GAHC010061852021

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./239/2021

1. MD. OSMAN ALI SAIKIA AND ANR
S/O LATE NOOR MAHAMOD, R/O VILL-NAGAON, P.S.-BAIHATA CHARIALI, DIST-KAMRUP, ASSAM, PIN-781381

2: HARUN SAIKIA
S/O MD. OSMAN ALI SAIKIA
R/O VILL-NAGAON
P.S.-BAIHATA CHARIALI
DIST-KAMRUP
ASSAM
PIN-78138

VERSUS

1. CHAND MAHAMOD SAIKIA AND 2 ORS
S/O LATE NUR MAHAMOD ALI, R/O VILL-NAGAON, P.S.-BAIHATA CHARIALI, DIST-KAMRUP, ASSAM, PIN-781381

2:SAHJAHAN SAIKIA
S/O LATE LAL MAHAMOD SAIKIA
R/O VILL-NAGAON
P.S.-BAIHATA CHARIALI
DIST-KAMRUP
ASSAM
PIN-781381

3:STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR
ASSAM

Advocate for the Petitioner (s) : Mr. D. Kalita , Advocate

Advocate for the Respondent (s) : Mr. D. Das, Advocate (R. 1 and R.2)
Mr. D. Das, Additional Public Prosecutor (R.3)

Date of Judgment **: 08.11.2023**

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA
JUDGMENT

(Mridul Kumar Kalita, J)

1. Heard Mr. D. Kalita, learned counsel for the petitioner. Also heard Mr. D. Das, learned counsel for the respondent Nos.1 and 2 and Mr. D. Das, learned Additional Public Prosecutor appearing for the respondent No.3.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 has been preferred by the petitioners, namely, (1) Md. Osman Ali Saikia, and (2) Harun Saikia impugning the order dated 04.09.2020 passed by learned Executive Magistrate, Rangia in Case No.53/2020 drawing up the proceeding under Section 145 of the Code of Criminal Procedure, 1973 as well as order dated 09.11.2020 of the Executive Magistrate, Rangia directing the attachment of land of the petitioners under Section 146 (1) of the Code of Criminal Procedure, 1973.

3. The facts relevant for consideration of the instant criminal petition, in brief, are as follows: -

a. The petitioners and the respondents are related to each other.

They inherited 17 bigha 12 lecha of land, from common ancestor. Though, in the year 1972 a partition deed was executed between the parties, however, no partition by metes and bounds was done between the parties. The petitioner No.1, as plaintiff, instituted a suit in respect of a plot of land measuring 2 katha 3 lecha covered by Dag no. 1634 of KP Patta no. 144 of village Nagaon, Mouza, Karara Police Station Baihata Chariali under Kamalpur Revenue Circle. The said plot of land is the part of the ancestral land measuring 17 bigha 12 lecha, which comprised of several dags. The petitioner prayed for relief of declaration of their right, title and interest and also for partition of their aforementioned ancestral land.

b. The respondents contested the suit by filing their written statement and also their counterclaim. The aforesaid suit was registered as Title Suit No. 25/2011. The Court of learned Munsif, Rangia decreed the suit and dismissed the counterclaim of the respondent and directed the Deputy Commissioner, Kamrup, to partition the suit land by meets and bounds. However, the respondents preferred an appeal before the Court of learned Civil Judge, Kamrup, which was registered as Title Appeal No. 06/2017 and by judgment and ordered dated 09.11.2018, the learned Appellate Court of Civil Judge, Kamrup set aside the judgment of learned Munsiff, Rangia on the ground of non-maintainability of a suit for partition of a land which has already been partitioned. Though, the judgment of the Trial Court was set aside by the First Appellate Court of Civil Judge, Kamrup in Title Appeal No. 06/2017, however, learned First Appellate Court observed that the

petitioner No.1 (plaintiff) has the right, title and interest over the suit land and it also upheld the decision of learned Trial Court with regard to the counterclaim of the respondents, which was dismissed by learned Trial Court.

c. Thus, by the judgment dated 09.11.2018 passed in Title Appeal No. 06/2017, though, it was observed that the present petitioner No. 1 has the right, title and interest over the suit land, however, no relief was granted to the present petitioner. It is also pertinent to mention herein that no further appeal was preferred by any of the parties against the said judgment passed by learned First Appellate Court in Title Appeal No.06/2017.

