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**BADRI PRAKASH SONI**  
v.  
**PRAHALAD SONI AND ORS.**

SEPTEMBER 5, 1994

B

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

C

*Code of Criminal Procedure, 1973 : S.145(2)—Possession of property—Executive Magistrate unable to decide—Passing order attaching properties and directing parties to approach the Civil Court to establish their rights—Validity of—Directions issued to Senior Sub-Judge before whom appeal is pending in the matter—Smooth running of the factories forming part of the property—Directions issued.*

D

The possession of certain property was in dispute and proceedings were initiated under S. 145(2) Cr. P.C. Unable to decide as to who was in possession of the disputed property, the Executive Magistrate passed an order attaching the properties and directing the parties to go to the Civil Court to establish their rights. When the said order was passed, a civil suit was pending before the Sub-Judge. Therefore, the High Court held that the Magistrate should have awaited the decision in the suit. The present appeal is against the said order of the High Court. The operation of the High Court's order was stayed by this Court.

E

During the tendency of the appeal, the sub-Judge dismissed the suit and the appeal filed by the respondent is pending before the Senior Sub-Judge.

F

Disposing of the appeal, this Court

G

**HELD : 1.** In view of the fact that the Magistrate has stated that he was not in a position to decide as to which of the contesting parties are in possession of the disputed property, the dispute shall be decided by the Senior Sub-judge pending in appeal before him. [103-C]

**2.** In the interest of the utilisation of the Cork Splitting Machine(German Make) and smooth running of the factories during the pendency of the appeal, it is directed that: [103-D]

H

(a) The respondent is at liberty to continue to utilise the machinery

in disputed property and run the factory. [103-D]

(b) Mr. Rakesh Kumar, Advocate practising in this Court is appointed as an Advocate Commissioner. He should after giving a notice to the counsel for the parties, make immediate inspection of the factory. The Executive Magistrate is directed to open the seals put on the disputed property. The Advocate-Commissioner with the Assistance of the expert Engineer or Valuer shall assess the condition of the machinery and also its value. He should also make an inventory of the machinery existing outside the factory. He would submit a report in that behalf to the Senior Sub-Judge. He should also take the signature of counsel for the parties before submitting the report to the Senior Subordinate Judge. [103-E-F]

(c) A sum of Rs. 10,000 is fixed initially as Commissioner's fees subject to his claiming any additional amount as his fees and of the expert Engineer or Valuer, which will be determined by the Senior Sub Judge after submission of his report. [103-G]

(d) As soon as the report is submitted by him, the Senior Sub Judge should direct the Executive Magistrate to lift the attachment made in respect of the disputed property and permit the respondent to run the factory. [103-H; 104-A]

(e) The respondent shall not remove the machinery within the disputed property as well as the machinery kept outside the factory. From the date on which the respondent starts running the factory, he shall for every working day deposit to the credit of the appellant a sum of Rs. 20,000. The Senior Subordinate Judge is directed to dispose of the appeal as expeditiously as possible within a period of six weeks from the date of receipt of this order. If the respondent before the Senior Subordinate Judge succeeding in his contention and on the Court finding that he is the owner, then he will be entitled to withdraw the amount deposited by the respondent herein. [104-A-B-C]

(f) In the event of the findings going against the respondent herein and if any damage to the machinery is caused contrary to noted conditions by the Commissioner, after taking delivery of the possession the appellant herein is entitled to claim damages caused to the machinery. The Commissioner shall give his report within a week to the Senior Subordinate Judge.

[104-D]

A (g) With the assistance of the parties, it is open to the Commissioner to take photographs of the existing machinery and put identification marks to the machinery so taken in the presence of the parties with their signatures. [104-E]

B (h) The parties shall bear the costs of the Commissioner as well as an expert or valuer in equal proportion. [104-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 613 of 1994.

C From the Judgment and Order dated 3.6.94 of the Delhi High Court in Crl. W.P. No. 438 of 1994.

M.L. Verma and S.B. Upadhyay for the Appellant.

D G.L. Sanghi, A.P. Gambhir, Maninder Singh and Vivek Gambhir for the Respondents.

