N.K.S.

Before S. S. Sandhawalia, C.J. and K. S. Tiwana, J.

KARTAR SINGH AND OTHERS,—*Petitioners.*

versus

SMT. PRITAM KAUR AND ANOTHER,—*Respondents.*

Criminal Misc. No. 2683-M of 1982.

November 25, 1983.

Code of Criminal Procedure (II of 1974)—Sections 146(1) and 397(2)—Order of attachment of immovable property—Nature of—Whether final or interlocutory—Revision against such order—Whether competent.

Held, that it is manifest from the proviso to section 146(1) of the Code that the order of attachment is inherently temporary in nature. In terms, the said proviso declared that the Magistrate may withdraw the order of attachment *at any time* if he is satisfied that there is no longer any likelihood of the breach of peace with regard to the subject matter of the dispute. The use of the language at any time and the power to withdraw attachment altogether (not merely modifying the terms thereof) are significant. An order which has the attribute of such transience, as to be withdrawn at any time, cannot easily be termed as a final order or even on intermediate one. It does not lie even within that penumbral area betwixt a purely interlocutory order and a final one which on liberal construction may be said to be revisable. The attributes noticed above of an order of attachment of an immovable property under section 146(1) of the Code is interlocutory in nature within the meaning of section 397(2) of the Code and consequently no revision against the same is maintainable.

(Paras 6 and 16).

Case referred by a learned Single Judge Hon'ble Mr. Justice B. S. Yadav on June 28, 1982 *to the Division Bench for the decision of an important question of law involved in this case. The Division Bench consisting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia and Hon'ble Mr. Justice Kulwant Singh Tiwana finally decided the case on November* 25, 1983.

Petition under Section 482 *of the Code of Criminal Procedure praying for summoning the records of the trial Court and after its perusal the impugned order may be set aside and order of attachment be revoked in the interest of justice and in the meantime operation of the order be stayed.*

S. M. L. Arora, Advocate, *for the Petitioner.*

H. S. Brar, D.A.G., *for the State.*

H. S. Bhullar, Advocate, *for the Respondent.*

JUDGMENT

S. S. Sandhawalia, C.J.

1. Is the order of attachment of immovable property under Section 146 (1) of the Code of Criminal Procedure, 1973, interlocutory in nature within the meaning of Section 397(2) of the said Code?. This is the significant question necessitating this reference to the Division Bench. Equally, at issue is a supposed discordance of single Bench views within this Court in *Bhawan Pal* v. *Prem Kumar*

Jain & others, (1) and *Shishu and others* v. *State of Haryana and others*, (2).

2. The matrix of facts may be taken from Crl. Misc. No. 2683-M of 1982 (*Kartar Singh* v. *Pritam Kaur & another*). Proceedings under Section 145 of the Code of Criminal Procedure, 1973 (hereinafter called 'the Code'), were initiated by the Station House Officer of Sadar police station, Muktsar, in the court of the Executive Magistrate, Faridkot. After notice to the parties and giving a hearing to them, the learned Magistrate had attached the agricultural property in dispute and appointed the Tehsildar, Muktsar as the Receiver thereof till further orders from the Court. Against the said order, Kartar Singh and others preferred a revision in the Court of Session at Faridkot, seeking the setting aside of this order and the interim relief of its suspension till the final disposal of the revision petition. A preliminary objection was forthwith raised by the opposite party that no such revision was competent on the ground that the order of attachment under Section 146(1) of the Code was inherently interlocutory in nature and the bar of Section 397 (2) of the Code was, therefore, firmly attracted. The learned Additional Sessions Judge, by his order dated May 6, 1982 up held the preliminary objection relying primarily on the judgment in *Shishu and others' case* (supra). Aggrieved by the said order, the present Criminal Miscellaneous Application No. 2683-M of 1982 (*Kartar Singh* v. *Pritam Kaur & another*) was preferred which came up for motion hearing before my learned brother Tewatia, J. sitting singly. Before him, reliance was sought to be placed on *Bhawan Pal's case* (supra) for contending that the order of attachment was not an interlocutory one. Noticing some apparent conflict of precedent, the matter, as already noticed, has been referred for an authoritative decision.