d. Thereafter, on 22.04.2020, the respondents filed a complaint before the Officer-in-Charge of Baihata Police Station, *inter-alia*, alleging that in the year 1972, the petitioner No. 1 and his 3 sons dispossessed the respondent from the land, measuring 2 katha 3 lecha covered by Dag no. 1634 under KP Patta no. 144, though the said land was partitioned. It was also stated in the said complaint that in the title appeal instituted by the respondent, the Court of learned Civil Judge, Kamrup has upheld the partition, however, the petitioners have not given the plot of land to the respondent and now they are trying to build a house thereon.

e. On receipt of the said complaint, the Baihata police registered a non-FIR case, bearing case No. 21/2020 under Sections 107/144/145/146(1) of the Code of Criminal Procedure, 1973 and

forwarded it along with a police report to learned Executive Magistrate, Rangia, who on receipt of the said report, drew up a proceeding under Section 145 of the Code of Criminal Procedure, 1973 and issued notice to the other side, i.e, the petitioner side and the case was fixed on 29.09.2020. Thereafter, it was fixed on 21.10.2020 and 23.11.2020. However, it is stated by the petitioner that on 09.11.2020, the learned Executive Magistrate, Rangia passed an order of attachment in respect of the land of the petitioner over which the petitioner was having possession (measuring 2 katha 3 lecha). Said order of attachment was passed on the basis of a petition filed by the respondents, and no hearing was afforded to the petitioner side.

f. On coming to know about the attachment order, on 09.12.2020, the petitioners filed a petition bearing No. 234 dated 09.12.2020 before the learned Executive Magistrate, Rangia praying for withdrawal of the order of attachment dated 09.11.2020, on the ground that the petitioner No. 1 had installed water pump and had several trees in the aforesaid plot of land and which is also surrounded by boundary fencing and due to attachment order, the petitioner has been put to undue hardship.

4. Mr. D. Kalita, learned counsel for the petitioner, has submitted that the order dated 04.09.2020 of the learned Executive Magistrate, Rangia, by which the proceeding under Section 145 of the Code of Criminal Procedure, 1973 was drawn up, which is also impugned in this proceeding, is illegal. Further, the order of attachment passed on 09.11.2020 was also illegal and an abuse of the

process of law. Learned counsel for the petitioner has submitted that in the complaint filed by the respondents before the Baihata Police Station on the basis of which the proceeding under Section 145 of the Code of Criminal Procedure, 1973 was drawn up, it is categorically stated that it is the petitioner who possessed the suit land in the 1972. It is further submitted that the right, title and interest of the petitioner over the suit land has also been re-affirmed by both the learned Trial Court as well as learned Appellate Court in the suit, which was preferred by the petitioner No.1. Learned counsel for the petitioner has also submitted that an Executive Magistrate can invoke jurisdiction under Section 145 of the Code of Criminal Procedure, 1973 only after he satisfies himself regarding existence of two conditions, namely, (i) there is a dispute concerning immovable property, and (ii) that there is likelihood of breach of peace for such dispute. Learned counsel for the petitioner has submitted that as regards the dispute is concerned, it is admitted by both the parties that there is a private civil dispute between the parties for which they also had rounds of civil litigation. However, learned counsel for the petitioner submits that there is no material on record as regards the likelihood of breach of peace for such dispute as there is nothing in the police report, on the basis of which the proceeding was drawn up to indicate that there is any likelihood of breach of peace in connection with the dispute between the parties. Further, learned counsel for the petitioner has also submitted that the condition precedent which should exist before an order of attachment under section 146 (1) of the Code of Criminal Procedure, 1973 may be passed does not exist in the instant case.