The following Order of the Court was delivered :

Leave granted. Heard the counsel on both sides.

E We do not propose to go into the entire controversy. Suffice to state that the Executive Magistrate exercising the power under Sec. 145 sub-s. (2) of the Criminal Procedure Code was unable to decide as to who was in possession of the disputed premises on the date of initiation of the proceedings under sub-s. (1) of Section 145, Therefore, he passed an order on may 1994 attaching properties and directing the parties to go to the Civil Court and establish their rights since there is dispute as to possession, though not for title to possession, existing as on that date. The Executive Magistrate is justified to pass that order even though suit for injunction had been filed by the appellant.

G Since the said order was passed when the Civil Suit No. 48 of 1994 was pending in the Court of Shri N.K. Kaushik, Sub-Judge the High Court held that the Magistrate should have held back his hands pending decision in the suit. This Court by the order dated June 13, 1994 suspended the operation of the High Court's order and passed the following order :

H "The order made by this Court on June 6, 1994 shall continue to

operate. The learned Subordinate Judge, before whom the proceedings are pending, is directed to dispose of the pending interlocutory applications before the end of July 1994 in accordance with law, after hearing the parties." A

At the hearing it was brought to our notice, that Sub Judge dismissed the said suit on July 13, 1994 but the respondent, has filed the appeal No. 178 of 1994 which is pending in the Court of Senior Sub Judge. B

In view of the fact that the Magistrate has stated that he was not in a position to decide as to which of the contesting parties are in possession of the disputed property, we also decline to decide the question as to who is in possession of the disputed property. However, the dispute shall be decided by the Senior Sub Judge pending in appeal before him. Yet in the interest of the utilisation of the Cork Splitting Machine (German Make) and smooth running of the factories during the pendency of the appeal directions are given. C

(1) The respondent is at liberty to continue to utilise the machinery in disputed property and run the factory. D

(2) Mr. Rakesh Kumar, Advocate practising in this Court is appointed as an advocate to Commissioner. He should after giving a notice to the counsel for the parties, make immediate inspection of the sealed portion of the property, that is, the factory. The Executive Magistrate is directed to open the seals put on the disputed property. The Advocate Commissioner with the assistance of the expert Engineer or Valuer shall assess the condition of the machinery and also its value. He should also made an inventory of the machinery existing outside the factory. He would submit a report in that behalf to the Senior Sub-Judge. He should also take the signature of counsel for the parties before submitting the report to the Senior Subordinate Judge. E F

(3) A sum of Rs. 10,000 is fixed initially as Commissioner' fees subject to his claiming any additional amount as his fees and of the expert Engineer or Valuer, which will be determined by the Senior Sub-Judge after submission of his report. G

(4) As soon as the report is submitted by him, the Senior Sub Judge should direct the Executive Magistrate to raise and attachment made in H

A respect of the disputed property permit the respondent to run the factory.

(5) The respondent shall not remove the machinery within the disputed property as well as the machinery kept outside the factory. From the date on which the respondent starts running the factory, he shall for every working day deposit to the credit of the appeal a sum of Rs. 20,000. The learned Senior Subordinate Judge is directed to dispose of the appeal as expeditiously as possible within a period of six weeks from the date of receipt of this order. If the respondent before the Senior Subordinate Judge succeeding in his contention and on the Court finding that he is the owner, then he will be entitled to withdraw the amount deposited by the respondent herein and the appellant in the appeal pending before the Senior Subordinate Judge.

(6) In the event of the findings going against the respondent herein and if any damage to the machinery is caused contrary to noted conditions by the Commissioner, after taking delivery of the possession, the appellant herein is entitled to claim damages that may be caused to the machinery. The Commissioner shall give his report within a week to the Senior Subordinate Judge.

In the event of the appellant herein succeeding the respondent shall give all the costs of the litigation, and payment of the amounts deposited by him. With the assistance of the parties, it is open to the Commissioner to take photographs of the existing machinery and put identification marks to the machinery so taken in the presence of the parties with their Signatures. The parties shall bear the costs of the Commissioner as well as an expert or a valuer in equal proportion.

The appeal is accordingly disposed of.

G.N.

Appeal disposed of.