3. Undoubtedly the primary and indeed the only question which has been posed at the out-set herein indicates a sharp cleavage of judicial opinion betwixt the different High Courts within the country. It would appear that the High Courts of Punjab and Haryana, Jammu & Kashmir, Himachal Pradesh and Allahabad have titled for one view whilst the High Courts of Bombay, Orissa and Rajasthan have chosen to opt for the other. In a matter so narrowly divided, one is inevitably faced with a somewhat difficult choice of subscribing to one or the other of the well matched rival opinions.

(1) 1982 C.L.R. 121.
(2) 1982 Cr. L.J. 124.

4. It is plain that the specific question herein is but a limb of the larger yet perennial controversy as to what constitutes a final as against a merely interlocutory order and the penumbral area lying betwixt the two extremes. In view of the mass of conflicting case law on the point it would appear that these two terms are not capable of a precisely exclusive definition for each and it would be a vain attempt to define what seems to be inherently undefinable. One cannot help commenting that the erudite attempts to confine each of the terms to a procrustean bed of the precise legal definition is reminiscent of the somewhat tautologist definition of a circle as one, that is, circular. Therefore, without launching into a dissertation as to what are the precise legal attributes of a final order as against an interlocutory one and attempting to draw a razor sharp line betwixt the two, I propose to confine myself to the limited focal question-whether in the peculiar context of Section 146(1) of the Code, the attachment of immovable property is broadly interlocutory in nature and that too for the specific purpose of Section 397(2) thereof.

5. Mr. Arora, the learned counsel for the petitioners whilst canvassing for the proposition that an order of attachment of immovable property under Section 146(1) of the Code, was in any case not interlocutory, first drew our attention to the trilogy of the final Court in *Amar Nath and others* v. *State of Haryana and others,* (3) *Madhu Limaye* v. *State of Maharashtra,* (4) and, *V. C. Shukla* v. *State through C.B.I.* (5). On the basis of the observations made therein, Mr. Arora has contended that the attachment of property of one or the other of the parties was a matter of moment deeply affecting their rights and therefore, could not be labelled as interlocutory and indeed was *quasi* final. In any case, it was contended that it fell in a category intermediate to the final, and interlocutory, orders and therefore, for the purpose of Section 397(2) of the Code, would still become revisable on a liberal construction as enunciated in the aforesaid case. Reliance was placed on *Chandrabhanu Gountia* v. *Durbadal Naik and others,* (6) *Hasmukh J. Jhaveri* v. *Shella Dadlani and another,* (7) *Abdul Jabbar Khan and*

(3) A.I.R. 1977 S.C. 2185.
(4) A.I.R. 1978 S.C. 47.
(5) A.I.R. 1980 S.C. 962.
(6) 1977 Cr.L.J. 1593 (Orissa).
(7) 1981 Cr.L.J. 958 (Bombay).

others v. *Kailash Chandra and another*, (8) and, *Rupa Jena and others* v. *Taoai Swain & others* (9). Marginal reference was also made to two judgments of the learned Single Judges of this Court reported as *Surinder Singh and Ors.* v. *The State of Punjab & Ors.* (10) and, *Latkan Singh & Anr.* v. *The State of Punjab & Ors.* (11).

6. Since the controversy herein admittedly revolves around the composite provisions of Sections 145 and 146 of the Code it is apt to quote the relevant parts thereof for facility of references:

> "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."
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> 146. *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 :

(8) 1982 Cr.LJ. 128 (Rajasthan).
(9) 1983 Cr.L.J. 1331 (Orissa).
(10) 1983(1) Chg. L.R. 643.
(11) 1983(1) Chg. L.R. 91.