5. Learned counsel for the petitioner has submitted that the order of attachment of the disputed land was passed by learned Executive Magistrate on

the basis of a petition filed by the respondents praying for attachment of the land. However, no opportunity was afforded to the present petitioners to respond to the said petition and the order of attachment was passed *ex-parte*. Learned counsel for the petitioners has submitted that an ex-parte order of attachment under Section 146 (1) of the Code of Criminal Procedure, 1973 may only be passed in exceptional circumstances where the preconditions mentioned in section 146 (1) of the Code of Criminal Procedure, 1973 exists, however, it is submitted that in the instant case, the impugned order of attachment dated 09.11.2022 failed to explain as to what emergency situation existed, which necessitated the passing of attachment order at the back of the present petitioners, though, there was an observation of learned Trial Court, as well as learned Appellate Court in the civil suit filed by the present petitioner that the present petitioner has right, title and interest over the suit land, and in the same civil proceedings, the counterclaim of the respondents were dismissed.

In support of his submissions, learned counsel for the petitioners has cited a ruling of this court in "***Kaushal Mishra and others vs. Raj Kumar Mishra"*** reported in "***2007 (4) GLT 889",*** wherein it was observed as follows:

> "***8. The provisions, contained in Sub-section (1) of Section 145, show that the source of information for the purpose of drawing a proceeding under Sub-section (1) of Section 145 is not material; what is material is that the Executive Magistrate must be satisfied about existence of a dispute as envisaged in Section 145(1) and must assign the grounds of his being so satisfied. This apart, the dispute must relate to a land, water or boundary thereof and the dispute must be such, which is likely to cause breach of the peace. The expression "breach of***

the peace' does not really mean mental peace of the parties concerned. Disturbance of public order is distinct from actions of the individuals, which do not disturb the society to the extent of vibrating a general disturbance of the even tempo of life of the community in a given locality. When a party, illegality or forcibly, occupies land of another, people, in general, or even neighbours of such a party may be shocked and mentally disturbed, but life of the community may still move keeping pace with the even tempo of the life of the community. If, by such act of dispossession, even tempo of the life of the community is disturbed or jeopardized, it may become a case of disturbance of public order and tranquility. The acts of a private party, which affect personal rights of another party, do not disturb the even tempo of the society, for, such feuds are private feuds. Basis of jurisdiction under Section 145(1) is a dispute, which is likely to cause a breach of the peace. It is not a breach of mental peace of the parties to apprehend danger of breach of peace in the locality. Ordinarily, a person dispossessed from his land shall sue for recovery of the immovable property under the provisions of the Specific Relief Act and if there is a threat of his dispossession, he should institute a suit to obtain injunction. These are ordinarily forum for establishing rights of the litigants. A proceeding under Section 145 is, therefore, an extra-ordinary provision to grant extra-ordinary relief, when there is likelihood of breach of the peace in a given locality. The final order of the Magistrate is subject to the decision of the Civil Court. It is, therefore, clear that private dispute between two persons, which does not disturb law and order or occasion breach of the peace in the locality, the forum for getting relief is the Civil Court of competent jurisdiction and

not an Executive Magistrate's Court. In Ram Sumer Puri Mahant v. State of U.P. , the Apex Court has discouraged drawing of proceedings under Section 145 as far as possible. In fact, Ram Sumer Puri Mahant (supra) lays down that a Magistrate should initiate a proceeding under Section 145 only when the essential elements of the provisions contained in Section 145 are found to be present in a given case.

9. What emerges from the above discussion is that exercise of power under Section 145(1) cannot be arbitrary and the provisions of Section 145 cannot be invoked unless the conditions precedent prescribed therein are available. Coupled with this, what also needs to be noted is that an order of attachment can be passed by an Executive Magistrate in exercise of his powers under Sub-section (1) of Section 146 if upon drawing a proceeding under Sub-section (1) of Section 145, the Magistrate considers the case to be one of emergency. This position of law is not, in fact, in dispute. That an order of attachment under Section 146(1) is an interlocutory order is, in fact, not in dispute. Thus, an order of attachment cannot be made unless there is a proceeding under Section 145 is pending. An order of attachment under Section 146(1) is inherently temporary in nature as the order may be withdrawn at any time by the Magistrate if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute. An order, under Section 146(1), is nothing, but a step-in-aid in the pending proceeding under Section 145. An order of attachment is, thus, neither a final order nor a quasi final order. In fact, by attachment, the subject of dispute becomes

custodia legis. (See Deokuer v. Sheo Prasad). Since an order of attachment is revocable at any stage of the proceeding, it becomes inherently temporary in nature and is, therefore, regarded as an interlocutory order. (See Indrapuri Primary Co-operative Housing Society Ltd. and Anr. v. Sri Bhabani Gogoi reported in (1991) 1 GLR 28.

