1934

FAZAL MOHAMMAD KHAN v. MOHAMMAD HABIB

Srivastava and Ziaul Hasan, JJ.

necessarily involved in and incidental to a suit under section 127. Section 135 of the Oudh Rent Act lays down that the provisions of the Code of Civil Procedure, 1908, shall, so far as they are not inconsistent with the provisions of this Act, apply to all suits and other proceedings under this Act but as we have shown that owing to the provisions of section 113 of the Act, an Assistant Collector of the second class is not empowered to try suits for determination of rent or for ejectment of the defendants, it cannot be said that according to section 15 of the Code of Civil Procedure the present suit should have been filed in the Court of the Assistant Collector of the second class.

We therefore allow this appeal with costs and setting aside the order of remand passed by the learned Judge of this Court restore the decree of the learned District Judge.

Appeal allowed.

MISCELLANEOUS CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

1934

December 11

MUSAMMAT MAKHANA DEVI (OPPOSITE-PARTY-APPLICANT) *v.* KAMLA PAT RAM (COMPLAINANT-OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), section 145—Scope and object—Pendency of proceedings under section 145—Suit in Civil Court—Appointment of receiver by civil court—No danger of breach of peace—Criminal Procedure Code (Act V of 1898), section 561A—Unnecessary and useless proceedings under section 145, Criminal Procedure Code, Court's inherent power to drop.

The object of proceedings under section 145, Criminal Procedure Code, is to prevent breach of peace. Mere institution of a suit in the Civil Court pending proceedings under section 145, Criminal Procedure Code, would not, by itself, be sufficient to justify the dropping of those proceedings, if there is danger of breach of peace which can best be averted by summary proceedings under the section. But, if the Civil Court appoints a receiver and the danger of a breach of peace is removed, there

*Criminal Miscellaneous Application No. 151 of 1934, against the order of Mr. T. C. Jaini, Special Magistrate 1st class, Lucknow, for quashing the proceedings pending in his Court.

is no need for continuing such proceedings and they should be dropped.

Where proceedings under section 145, Criminal Procedure Code, have become wholly useless and unnecessary it is an eminently fit case for the exercise by the Court of its inherent powers under section 561A, Criminal Procedure Code, in order to put a stop to such proceedings. To allow them to continue would be a sheer abuse of the process of the Court, which section 561A was clearly intended to prevent.

Messrs. *Hardhian Chander* and *Durga Dayal*, for the applicant.

Opposite party absent.

Mr. *A. N. Mulla*, for Railway Magistrate.

SRIVASTAVA, J.:—This is an application by one Musammat Makhana Devi under section 561-A of the Code of Criminal Procedure praying that the proceedings under section 145 of the Code of Criminal Procedure pending in the lower Court be quashed. The circumstances which have led to the making of the present application are briefly these:

On the 11th of August, 1934, the opposite party Kamlapat Ram made an application to the City Magistrate of Lucknow praying that in the interests of the maintenance of peace Pandit Sheo Dulare Tewari, son of the applicant, and Gajadhar Prasad Tewari and Chandrika Prasad Tewari, grandsons of the applicant, should be restrained from entering a house in respect of which there was a dispute between the parties. On the 14th of August, 1934, the City Magistrate decided to treat the application as one under section 145 of the Code of Criminal Procedure, and transferred it to the Court of the Special Railway Magistrate. In the course of those proceedings, on the 31st of August, 1934, the Railway Magistrate being of opinion that there was serious danger of the breach of peace put the house in dispute in possession of the police. Subsequently on the 3rd of October, 1934, he also ordered the applicant to be made a party to the proceedings. In the meantime the applicant had filed a declaratory suit in the Court of the Subordinate Judge of Lucknow for a

1934

MUSAMMAT MAKHANA DEVI v. KAMLA PAT RAM

declaration that she was the owner and in possession of the house in dispute. An application was made to the Magistrate on the 1st of October, 1934, for stay of proceedings pending the decision of the civil suit, but it was rejected on the 3rd of October, 1934. It is admitted that since the passing of this order the Subordinate Judge has appointed a receiver to take possession of the house in question and has directed him to let out the house on rent and to deposit the rent realized in a bank.

Srivastava, J.

The applicant, Musammat Makhana Devi, is the mother of the late Pandit Sheo Narain Tewari, who was a Subordinate Judge in Oudh, and died in July, 1934. The opposite party Kamlapat Ram, who initiated the proceedings in the criminal court by the application, dated the 11th of August, 1934, is the brother of the widow of Pandit Sheo Narain Tewari. The house in dispute was purchased in the name of Musammat Makhana Devi. Pandit Sheo Narain Tewari has left a will bequeathing the whole of his personal property in favour of his widow. In this will he claimed a lien over the house in dispute to the extent of Rs.8,000 spent by him with the permission of his mother and other members of the family in the repairs of the house and has made a devise of this lien also to his widow. The will also states that Musammat Makhana Devi had executed a will in respect of the house in favour of her four sons.