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.

* * * *

* * * *"

As already noticed, with rival judicial opinion ranged on either side, it seems refreshing to first examine the issue on principle and the language of the statute. What prominently catches the eye here first is that the order of attachment under Section 146(1) of the Code is inherently temporary in nature. This is manifest from the proviso to the said provision. In terms, it declares that the Magistrate may withdraw the order of attachment *at any time* if he is satisfied that there is no longer any likelihood of the breach of peace with regard to the subject of dispute. The use of the language at any time and the power to withdraw attachment altogether (not merely modifying the terms thereof) are significant. An order which has the attribute of such transience, as to be withdrawn at any time, cannot easily be termed as a final order or even an intermediate one. In my view, it does not lie even within that penumbral area betwixt a purely interlocutory order and a final one which on liberal construction may be said to be revisable. The attributes noticed above of an order of attachment under Section 146(1) of the Code would, therefore, bring it absolutely within the label of an interlocutory order.

7. Yet again, the attachment of the property and the appointment of a receiver therefor does not in any way determine the title of the parties thereto. Consequently, the ownership of the property under attachment is not even put remotely in issue. It seems to be elementary that in fact in the whole gamut of proceedings under Sections 145 and 146 of the Code, no question of title to the property in dispute arises betwixt the parties. At the highest, it affects temporarily the right to possession and that too by not transfering it from one party to another, but merely taking it into custody *legis*, which again, as noticed, may be withdrawn at any time and thus reverting possession to *status quo ante*. The factors of title and ownership being altogether out of the arena of dispute before the Executive Magistrate and the possession and attachment also being of a temporary and transient in nature, are other attributes militating wholly against the concept of such an order being labelled as either final or *quasi* final in nature.

8. Adverting to the contingency where the order of attachment is not withdrawn, it would appear that this also affects the surface question of possession only for the time being. Obviously, in this situation also, the order of attachment is temporary in nature because it will subsist only as long as the proceedings under Section 145 of the Code are not concluded before the Executive Magistrate. If he determines the question as to which of the parties was in possession at the time of the preliminary order under Section 145 of the Code, he would inevitably direct the restoration of possession to such a party and declare him to be entitled to possession until evicted therefrom in due course of law. In the alternative, if he is of the view that one of the parties was wrongfully dispossessed within two months prior to the date of the temporary order, he may treat the party so dispossessed as if it had been in possession and pass orders accordingly. It is thus obvious that the attachment subsists in these circumstances only for the period for determining the aforesaid issues. Equally; under sub-section (5) of Section 145 of the Code, if it can be established before the Magistrate that no such dispute, as envisaged in the said Section exists, he would inevitably revoke the preliminary order of the court with the consequential result that the attachment of the property would also be revoked. Even more so, in circumstances, if a reference to the civil court is rendered inevitable, then the attachment of the property by the Magistrate again is subservient to the orders which the civil court may make with regard to the receiver or such incidental or consequential orders as may be passed. Viewed from any angle, it appears to me that the attachment of property under Section 146(1) of the Code is transitory in nature and it needs no great erudition to hold that an order essentially ephemeral is not to be easily labelled as final or *quasi* final.

9. Again in *Amar Nath's case* (supra), their Lordships expressly noticed that under the Code, there would necessarily be orders which are interlocutory in nature and thus beyond the arena of revision. Without being exhaustive or attempting to specify the innumerable such orders, they observed illustratively:—

> "Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports *and such other steps in aid of the proceedings* may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code.——"

It appears to me that the attachment of property here is nothing but a step-in-aid in the pending proceedings under Section 145 of the Code. It is nobody's case before us that the attachment of immovable property is an imperative or a mandatory requirement of the law. Sections 145 & 146 of the Code are intended to prevent a breach of peace and to take measures against its continued likelihood. Attachment of immovable property herein is to be restored only as a step-in-aid to the pending proceedings in this regard. It thus seems to me as fully covered by the classification or categorization of interlocutory orders by the final Court in *Amar Nath's case* (supra).