10. When a Magistrate draws a proceeding under Section 145(1), the order, drawing the proceeding, is commonly known as preliminary order. Since there is no provision for conversion of the proceeding from one under Section 144 to 145 Cr.P.C., the order of conversion is nothing, but as already indicated above, a preliminary order. This order, therefore, must reveal that the conditions precedent for drawing of a proceeding under Section 145 stands satisfied. In the present case, the order of conversion of the proceeding does not disclose the grounds of satisfaction of the learned Magistrate nor does this order disclose as to why the dispute was treated to be a dispute, which was likely to cause breach of the peace.

11. Coupled with the above, the dispute in the present case, as indicated above, is out and out a private dispute inasmuch as the dispute did not involve anyone other than the parties to the proceeding and the members of the general public were neither affected nor were they shown to be interested in the dispute. Considered thus, the learned Magistrate had no jurisdiction in the matter and could not have drawn a proceeding under Section 145. This aspect of the matter appears to have totally escaped the notice of the learned revisional Court.

> ***12. What emerges from the above discussion is that the preliminary order drawing proceeding was without jurisdiction and illegal. When the foundation of the proceeding is without jurisdiction, the question of making declaration of possession in favour of the parties to the proceeding and/or affirming such declaration by the revisional Court does not arise at all. Viewed thus, it is clear that the impugned order, dated 08.08.2007, dismissing the revision and upholding the order, dated 22.12.2006, cannot be sustained."***

6. Learned counsel for the petitioner has also cited ruling of this Court in "***Safique Ali vs. Surjan Bibi"*** reported in "***2004 (Supp) GLT 263***". Learned counsel for the petitioner has also cited a ruling of Hon'ble Apex Court in "***Ashok Kumar vs. State of Uttarakhand and others"*** reported in "***(2013)3 SCC 366"***, wherein it was observed as follows:

> "***6. We are of the view that the SDM has not properly appreciated the scope of Sections 145 and 146(1), Cr.P.C. The object of Section 145, Cr.P.C. is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of enquiry under Section 145 is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute.***
>
> ***9. The above order would indicate that the SDM has, in our view, wrongly invoked the powers under Section 146(1), Cr.P.C. Under Section 146(1), a Magistrate can pass an order***

of attachment of the subject of dispute if it be a case of emergency, or if he decides that none of the parties was in such possession, or he cannot decide as to which of them was in possession.

Sections 145 and 146 of the Criminal Procedure Code together constitute a scheme for the resolution of a situation where there is a likelihood of a breach of the peace and Section 146 cannot be separated from Section 145, Cr.P.C. It can only be read in the context of Section 145, Cr.P.C. If after the enquiry under Section 145 of the Code, the Magistrate is of the opinion that none of the parties was in actual possession of the subject of dispute at the time of the order passed under Section 145(1) or is unable to decide which of the parties was in such possession, he may attach the subject of dispute, until a competent court has determined the right of the parties thereto with regard to the person entitled to possession thereof.

10. The ingredients necessary for passing an order under Section 145 (1) of the Code would not automatically attract for the attachment of the property. Under Section 146, a Magistrate has to satisfy himself as to whether emergency exists before he passes an order of attachment. A case of emergency, as contemplated under Section 146 of the Code, has to be distinguished from a mere case of apprehension of breach of the peace. The Magistrate, before passing an order under Section 146, must explain the circumstances why he thinks it to be a case of emergency. In other words, to infer a situation of emergency, there must be a material on record

before Magistrate when the submission of the parties filed, documents produced or evidence adduced.

11. We find from this case there is nothing to show that an emergency exists so as to invoke Section 146(1) and to attach the property in question. A case of emergency, as per Section 146 of the Code has to be distinguished from a mere case of apprehension of breach of peace. When the reports indicate that one of the parties is in possession, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency. The order acknowledges the fact that Ashok Kumar has started construction in the property in question, therefore, possession of property is with the appellant – Ashok Kumar, whether it is legal or not, is not for the SDM to decide."

