection it is necessary to refer to the provisions of sub-clauses (1) to (4) of Section 145, Cr. P.C.

"145. Procedure where dispute concerning land or water is likely to cause breach of peace.- (1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, 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 in person or by pleader, on a specified date and time, and to put in written statements of their

respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this Section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land. and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct. and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute. peruse the statements so put in, hear the 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."

It will be seen from the facts stated above that the order under Section 145(1) was passed by the learned Magistrate on 16.3.1993. The question is whether the magistrate could have passed any order in favour of the petitioner under Sub-section (4) of Section 145. Going by the main sub-clause (4) of Section 145 it is clear that the Magistrate could initially decide who was in possession as on the date when the order under Section 145(1) was passed on 16.3.1993. In cases where the proviso to the said sub-clause (4) applied, that is, if it appeared to the Magistrate that any party had 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), the Magistrate might treat the party so dispossessed as if the said party had been in possession on the date of his order under sub-section (1). In other words, if the conditions mentioned in the proviso to sub-section (4) were satisfied, the Magistrate could deem a person to be in possession as on the date of the order under Section 145(1) notwithstanding the fact that he was not in fact in possession on that date. but lost possession earlier, Within two months next before the order. In this case unfortunately there is no material to show that any report of a police office or other information was received by the Magistrate within the period contemplated by the proviso. On the other hand, petitioner's admissions show that she lost possession much before the period mentioned in the said proviso.

We are, therefore, of the view that both the learned Chief Metropolitan Magistrate and the High Court were right in coming to the conclusion that no order for restoration of

possession could be passed in favour of the petitioner under Section 145 of the Cr. P.C. A contention was then raised that as the dispossession of the petitioner was continuing, and it amounted to a continuing wrong and, therefore, the proviso to sub-clause (4) must be deemed to be satisfied. We are afraid that such a contention based on continuance of dispossession. cannot be accepted.

The next question is whether the petitioner is to be granted relief in exercise of the powers of this Court under Article 142 of the Constitution of India. Learned counsel for the petitioner strongly relied upon the judgment of this Court in Union Carbide Corporation vs. Union of India (1991 (4) SCC 584) for submitting that the prohibitions or limitations contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers of this Court under Article 142. The following passage in the said judgment was referred to :

"The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such Prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law. taking into account the nature and status of the authority or the court on which conferment of powers- limited in some appropriate way - is contemplated. The limitations may not necessarily reflect, or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney General, referring to Garg case, said that limitation on the powers under Article 142 arising from "inconsistency with express statutory provisions of substantive law" must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression 'prohibition' is read in place of 'provision' that would perhaps convey the appropriate idea. But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy art not merely incidental to a particular statutory scheme or pattern. It will again be wholly incorrect to say that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provisions. Perhaps, the proper way of expressing the idea is that in exercising the idea

is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly. The proposition does not relate but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."

Relying upon the aforesaid passage, learned senior counsel contended at the limitation of two months in the proviso to Sub-clause (4) of Section 145 would not come in the way for this Court while exercising powers under Article 142 far granting possession to the petitioner even though the dispossession of the petitioner was for a period in excess of two months next before the date of the preliminary order passed under Section 145 (1). It will be seen that even according to the petitioner, she permitted the first respondent in December, 1991 temporarily occupy 2500 sq. ft. in the ground floor of the premises. Subsequently the first respondent did not vacate and on the other hand, the 1st respondent allowed the second respondent to occupy the property claiming that he was her husband and thereafter they constructed a wall dividing the said portion from the other portion occupied by the petitioner. On these facts we do not find any social circumstances which are different from ordinary cases where a person permits a licensee or a tenant to occupy the premises and upon termination of the licensee or the lease, the licensee or the tenant, as the case may be, does not vacate the premises or makes some constriction on the property. No doubt the petitioner is an old lady of 75 years and there is some material to show that the respondents 1 and 2 have been indulging in similar litigations in Bombay. But that in our opinion is not sufficient to persuade us to exercise powers under Article 142 of the Constitution of India. The petitioner has adequate remedies under the law for recovery of possession. For the aforesaid reasons this special leave petition is dismissed.