10. Lastly, in this context a broader perspective of the matter also militates against the classification of such an order being final and consequently revisable. It seems somewhat axiomatic that an appeal or revision is generally directed against an order which is either final or *quasi* final or at least has attributes of permanence. Where an order of attachment is transistory in nature and may well be in a constant state of flux by being either likely to be withdrawn, cancelled or subject to the decision in the proceedings under Section 145 of the Code or by referring the matter to the civil court, then it would be rather incongruous that the revisional power be exercised against such a fluctuating adjudication. Learned counsel for the respondents rightly pointed out that this would mean a parallel adjudication of the same order by the inferior and superior courts. Thus, if the proceedings before the Executive Magistrate are not stayed during the pendency of the revision, he may either withdraw the attachment of cancel the order under Section 145 of the Code or decide the matter and restore possession to the party entitled thereto. The revisional court would then be left in the limb to adjudicate upon an eerie nothing.

11. Adverting now to precedent, one must first notice the Division Bench judgment of this Court in *Mohinder Singh* v. *Shri Dilbagh Rai* (12). Therein, the real nature of the proceedings under Sections 145 and 146 of the Code were summed up as under:—

> "Section 145 Criminal Procedure Code is a beneficial section enacted with the express object of preserving the peace. For the attainment of this object emergency provision for attaching the subject matter of dispute has been provided

(12) 1976 P.L.R. 803.

in it. *Under this section the criminal Court can only pass a temporary order that the rights of the parties in fact are to be settled by the civil courts.*"

Reference is also apt to the recent Division Bench judgment in (*Ram Partap* v. *State of Punjab*) (13), wherein, after examining the nature of the order under Section 146(1) of the Code, it was held that the same can be passed even without affording a hearing to one or both of the parties. Therein, it has also been authoritatively noticed that the earlier view taken by some of the High Courts that attachment under Section 146(1) of the Code virtually terminated the proceedings under Section 145 of the Code, was no longer tenable after the categoric dictum of the final Court in *Mathuralal* v. *Bhanwarlal and another* (14). Once that is so, the sheet-anchor for the opposite view that the rights of the parties are finally and irretrievably affected by attachment disappears. In fact, it would appear that *Mathuralal's* case (supra), in its true import, has not been adequately noticed or appreciated in the judgments taking the contrary view.

12. Apart from the judgments of this Court, the recent Division Bench decision in *Indra Deo Pandey* v. *Smt. Bhagwati Devi* (15) renders a complete answer to most of the contentions raised on behalf of the petitioner. After an exhaustive examination of the matter (with which I entirely concur), it was held that the earlier Division Bench view of the same High Court in *Sohan Lal Burman* v. *State of U.P. & Ors.* (16), was in fact no longer good law after the authoritative pronouncement in *Mathuralal's case* (supra).

13. In the light of the above, it would be unnecessary, if not futile, to individually distinguish all the judgments relied upon by the petitioners. It suffices to specifically refer to *Hasmukh J. Jhaveri* v. *Shella Dadlani and another* (17). Therein the learned Judge sought to lay down as many as twelve propositions for determining, whether an order was interlocutory or otherwise. With the greatest deference it appears to me (as I have noticed earlier), that the attempt to lay down a precise definition and

(13) Cr.R. 18/83 decided on 30-8-83.
(14) A.I.R. 1980 S.C. 242.
(15) 1981 All L.J. 687.
(16) 1977 Cr.L.J. 1322.
(17) 1981 Cr.L.J. 958.