7. Learned counsel for the petitioner has also cited a ruling of Hon'ble Apex Court in "***Ramsunder Puri Mahant vs. State of U.P. and others"*** reported in "***AIR 1985 SC 472",*** wherein it was observed as follows:

"***When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification for initiating a parallel criminal proceeding under section 145 of the code. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the Criminal Court in a matter like the one before us. The learned counsel for respondent no. 2 to 5 was not in a position to challenge the proposition that parallel proceedings should not be permitted to continue, and in the event of a decree of a civil court, the Criminal Court should not be allowed***

to invoke its jurisdiction, particularly when possession is being examined by the civil court and parties are in a position to approach civil court for interim orders, such as injunction or appointment of receivers, or adequate protection of property during pendency of the dispute."

8. On the other hand, Mr. D Das, learned counsel for respondent Nos. 2 and 3 has submitted that the suit land fell within the share of the respondents as per the partition deed which was executed between the parties in the year 1972. It is also submitted by learned counsel for the respondents that the judgment of learned Trial Court which was passed on 24.08.2017 in Title Suit No. 25/2011 was set aside in the Title Appeal No. 06/2017 by the judgment of Learned Appellate Court i.e. Civil Judge, Kamrup dated 09.11.2018, whereby the petitioner No. 1 who was the plaintiff in the Title Suit No. 25/2011 was denied any relief in the suit filed by him. It is also submitted by learned counsel for the respondents that the respondents were cultivating the land for all these years and the police report submitted in Non-FIR Case No. 21/2020 by the Sub-Inspector of Baihata Police Station, by one Jeevan Chandra Sarkar, Sub-Inspector of Baihata Police Station on 25.04.2020 clearly shows that the petitioner tried to obstruct the land and the reports suggested prohibiting both the parties from entering into the land.

9. Learned counsel for the respondents also submitted that due to the existing dispute between the parties and after the passing of judgment by the Appellate Court of Civil Judge, Kamrup in Title Appeal No. 06/2017, the petitioner tried to make constructions over the disputed plot of land, which created a situation of emergency and as such the learned Executive Magistrate,

Rangia acted well within his jurisdiction in ordering the attachment of the disputed land on the ground of emergency as there was an apprehension of imminent breach of peace due to the dispute between the parties.

10. In support of the submissions made by him, Mr. D. Das, learned counsel for the respondents, cited a ruling of the Patna High Court in "***Bäijnath Choubey and Others vs. Dr. Ram Ekbal Choubey and Ors.",*** reported in "***1981 (29) BLJR 530",*** wherein it was observed as follows:

> "***12. It would thus appear that it is not the use of the word emergency which gives jurisdiction to the Magistrate for attaching the land rather it is the existence of the emergency which gives the jurisdiction and where the word 'emergency' has not been used the order can be referred to for finding if an emergency really existed. If the word emergency has been used but the order does not indicate that any emergency really existed the order of attachment on the ground of emergency cannot be supported. A second look at the order in question quoted at pages 3 and 4 would, therefore, be necessary to examine if it discloses any apprehension of imminent breach of peace. In the second paragraph of the order it has been mentioned that there was immediate serious apprehension of breach of peace, and unless steps were taken disturbance to the public peace and tranquillity was bound to take place and possible blood-shed could not be averted. The third paragraph of the impugned order shows the Magistrate's satisfaction that there was "immediate apprehension of breach of peace between the members of the first party and that of the second party" In the 7th paragraph***

of the order while attaching the land the Magistrate has again said that it was necessary for conserving peace and saving the standing crops. Now if a composite order under Sections 145(1) and 146(1) is permissible in law (as held by Full Bench in the case of Gaya Singh) the whole order should be considered for finding out if the case for attachment is made out or not. It should not be necessary to say in the first part of the order that there is apprehension of breach of peace for drawing up a proceeding under Section 145 and in the second part of the order repeating the same thing and adding that the danger is imminent, for attaching the land. If, therefore, in first part of the order itself it has been said that a danger is imminent it is sufficient both for drawing up the proceeding and for attaching the land. At the risk of repetition, I may say that if the Magistrate has omitted the use of the word 'emergency' that by itself will not vitiate the attachment if the order otherwise discloses the emergency. Needless to say that the satisfaction of the Magistrate is always subjective satisfaction and it can not be substituted by the satisfaction of any superior Court. I have also not been called upon by the parties to examine this aspect of the order. I would, therefore, find the order of attachment to be legal and with jurisdiction."

