

Vinod Vs. State of Kerala

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Court : Kerala

Decided On : Aug-13-2014

Judge : Honourable Mr. Justice a.Hariprasad

Appellant : Vinod

Respondent : State of Kerala

Advocate for Def. : Shri. Raja Vijayaraghavan

Advocate for Pet/Ap. : Shri. K.P.Sreekumar

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR. JUSTICE A.HARIPRASAD WEDNESDAY,THE13H DAY OF AUGUST201422ND SRAVANA, 1936 CrI.MC.No. 2361 of 2013 () ----- CRL.RP642011 of III ADDITIONAL SESSIONS COURT, KOLLAM PROCEEDINS NO.M.9017/2011 OF SUB DIVISIONAL MAGISTRATE COURT,KOLLAM PETITIONER(S)/RESPONDENTS2TO4 ----- 1. VINOD AGED38YEARS S/O. BAHULEYAN, BINU BHAVANAM, MADATHIL KARANMA OACHIRA, KOLLAM DISTRICT.

2. SUSEELAN AGED51YEARS S/O. RAGHAVAN, ASANTTAYYATHU VEEDU, MADATHIL KARANMA OACHIRA, KOLLAM DISTRICT.

3. HARIDAS AGED60YEARS S/O. NANU, KAYYALATHARAYIL, MADATHIL KARANMA OACHIRA, KOLLAM DISTRICT. BY ADV. SRI.K.P.SREEKUMAR RESPONDENT(S)/1ST RESPONDENT & REVISION PETITIONER: ----- 1. STATE OF KERALA REPRESENTED BY ITS PUBLIC PROSECUTOR HIGH COURT OF KERALA, PIN-682031.

2. THE SUB DIVISIONAL MAGISTRATGE KOLLAM-690013.

3. THANKAPPAN, AGED60YEARS S/O. VELAYUDHAN, VIPIN NIVAS, HOUSE NO.OP-VIII/398, MADATHILKARANMA, OACHIRA VILLAGE KARUNAGAPPALLY TALUK PIN-690526.

4. SAJI KUMAR, AGED41YEARS S/O. DAMODHARAN, KOCHUPURAYIL VEEDU, HOUSE NO.VIII/263, MATHATHILKARANMA OACHIRA VILLAGE, KARUNAGAPPALLY TALUK-690526. R3 & R4 BY ADV. SRI.RAJA VIJAYARAGHAVAN R3 & R4 BY ADV. SRI.M.T.SURESHKUMAR R1 & R2 BY PUBLIC PROSECUTOR SHRI JUSTIN JACOB THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON3107.2014, THE COURT ON1308-2014 PASSED THE FOLLOWING: CrI.MC.No. 2361 of 2013 () -----

APPENDIX PETITIONER(S)' EXHIBITS ----- ANX.A1 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED2309-2011 NO. M. 9017/2011. ANX.A2 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED199-2012NO. M. 9017/2011. ANX.A3 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED1510-2012NO. M. 9017/2011. ANX.A4 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED1212-12NO. M. 9017/2011. ANX.5 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED1912-12NO. M. 9017/2011. ANX.6 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED031-2013 NO. M. 9017/2011. ANX.7 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED2410-11 NO. M. 9017/2011. ANX.8 TRUE COPY OF THE NOTICE ISSUED BY THE2D RESPONDENT DATED3110-11NO. M. 9017/2011. ANX.9 CERTIFIED COPY OF THE

ORDER

IN CRL.R.P.NO. 64/11 OF THE III RD ADDL. SESSIONS COURT KOLLAM,
DATED 4-6-13. RESPONDENT(S)' EXHIBITS: NIL -----
//TRUE COPY// "C.R." A.HARIPRASAD, J.

----- Crl.M.C. No.2361 of 2013
----- Dated this the 13th day of August, 2014.

ORDER

Petition filed under Section 482 of the Code of Criminal Procedure, 1973 (in short, "Cr.P.C.").

2. The order under challenge is passed by the learned III Additional Sessions Judge, Kollam in a criminal revision filed under Section 397 Cr.P.C.. An order passed by the Sub Divisional Magistrate, Kollam (in short, "the SDM") in a proceeding under Section 145 Cr.P.C. was challenged before the learned Additional Sessions Judge. He found that the order passed by the SDM is a composite order under Sections 145(1) and 146(1) Cr.P.C. and, therefore, it was not legally correct and sustainable. Besides, the order was not passed in compliance with the said provisions in the Cr.P.C. Hence, the order was set aside by the learned Additional Sessions Judge. Feeling aggrieved by the order in the criminal revision, the petitioners (members of A party before the SDM) are before this Court.

