

**IN THE COURT OF THE SESSIONS JUDGE : SONITPUR
AT TEZPUR**

**PRESENT : Sri A. Borthakur
Sessions Judge
Sonitpur, Tezpur**

CRIMINAL REVISION NO. 21 (S-2) OF 2012

(Revision against the preliminary orders dated 29-02-2012 u/s 144 CrPC and dated 18-04-2012 u/s 145/146(1) passed by Sri Kushal Bora, ACS, learned Additional Deputy Commissioner, Sonitpur, Tezpur in connection with Misc. Case No. 6/145/146/2012)

1. Sri Girindra Baruah

Son of Late Padmanath Bharali
Resident of Gharpora Chuburi, Tezpur
Mouza - Bhairabpad
PS – Tezpur
Dist – Sonitpur, Assam

2. Sri Tapan Barhoi @ Nipul Barhoi

Son of Late Suklal Barhoi
Resident of Lane No.5, Rubber Bagan
PS – Tezpur
Dist – Sonitpur, Assam

.... **OP / Petitioners**

VERSUS

1. Sri Nalini Kumar Baruah

Son of Late Kushal Ch. Bharali

2. Sri Lakhi Prasad Baruah

Son of Late Kushal Ch. Bharali

3. Sri Nipen Chandra Baruah

Son of Late Kushal Ch. Bharali

All are residents of Baruah Chuburi
Mouza - Mahabhairab
PS – Tezpur
Dist – Sonitpur, Assam

4. State of Assam

Represented by Public Prosecutor
Tezpur, District – Sonitpur, Assam

... **Petitioners / OP**

ADVOCATES WHO APPEARED IN THIS CASE

For the petitioners : **Sri S. Mishra
Advocate**

For the Opposite Parties : **Sri D. Bose
Advocate**

Date of Argument : **08-08-2012 &
22-08-2012**

Date of Judgment : **31-08-2012**

J U D G M E N T

This revision petition u/s 397/399 CrPC has been preferred against the preliminary orders, u/s 144 CrPC, dated 29-02-2012 and dated 18-04-2012 u/s 145/146(1) CrPC, passed, in Misc. Case No. 6/145/146/2012, by the Court of learned Additional District Magistrate, Sonitpur at Tezpur.

The facts, in brief, giving rise to the instant criminal revision petition, may be stated as follows –

The OP-revision petitioner No.1 Sri Girindra Baruah, herein, has been in peaceful possession of a plot of land measuring 5 bigha 2 katha 2 lessa, covered by Dag No.5 of PP No.10 of Tezpur Town, 4th part, Mouza- Mahabhairab by constructing his house and structures thereon. A civil suit being Title Suit No.40/2001 has been pending between the parties in the Court of the learned Munsiff at Tezpur, in respect of the said plot of disputed land. The petitioners –OP No. 1,2 and 3 previously filed a petition for attachment of the land, being Misc. Case No. 11/145/146/09. The preliminary order passed in the said proceeding by the learned Additional District Magistrate, Sonitpur was set aside by the learned Additional Sessions Judge, Sonitpur at Tezpur, vide order, dated 21-07-2011, passed, in Crl. Revision

No.49 (S-3) of 2009. The learned Additional District Magistrate, Sonitpur, by his order, dated 29-02-2012, passed a preliminary order u/s 144 CrPC prohibiting entry of both the parties into the disputed land noting therein, that "the Court is totally at confusion regarding its course of action" without referring to the question, whether there is existence of any apprehension of breach of public peace and tranquility. The learned Additional District Magistrate, Sonitpur by order, dated 18-04-2012, passed the preliminary order drawing proceeding u/s 145 CrPC and passed further order for attachment of the disputed land u/s 146 CrPC. Hence, it is prayed to set aside the impugned orders, aforementioned.