11. Learned counsel for the respondents has submitted that under the facts and circumstances of the present case, Learned Executive Magistrate, Rangia has rightly attached the disputed land under Section 146 (1) of the Code of Criminal Procedure, 1973 and hence, the application filed by the petitioners for setting aside the impugned order of drawing up of proceeding under Section 145(1) of the Code of Criminal Procedure, 1973 as well as attachment of the

disputed land under Section 146 (1) of the Code of Criminal Procedure, 1973 is liable to be set aside.

12. I have considered the submissions made by Learned Counsel for both the parties and also have gone through the materials available on record including the case record of case No. 53/2020 under Section 145/146 of the Code of Criminal Procedure, 1973, which was called for in connection with this case from the office of Learned Sub-Divisional Officer (C), Rangia in connection with this case.

13. For the sake of convenience, the impugned order dated 04.9.2020 by learned Executive Magistrate, Rangia by which the proceeding under Section 145 of the Code of Criminal Procedure, 1973 was drawn up is quoted herein below:

> "***Received the case record on transfer. Seen the petition of the 1st party along with the police report. There is serious apprehension of breach of the peace between the parties over the possession of the D/L. Hence a proceeding U/S 145 Cr.P.C can be drawn up directing both the parties to appear before the court on the date along with relevant documents in support of their respective claims. Serve notice to both the parties.***
> ***Date fixed- 29/09/2020"***

14. Section 145 (1) of the Code of Criminal Procedure, 1973 provides as follows:

> "***(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."

15. In "**Kaushal Mishra and others" (Supra),** this Court has observed as follows:

"***7. A close analysis of the provisions of Section 145 shows that the Magistrate is empowered to try a proceeding under Sub-section (1) of Section 145 if he is satisfied from a report of a police officer or upon other information that a dispute likely to cause breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction. A careful reading of Section 145(1) also shows that on receipt of report or information as aforementioned, the Magistrate shall make an order, in writing, stating the grounds of his being so satisfied and requiring the parties concerned, in the 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."***

16. It was further observed in the case of "Kaushal Mishra and others" (Supra) as follows:

"***8. The provisions, contained in Sub-section (1) of Section 145, show that the source of information for the purpose of drawing a proceeding under Sub-section (1) of Section 145 is not material; what is material is that the Executive Magistrate must be satisfied about existence of a dispute as envisaged in Section 145(1) and must assign the grounds of his being so satisfied. This apart, the dispute must relate to a land, water or boundary thereof and the dispute must be such, which is likely to cause breach of the peace. The expression "breach of the peace' does not really mean mental peace of the parties concerned. Disturbance of public order is distinct from actions of the individuals, which do not disturb the society to the extent of vibrating a general disturbance of the even tempo of life of the community in a given locality. When a party, illegality or forcibly, occupies land of another, people, in general, or even neighbours of such a party may be shocked and mentally disturbed, but life of the community may still move keeping pace with the even tempo of the life of the community. If, by such act of dispossession, even tempo of the life of the community is disturbed or jeopardized, it may become a case of disturbance of public order and tranquility. The acts of a private party, which affect personal rights of another party, do not disturb the even tempo of the society, for, such feuds are private feuds. Basis of jurisdiction under Section 145(1) is a dispute, which is likely to cause a breach of the peace. It is not a breach of mental peace of the parties to apprehend danger of breach of peace in the locality. Ordinarily, a person dispossessed from his land shall sue for recovery of the immovable property under the provisions of the Specific Relief Act and if there is a threat of his dispossession, he should institute a suit to obtain injunction.***

These are ordinarily forum for establishing rights of the litigants. A proceeding under Section 145 is, therefore, an extra-ordinary provision to grant extra-ordinary relief, when there is likelihood of breach of the peace in a given locality. The final order of the Magistrate is subject to the decision of the Civil Court. It is, therefore, clear that private dispute between two persons, which does not disturb law and order or occasion breach of the peace in the locality, the forum for getting relief is the Civil Court of competent jurisdiction and not an Executive Magistrate's Court. In Ram Sumer PuriMahant v. State of U.P. , the Apex Court has discouraged drawing of proceedings under Section 145 as far as possible. In fact, Ram Sumer Puri Mahant (supra) lays down that a Magistrate should initiate a proceeding under Section 145 only when the essential elements of the provisions contained in Section 145 are found to be present in a given case.""