3. Facts in dispute lie in a narrow compass. The Assistant Commissioner of Police, Karunagappally reported to the SDM that a Crl.MC No.2361/2013 2 dispute, likely to induce breach of peace, existed between the members of A and B parties concerning administration of Madathilkarazhma SNDP Sakha No.188 and its properties, including temples, situated in Oachira Village. The Police requested for the intervention of the SDM under Section 145 Cr.P.C. and to initiate steps to take possession and administration of SNDP Sakha and its properties, including the temples. On getting the report, the SDM passed the following order on 24.10.2011: "Whereas it has been made to appear to me from the above read reference report submitted by Assistant Commissioner of Police Karunagappally that a dispute likely to induce a breach of peace existed between the above parties concerning the administration of Madathikarazhma SNDP188No. Sakha and temple properties

situated within the local limits of my jurisdiction. Whereas in this circumstances, there is every chance for the breach of peace in that locality and whereas upon due inquiry, I am unable to satisfy, myself as to which of the above parties were dispute the said SNDP sakha No.188 and temple. Hence I,, Sub Divisional Magistrate, Kollam hereby invoke my powers vested under section 145 and 146 of the code of Criminal procedure appoint and authorize Sri.R.Sadasivan, Deputy Tahsildar (H.Q.), Karunagappally to attach and to take over and to act as Crl.MC No.2361/2013 3 the receiver of SNDP Madathikarazhma temple and Sakha No.188 administration. The Assistant Commissioner of Police, Karunagappally shall render police protection to Deputy Tahsildar, Karunagappally for the execution of this order without obstructing the daily poojas and ritual ceremonies. It is further directed the Village Officer Oachira to assist the Deputy Tahsildar for the smooth and effective implementation of the above order. Also all the temple staff including the 'Thanthri', Melsanthi and Kazhakom will continue as such, until further orders." On a reading of the above order, it can be seen that the SDM has invoked powers vested in him under Sections 145 and 146 Cr.P.C. to pass the order and to appoint a Receiver for administration of SNDP Sakha and the temples. Learned Additional Sessions Judge took note of the fact that though the property of Sakha was excluded from attachment as per order dated 31.10.2011, the Deputy Tahsildar/Receiver could not hand over the property to any of the parties because of the nature of dispute raised by the rival parties.

4. The members in A party before the SDM challenged the order in revision before the learned Additional Sessions Judge. The foremost contention raised by the revision petitioners is that the order passed by the SDM is a composite order under Sections 145 and 146 Cr.P.C. and the Crl.MC No.2361/2013 4 SDM has no jurisdiction to pass such an order. Further, it was contended that the SDM flouted the mandatory requirements in Sections 145 and 146 Cr.P.C. Per contra, petitioners herein (respondents before the Additional Sessions Court) justified the order contending that in spite of opportunities given for showing cause, the respondents (petitioners before the Additional Sessions Court) failed to avail the opportunities and show cause as required. The order passed by the SDM is perfectly legal on all counts.

5. Heard Shri K.P.Sreekumar, learned counsel for the petitioners and Shri Raja Vijayaraghavan, learned counsel for respondents 3 and 4. Shri Justin Jacob, learned Public Prosecutor is also heard.

6. Shri K.P.Sreekumar contended that the order passed by the learned Additional Sessions Judge is unsupportable on facts and law. According to him, there is no legal infirmity in the order passed by the SDM. It is the submission of the learned counsel that after passing Annexure-A7 order on 24.10.2011, the SDM passed another order (Annexure-A8) on 31.10.2011, wherein SNDP Sakha No.188 was excluded from attachment and the temples situated in the property alone were kept under administration of the Receiver. To that extent, Annexure-A7 order was modified by Annexure-A8. Each party contended that the property in dispute was in their respective possession before the order of attachment passed by the SDM. Disputants also contended that each of them were in CrI.MC No.2361/2013 5 administration and management of the temples situated in the property.