Now, the instant revision petition has been preferred basically on the following grounds –

(i) That since civil suit, being Title Suit No.40/2001, is pending in respect of the disputed land between the parties, no proceeding u/s 145 CrPC can be drawn up ;

(ii) That the dispute being purely private in nature, the civil court alone can resolve the matter in dispute ; and

(iii) That the impugned preliminary order is not based on materials on record ;

I have heard the argument advanced by the learned counsel for both the sides and have gone through the connected case records of Misc. Case No. 6/145/146/2012.

POINT FOR DETERMINATION :

Whether the impugned preliminary orders, dated 29-02-2012, u/s 144 CrPC and dated 18-04-2012, u/s 145(1)/146(1) CrPC, passed, by the learned Additional District Magistrate, Sonitpur, Tezpur, in Misc. Case No. 6 /

145 / 146 / 2012, are liable to be set aside, on the grounds, mentioned in the revision petition ?

THE DECISION AND THE REASONS THEREFOR :

Legal positions :

SECTION 144 CrPC

Section 144 CrPC provides that in cases, where in the opinion of a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding u/s 144 CrPC and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case, direct any person to abstain from a certain act or to take certain order with respect to a certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquility or a riot or an affray. Except in emergency situations, a notice is required to be served upon the person against whom the order is directed to show cause, before the order is passed. **The order u/s 144 CrPC does not remain in force for more than two months from the date of making the order, unless** the State Government considers it necessary in the interest of preventing danger to human life, health or safety or for preventing a riot or an affray, it may by notification extend the period of such order by a period not exceeding six months from the date of the order.

SECTIONS 145(1)/146(1)CrPC

It may further be mentioned that the Executive Magistrate, before invoking Section 145 (1) CrPC, (i) it must be satisfied as to existence of a dispute likely to cause a breach of peace concerning land or water ; (ii) pass an order in writing; (iii) the order must state the ground of being satisfied ; (iv) the order must require the parties to attend the Court on a specified date

and time and put in written statement as to **actual possession** of the subject matter of the dispute ; and (v) the subject matter of the dispute has to be described in the order. Possession referred to in section 145 CrPC is actual and exclusive possession of the subject matter. After issuing preliminary order and after serving copy of the order, passed under Section 145(1) CrPC, the Magistrate is required to receive all such evidence as may be produced by the parties and take such other evidence, if any, as he may think necessary. A final order, therefore, cannot be passed under Section 145(6) CrPC, unless he can decide which party was in possession on the date of conditional order. If he is unable to decide that question, he can make an order of attachment under Section 146(1) CrPC. However, under Section 145 (5) CrPC, the Magistrate at any time before a final order is passed under Section 145 (6) CrPC, cancel the conditional order as soon as he is satisfied that no such dispute likely to cause breach of peace exists. On the other hand, as per section 146 CrPC, the Magistrate, in a proceeding u/s 145 CrPC, may issue interim order of attachment at any time after passing an order u/s 145(1) CrPC, when it appears to him (i) to be a case of emergency ; (ii) if he decides that none of the parties was in actual possession or (iii) if he is unable to satisfy himself as to which of them was then in possession of the subject matter of dispute.

ORDER U/S 144 CrPC :

On scrutiny of the record of Misc. Case No. 6/145/146 / 2012, it transpires that based on a petition, dated 29-02-2012, filed by the petitioners-OP, herein, the learned Additional District Magistrate, Sonitpur, by the impugned order, dated 29-02-2012, had drawn up a proceeding u/s 144 CrPC prohibiting entry into the disputed land, described in the schedule, on the ground that during the pendency of Title Suit No. 40/2001, before the Court of the learned Munsiff, Tezpur and based on another alleged petition filed by the OP-revision petitioners, herein, under the pretext of seeking police protection, they had allegedly erected fencing covering a

good portion of boundary of the disputed land and further, that "the Court is totally at confusion regarding its course of action". By the said impugned order, the learned Additional District Magistrate directed the O/C, Tezpur Police Station, to make a detail enquiry on both the petitions and also sought for a report from the Circle Officer (Revenue) concerned after 'spot survey'. As stated earlier, a prohibitory order u/s 144 CrPC remains in force for not more than two months from the date of the order unless, in the meantime, extended by Government through official notification for a further period not exceeding six months. Therefore, without going into the details of foundation of the impugned order, passed under Section 144 CrPC, aforementioned, it can be said that in view of expiry of the prescribed period of validity of two months, in the meantime, from the date of the said order, dated 29-02-2012, the same is held infructuous.