17. Thus, what is evident from above that before drawing up a proceeding under Section 145 (1) of the Code of Criminal Procedure, 1973, is that the learned Executive Magistrate must be satisfied not only about existence of a dispute as envisaged under Section 145 (1) of the Code of Criminal Procedure, 1973, but also he must come to a finding that the dispute must be of such a nature which is likely to cause breach of peace and this breach of peace is distinct from the private dispute between two parties which does not disturb the public order. The act of alleged dispossession by one of the party must result into breach of peace of such a nature that the even tempo of the life of the community is disturbed. There must be material to show that due to the dispute between the party, there is a likelihood of breach of peace in a given locality and

it may disturb the public order and tranquility.

18. As seen herein above, Hon'ble Apex Court has discouraged drawing up proceeding under Section 145 of the Code of Criminal Procedure, 1973 unless the elements of provisions contained in Section 145 of the Code of Criminal Procedure, 1973 are found to be present in a given case.

19. In the instant case apart from the fact that the present petitioner and respondent had pursued civil litigation in which, though the suit of the present petitioner was dismissed, it was observed by both the Trial Court as well as the Appellate Court that the petitioner No. 1 has the right, title and interest over the suit property/disputed land. It also appears from the complaint which was filed by the respondent on the basis of which the proceeding under section 145 of the Code of Criminal Procedure, 1973 was drawn up that in the said complaint itself it has been categorically stated that the present petitioner took possession of disputed land in the year 1972 itself. Moreover, though in the impugned order dated 04.09.2020 learned Executive Magistrate, Rangia has mentioned that there is serious apprehension of breach of peace between the parties over possession of disputed land, however, in the police report dated 25.04.2020, on the basis of which the proceeding under Section 145 of the Code of Criminal Procedure, 1973 was drawn up, there is no mention about any apprehension of breach of peace. Rather, what appears that the police report had mentioned about the existence of dispute which is there between the parties and the police officer who submitted the report instead of reporting about the facts in detail has suggested that the parties may be prohibited from entering into the land. However, why such a suggestion has been made by the officer, submitting the

report dated 25.04.2020, has not been mentioned in detail in his report. Mere existence of a civil dispute between the parties, in itself, cannot be a ground to draw a proceeding under Section 145 of the Code of Criminal Procedure, 1973 unless and until the conditions precedent prescribed in Section 145 (1) of the Code of Criminal Procedure, 1973 are present in a given case.

20. In the instant case, the complaint filed by the respondents on 22.04.2020 before the officer-in-charge of Baihata Police Station, which was one of the documents on the basis of which the police report was submitted before learned Executive Magistrate, Rangia on the basis of which the impugned order dated 04.09.2020 was passed, itself mentions that the petitioner Osman Ali Saikia and his three sons occupied the disputed land in the year 1972 itself.

21. It also appears that the petitioners when tried to construct a house on the said land, the respondent filed the complaint to the police of Baihata Police Station, wherein they made a prayer for giving the possession of the land to the respondent by police help, which is impermissible in law as admittedly the possession of the disputed land is with the petitioner since 1972, which is evident from the language used in the complaint lodged by the respondent before Baihata Police Station on 22.04.2020.

22. On bare perusal of the complaint dated 22.04.2020, filed by the respondent to the Officer-in-Charge of Baihata Police Station, it appears that in the said complaint there is no allegation or not a whisper about the apprehension of breach of peace by the present petitioner. Rather, said complaint appears to be an application to the police for recovery of possession of the disputed land from the petitioner to the respondents.

23. When there is a clear admission about the possession of the disputed land by the petitioner No.1 and his sons since 1972, the possession of the same cannot be recovered by the respondent with the help of the police without any order of the Civil Court and the proceeding under Section 145 of the Code of Criminal Procedure, 1973 cannot be clandestinely used by the respondents to recover the possession of the land from the petitioner which is admittedly with them since 1972.