7. The primary object of Section 145 Cr.P.C. is to prevent breach of the peace concerning any land or water or the boundaries thereof. For better understanding the scope of the dispute, Section 145 (1) and (2) Cr.P.C. are excerpted hereunder: "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. (2) For the purposes of this section, the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property. xxxxxxxxxxxxxx" CrI.MC No.2361/2013 6 On a scrutiny of Section 145 Cr.P.C., it is evident that power of the Executive Magistrate to take action thereunder stems from obtaining a report from a Police Officer or upon other information relating to the likelihood of a breach of the peace concerning any land or water or boundaries thereof. In that

event, he shall make an order in writing stating the grounds of his being satisfied about the possibility of a breach of the peace as mentioned above and require the parties concerned in such dispute to attend his court in person or by pleader on a specified date and time. He should direct the parties to put in written statements of their respective claims in regard to the fact of actual possession of the subject of dispute. Sub-section (2) of Section 145 Cr.P.C. says that for the purpose of the Section, land or water includes buildings, markets, fisheries, crops or other produce of land and the rents or profits of any such property.

8. Sub-section (3) of Section 145 Cr.P.C. mandates that a copy of the order passed under Sub-section (1) shall be served in the manner provided in the Cr.P.C. for service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by affixture at some conspicuous place at or near the subject of dispute. Sub-section (4) of Section 145 Cr.P.C. prescribes that the Magistrate shall, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements CrI.MC No.2361/2013 7 put in and hear the parties. He shall receive all such evidence as may be produced by them and take further evidence, if any. It is clearly mentioned that if possible, the Magistrate shall decide whether any and which of the parties was, at the date of the order made by him under Sub-section (1), in possession of the subject of dispute. Proviso to Sub-section (4) says that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of Police Officer or other information was received by the Magistrate or after that date and before the date of his order under Sub-section (1), the Magistrate may treat the party so dispossessed as if that party had been in possession on the date of his order under Sub-section (1).

9. Sub-section (5) of Section 145 Cr.P.C. allows any of the parties to appear and show before the Magistrate that no such dispute ever existed in respect of any land or water. If the Magistrate accepts that contention, the order passed under Sub-section (1) of Section 145 Cr.P.C. shall be cancelled and all further proceedings thereon, shall be stayed. Sub-section (6) states that if the Magistrate decides, after complying with the procedure in respect of hearing, that one of the

parties was or should under the proviso to Sub-section (4) be treated as being in such possession of the subject matter, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. He shall also forbid all disturbances of such possession until such eviction. The Magistrate has also the power to restore possession to the party, who was forcibly and wrongfully dispossessed. The said order shall also be served and published as provided in the earlier part of the Section. Sub-section (7) permits the Magistrate to implead the legal representatives of a deceased party, if any party dies during the pendency of the proceedings. In respect of crop or other produce standing on the disputed property, if it is subject to speedy decay, the Magistrate shall make appropriate orders for disposal of such property or sale proceeds thereof, as he thinks fit as provided in Sub-section (8) of the Section. Sub-section (9) recognizes the power of the Magistrate to summon any witness at any stage of the proceedings. Sub-section (10) says that the powers under the Section shall not be deemed to be in derogation of the powers of the Magistrate to proceed under Section 107 Cr.P.C.

10. If the Executive Magistrate is satisfied from a Police report or other information that a dispute likely to cause breach of the peace exists, he gets the jurisdiction to take action under Section 145 Cr.P.C. Viewed from this angle, it can be said that the jurisdiction of the Magistrate arises from the factum of receiving certain information and the information so received satisfied his judicial mind that there exists grounds to believe that there is a possibility of a breach of the peace in the area. The object of CrI.MC No.2361/2013 9 Section 145 Cr.P.C. is to prevent breach of the peace and for that end, to provide a speedy remedy by bringing the contesting parties before the court to ascertain who of them was in actual possession and also to maintain status quo until their rights are finally determined by a competent court. It is an axiom that the life of the order is conterminous with the passing of a decree by a civil court. The moment a civil court makes a decree or an order of eviction, the final order of the criminal court stands suspended. The Section authorises the Magistrate to issue a declaratory order in favour of a party that he is entitled to possession until evicted therefrom in due course of law. This power is traceable in the proviso to Section 145(4) read with Sub-section (6) thereof. It is true that the Magistrate has to decide who is in actual possession on

the date of his preliminary order; but if he finds that the party in defacto possession on that date had obtained possession forcibly and wrongfully dispossessing the other party, within two months next preceding the date of his order, the Magistrate can treat as if the dispossessed party was in possession on such date and restore possession to him. He can also prohibit the dispossessor from interfering with possession until eviction of that person is made in due course of law.

11. Law is well settled that the preliminary order should reflect the satisfaction of the Magistrate that a dispute likely to cause breach of the CrI.MC No.2361/2013 10 peace exists concerning any land or water or their boundaries. Stated precisely, the preliminary order should show the grounds of his satisfaction and require the parties concerned to attend his court and to put in written statements of their respective claims as regards the fact of actual possession of the subject in dispute. Intent and purport of the provision makes it clear that a preliminary order passed by an Executive Magistrate without revealing the grounds of his satisfaction certainly falls short of the mandate of law.