It appears that after the death of Pandit Sheo Narain Tewari disputes have arisen in the family as regards the ownership and possession of the aforesaid house. The object of proceedings under section 145 is to prevent the breach of peace. The question is whether after the institution of the declaratory suit by the applicant in the Court of the Subordinate Judge Lucknow and after the order passed by the Subordinate Judge appointing a receiver, there is any need for continuing those proceedings. It is obvious that the question of title

1934

MUSAMMAT MAKHANA DEVI v. KAMLA PAT RAM

Srivastava, J.

can be finally determined only by the civil court. Amongst the reliefs asked in the civil suit is also a declaration as regards the applicant's possession over the house. So it will be necessary for the civil court to make an enquiry into the question of possession also. It seems to me that it would be a sheer waste of public time to allow two parallel proceedings to go on simultaneously one in the civil court, and the other in the criminal court and evidence being led by the parties in both cases in support of their possession. It would be more in the fitness of things that all the matters in dispute between the parties including the claim for possession should be inquired into and decided once for all in the suit pending in the civil court. The mere institution of the suit in the civil court would not by itself have been sufficient to justify the dropping of proceedings under section 145 if there was a danger of breach of peace which can best be averted by summary proceedings under section 145, but in the present case the order of the civil court appointing a receiver removes all such danger. In this connexion it may be pointed out that section 146 of the Code of Criminal Procedure provides that in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any civil court possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged. It is true that the present case is not governed by section 146 of the Code of Criminal Procedure as no final orders have yet been passed in the proceedings under section 145 yet the provision above referred to shows clearly that the policy of the law is to give preference in matters of this nature to possession by a receiver appointed under orders of a civil court. I think therefore that in view of the situation which has arisen as a result of the institution of the suit in the civil court which fully covers the dispute as regards possession which forms the subject of inquiry in the proceedings

1934

MUSAMMAT MAKHANA DEVI v. KAMLA PAT RAM

under section 145, and by reason of the order appointing a receiver, the only proper course would be to drop the proceedings under section 145 in order to avoid unnecessary harassment to the parties and useless waste of time, money and energy.

Srivastava, J.

Section 561-A of the Code of Criminal Procedure gives legislative recognition to the inherent powers of the Court to make such orders as may be necessary to prevent abuse of the process of the Court or otherwise to secure the ends of justice. In view of the facts stated above, the present case seems to be an eminently fit one for the exercise of these inherent powers in order to put a stop to the proceedings under section 145 of the Code of Criminal Procedure which have now become wholly useless and unnecessary. If in the circumstances which have now come into existence proceedings under section 145 are allowed to be continued, it would be a sheer abuse of the process of the Court, and section 561-A was clearly intended to prevent such abuse. The present case seems to be much more clear and stronger than the decision of this Court in *Hakim Abdul Wali* v. *King-Emperor* (1). The counsel for the opposite party has relied upon the decision of the Madras High Court in *Marudayya Thevar* v. *Shanmugasundara Thevar* (2) and contended on the authority of this decision that section 561-A does not confer any new powers on the Court and that under it the jurisdiction of the High Court can be invoked only in regard to matters for which specific provision exists in the Code of Criminal Procedure. This case appears to me to be quite distinguishable on the facts and is not in point. In this case an application was made for appointment of a receiver for which the Criminal Procedure Code makes no provision and the Court held that the High Court had no jurisdiction to appoint a receiver pending the disposal of a criminal revision petition. It cannot be said that the rejection of a

(1) (1933) I.L.R., 9 Luck., 61. (2) (1925) 49 M.L.J.R., 593.

1934

MUSAMMAT MAKHANA DEVI v. KAMLA PAT RAM

complaint made under section 145 is equally foreign to the provisions of the Code of Criminal Procedure.

The result therefore is that I allow this application and quash the proceedings under section 145 of the Code of Criminal Procedure pending in the Court of the Railway Magistrate.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1934 *December* 13

SHEO SHANKAR AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* MUSAMMAT RAM DEI AND OTHERS (DEFENDANTS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 149—Limitation Act (IX of 1908), section 5—Appeal filed without court-fee but with an application for permission to appeal as pauper —Application rejected—Court-fee tendered after limitation— Appeal, if within time—Evidence—Will—Proof of signature of testator, necessity of—Attesting witnesses should be called or their absence accounted for.

Where an appeal is filed within time but without court-fee and with an application for permission to appeal as pauper and, that application being rejected, the court-fee is tendered after the expiration of the period of limitation for filing the appeal, the appeal is not time-barred. Section 149, Civil Procedure Code, gives the Court a discretion to allow the payment of the court-fee at any stage, and when the court-fee is paid it has the same effect as if it had been paid in the first instance. Even if section 149 has not this effect, it would be a case for the application of section 5 of the Limitation Act.

In cases of dispute as to the signature of a will the best evidence procurable that it was signed by the alleged testator should be furnished and the attesting witnesses should be called or their absence accounted for. Evidence that the signature on the will appeared to be genuine is of little worth in the absence of satisfactory evidence by witnesses present when the will is purported to have been signed. *Rajendra Prasad*

*First Civil Appeal No. 89 of 1933, against the decree of Sh. Mohammad Baqar, Subordinate Judge of Rae Bareli, dated the 20th of February, 1933.