24. In a proceeding under section 145 of the Code of Criminal Procedure, 1973, the Magistrate has to find out as to whether a 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 has been received by the Magistrate. However, in the instant case in the complaint filed to the police itself, it has been categorically stated by the respondents themselves that the petitioner no. 1 and his three sons took possession of the disputed land in the year 1972 itself and they have prayed for recovery of the said possession by filing the complaint to the Baihata Police Station as the suit filed by the petitioner has been dismissed by the first appellate court.

25. From the above facts, it is clear that though there is a dispute between the respondents and the petitioners as regards the 2 katha and 3 lecha of land is concerned, however, this dispute appears to be a private dispute between two parties and there is nothing on record to show that it has disturbed the law and order or has occasioned breach of peace in the locality and the appropriate forum for the respondent for getting relief is the Civil Court of Competent Jurisdiction and not by invoking the jurisdiction of Executive Magistrate's Court

under Section 145 of the Code of Criminal Procedure, 1973.

26. The impugned order dated 04.0902020 by which the proceeding under Section 145 of the Code of Criminal Procedure, 1973 was drawn up apart from reciting the phrase that there is a serious apprehension of breach of peace between the parties over the possession of disputed land, does not make it clear as to on what basis learned Magistrate came to such a finding as neither the police report nor the complaint filed by the respondent before the police mentions anything about breach of peace in the locality due to the existence of the private dispute between the parties.

27. Similarly, on mere perusal of the impugned order dated 09.11.2020 passed by learned Executive Magistrate, Rangia under Section 146 of the Code of Criminal Procedure, 1973, it appears that it has been observed by the learned Executive Magistrate that both the parties are trying to occupy the disputed plot of land and emergent situation can take place between the parties over the disputed plot of land and therefore the order of attachment under Section 146 (1) of the Code of Criminal Procedure, 1973 was passed by learned Magistrate. If we go through the provision of Section 146 (1) of the Code of Criminal Procedure, 1973, it appears that out of the three circumstances under which an order of attachment may be passed by learned Magistrate, one such circumstance is that the Magistrate considers the case to be of emergency. The learned Executive Magistrate in the instant case without affording an opportunity to the petitioner after going through the petition filed by the respondent had observed that an emergent situation can take place between the parties, however, he has not clarified while making such an order as to why

he is of the opinion that an emergent situation can take place between the parties.

28. As observed by Hon'ble Apex Court in ***Ashok Kumar vs. State of Uttarakhand (Supra)*** a case of emergency as contemplated under Section 146 of the Code of Criminal Procedure, 1973 has to be distinguished from a mere case of apprehension of breach of peace. The Magistrate before passing an order under Section 146 of the Code of Criminal Procedure, 1973 must explain the circumstances why he thinks it to be a case of emergency.

29. In other words, to infer a situation of emergency there must be materials on record before the Magistrate. However, in the instant case, apart from the petition filed by the respondent there was nothing before the learned Magistrate to show that an emergency existed so as to invoke Section 146 (1) of the Code of Criminal Procedure, 1973 and to attach the land in question. When the respondents have categorically stated that the petitioners were in possession since 1972, rightly or wrongly, the Magistrate cannot pass an order of attachment on the ground of emergency without explaining as to what emergency exist. It is not for the learned Executive Magistrate to decide as to whether the possession of the petitioners over disputed land is right or wrong in the proceeding under Section 145 of the Code of Criminal Procedure, 1973 when such possession since 1972 is admitted by the respondents themselves.

30. This Court is, therefore, of the considered opinion that both the impugned order passed by the learned Executive Magistrates in drawing up the proceeding under Section 145 (1) of the Code of Criminal Procedure, 1973 and also issuing the order of attaching of the disputed land Section 146 (1) of the

Code of Criminal Procedure, 1973 suffers from non-application of mind and jurisdictional error and has resulted in gross injustice to the present petitioner.

31. In view of the above, the impugned order dated 04.09.2020 as well as 09.11.2020 passed in case No. 53/2020 by the learned Executive Magistrate, Rangia are hereby quashed and this criminal petition is accordingly allowed.

32. Send back the LCR.

JUDGE

Comparing Assistant