inflexible criteria in this field, appears to be a vain one. In proposition Nos. (10) and (11),—(in para 24 of the report) it is observed that an order which decides or even touches the important right or liabilities of the parties cannot be said to be interlocutory. With great humility such like guidelines or propositions only beg the question. How and in which golden scale it is to be determined that the right or liability is important to a party ? When can it be held that the order not only decides, but merely touches such a right ? This would be a somewhat futile exercise in semantics or in metaphysical abstractions which are more likely to confound rather than resolve an issue. Again, it has been observed that an order which substantially affects the rights of the parties or decides certain rights of the parties, cannot be termed as interlocutory. Such a criteria is so vague, as to be of little practical use. The same can also be said of proposition (12) which then follows. With the greatest respect, I would wish to record my dissent from the view in *Hasmukh J. Jhaveri's case* (supra), that an order of attachment under Section 146(1) of the Code can never be embraced by the terms of interlocutory order. For identical reasons, I would differ from *Chandrabhanu Gountie's case* (supra); *Rupa Jena's case* (supra) *Abdul Jabbar Khan's case* (supra).

14. For the detailed reasons enunciated earlier I would concur with the view in Full Bench judgments in *Brij Lal Chakoo* v. *Abdul Ahad Nishat & Ors.* (18), *Puran M Ors.* v. *State of Himachal Pradesh* (19), and, *Inder Deo Pandey's case* (supra) and the Division Bench judgments of this Court in *Mohinder Singh's case* (supra) and, *Ram Partap's case* (supra).

15. On a closer analysis, I see no inherent conflict in the view of the learned single Judge in *Bhawan Pal* v. *Prem Kumar Jain & others* (20) and *Shishu and others* v. *State of Haryana and others* (21). A bare perusal of the passing observation made in para 5 of the report, in *Bhawan Pal's case* (supra) would indicate that the reference therein was to an order calling upon the petitioner to join the proceedings made under Section 145 of the Code and to submit his evidence in support of his claim of being in possession of the house in question and further attaching the house during the course of those proceedings and throwing him out of the said building.

(18) 1980 C.L.R. 51, (Jammu and Kashmir).
(19) 1977 C.L.R. 10(H.P.)
(20) 1982 C.L.R. 121.
(21) 1982 Cr.L.J. 124.

It was in the context of such a composite order that the learned Judge had observed that on the parity of reasoning in *Amar Nath's case* (supra), the order could not be styled as interlocutory and even if it was, the court was not barred from examining its legality and propriety in the exercise of its powers under Section 482 of the Code, in view of *Madhu Limaya's case* (supra). These observations do not in any way aid or advance the case of the petitioners or run counter to the view in *Shishu and others'* v. *State of Haryana & Ors.* (22). In the light of the earlier discussion, *Shishu and others' case* (supra), is hereby affirmed.

15. For clarity of precedent, within this Court, it deserves notice that the marginal reliance on *Surinder Singh & Ors.* v. *The State of Punjab & Ors.* (23), by the learned counsel for the petitioner, is hardly merited. It is true that therein a criminal revision against an order of attachment under Section 146(1) of the Code was entertained and allowed. However, the issue regarding its maintainability and the bar of Section 397(2) of the Code was not even remotely raised or adjudicated upon. It is now a hallowed rule that a judgment is no authority on a point which was not at all pressed or adjudicated before the Court. Only as a matter of abundant caution, it has to be observed that if *Surinder Singh & Ors' case* (supra), is sought to be construed as a warrant for the proposition that a criminal revision is still entertainable against an order of attachment under Section 146(1) of the Code, then the same is not good law.

16. To conclude, the answer to the question posed at the very out-set, is rendered in the affirmative and it is held that an order of attachment of an immoveable property under Section 146(1) of the Code is interlocutory in nature within the meaning of Section 397(2) of the Code and consequently no revision against the same is maintainable.

17. Applying the above, the view of the learned Additional Sessions Judge upholding the preliminary objection that revision was not maintainable is affirmed and the present Criminal Miscellaneous Application is dismissed.

K. S. Tiwana, J.—I agree.

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(22) 1982 Cr.L.J. 124.
(23) 1983(1) Chg. L.R. 643.