ORDER U/S 145 (1) /146 (1) CrPC :

Turning to the second impugned order, dated 18-04-2012, passed u/s 145(1)/146 (1) CrPC, it transpires that the said preliminary order, has been passed, after perusal of the petition, dated 29-02-2012, filed by the petitioners-OP, herein, and the police report which showed that the disputed land is a joint property of both the parties and the OP-revision petitioner No.1 executed a Power of Attorney in favour of the OP-revision petitioner No.2 which led to development of dispute over exercise of force to occupy the land, between the parties evoking a threat to public peace and tranquility in the locality. Hence, on being satisfied and with a view to prevent breach of public peace and tranquility arising out of question of possession of the disputed land, directed to draw up a proceeding u/s 145(1) CrPC and put the disputed land under attachment u/s 146(1) CrPC restraining both the parties from entering into the disputed land until further order u/s 146(1) fixing 18-05-2012 for appearance of parties and filing written statement.

On perusal of the copy of the plaint of the Title Suit No.40/2001, it reveals that the OP-revision petitioner, herein, and others have instituted the suit against the petitioners-OP, herein, praying for declaration of right, title and interest over their share in the suit land, for confirmation of possession and for issuance of a precept for effecting partition of the share, specifically described in Schedule 'B' out of Schedule 'A' land. On perusal of the schedules of the said suit land and the disputed land involved in 145 CrPC proceeding, it appears that the subject matter in the proceeding u/s 145 CrPC, covers the same patta land which is in dispute before the Civil Court and as such, being a parallel proceeding, the appropriate remedy for the dispute over the possession of the disputed land certainly lies before the Civil Court. In **Sushma Rani Das & 2 Ors -Vs- Ashutosh Das [(1990) 2 GLR 215]**, the Hon'ble Gauhati High Court held that drawing up a proceeding u/s 145 CrPC is barred when there is already civil dispute pending over the same subject matter.

Apart from the above, it may be reiterated that OP-revision petitioners, herein, had preferred another revision petition being Criminal Revision No. 49 (S-3) 2009 against the order, dated 15-06-2009, passed by the learned Additional District Magistrate, Sonitpur, Tezpur drawing up proceeding u/s 145/146 CrPC, and the same was set aside by the learned Additional Sessions Judge, Sonitpur, Tezpur, vide judgment and order, dated 21-07-2011, holding that Title Suit No.40/2001 was going on between both the parties regarding the same subject matter and as such, there is no scope for allowing the proceeding u/s 145 CrPC.

Considered thus, the impugned orders, drawing up of the proceeding u/s 145(1)/146(1) CrPC, were without jurisdiction and illegal.

FINDING

In the result, the revision succeeds and the impugned order, dated 29-02-2012 passed u/s 144 CrPC is held infructuous

and impugned preliminary order, dated 18-04-2012, u/s 145(1)/146(1) CrPC, are held without jurisdiction and illegal.

Send back the record of Misc. Case No. 6/145/146 / 2012 along with a copy of this judgment.

Given under my Hand and Seal of this Court on this 31st day of August, 2012

(A. BORTHAKUR)
SESSIONS JUDGE
SONITPUR : TEZPUR

Typed to my dictation and corrected by me, and each page bears my signature:

(A. BORTHAKUR)
SESSIONS JUDGE,
SONITPUR :: TEZPUR

Typed by me,
on dictation :

(J.K. Muru, Steno)

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