12. Section 146 Cr.P.C. confers on the Magistrate power to attach the subject of dispute and to appoint a Receiver. The Section opens with the wording that if the Magistrate at any time after making the order under Sub-section (1) of Section 145 Cr.P.C. 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 Cr.P.C. 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 possession thereof. A close scrutiny of the provision would show that the Magistrate can pass an order to attach the subject of dispute only after making an order under Sub-section (1) of Section 145 Cr.P.C. Secondly, he must consider the case to be one of emergency. CrI.MC No.2361/2013 11 Thirdly, he must be satisfied from the materials that none of the parties was in possession of the disputed property as is referred to in Section 145 Cr.P.C. or he must not be sure as to which one of them was then in such possession of the subject of dispute. Satisfaction of the first and second conditions stated above are essential for invocation of the power of the Magistrate under Section 146 Cr.P.C. Out of the

third condition, any one part at least should be established. Then he can pass an order under Section 146 Cr.P.C. It is evident that the provision is intended to prevent breach of the peace in respect of immovable property where there is a scramble for possession. The proviso to Section 146(1) Cr.P.C. enables the Magistrate to 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. Sub-section (2) of Section 146 Cr.P.C. empowers the Magistrate to appoint a Receiver to the subject of dispute, if no Receiver was appointed by any competent civil court. He may also make such arrangements as he considers proper for looking after the property. The Receiver so appointed by the Magistrate shall be under the control of the Magistrate and the Receiver appointed shall have all the powers under Order 40 of the Code of Civil Procedure, 1908. The proviso therein requires that in the event of a Receiver being subsequently appointed in relation to the subject of dispute by any civil court, the Magistrate shall CrI.MC No.2361/2013 12 order the Receiver appointed by him to hand over possession of the subject of dispute to the Receiver so appointed by the civil court and the Magistrate shall discharge the Receiver appointed by him. It also empowers the Magistrate to make such incidental and consequential orders as may be just.

13. The power conferred on an Executive Magistrate under Section 146 Cr.P.C. is to be exercised by him to preserve the status quo of a property, which is the subject matter of a dispute under Section 145 Cr.P.C. The steps envisaged under Section 146 Cr.P.C. enable the Magistrate to maintain peace and tranquility in the area. The above provisions clearly show that the decision of the Executive Magistrate in respect of the subject of dispute is subservient to and dependent on the decision of a competent civil court. To put it short, it can be stated that Sections 145 and 146 Cr.P.C. are measures to be adopted by an Executive Magistrate to avoid any disruption of peace and tranquility in an area and also to maintain public order. By the said proceedings, the Executive Magistrate cannot decide title to or right to possess the subject matter of dispute.

14. Shri Raja Vijayaraghavan, the learned counsel for respondents 3 and 4 relying on P.C.Asraf v. V.P.Abdulla (1987 (1) KLT795 contended that the order passed by the Magistrate must contain in clear terms the CrI.MC No.2361/2013 13 existence

of a dispute likely to cause breach of the peace and grounds for himself being so satisfied. This proposition is indubitable. The Executive Magistrate cannot pass an order without indicating sufficient reasons for his satisfaction and for invoking power vested in him by the said provisions 15. Learned counsel for the respondents 3 and 4 contended that the Executive Magistrate has flouted the law in Section 146 Cr.P.C., wherein it is mentioned that the power to attach the property in dispute and to appoint a Receiver arises only after the Magistrate passing an order under Section 145(1) Cr.P.C. As discussed above, the wording in Section 146(1) Cr.P.C. makes the position very clear. Following observation in Lilly Franklin v. Wilson (1977 KLT871 is relevant for our purpose: "The expression 'after making the order' in S.146 (1) makes it clear that proceedings under S.145(1) should precede the order attaching the property, S.146 (1) does not contemplate a simultaneous exercise of jurisdiction under S.145(1) and S.146(1). The order under S.145(1) becomes complete only when the Magistrate puts his signature therein. It is only, thereafter that he is expected to consider whether it is a case of emergency requiring attachment of property. Since the order attaching property in the instant case did not satisfy the above requirements, it was rightly set aside by the Additional Sessions Judge." CrI.MC No.2361/2013 14 Facts in the case show that the order passed by the SDM in this case (Annexure-A7) is a composite order. Learned counsel for respondents 3 and 4 contended that the Supreme Court in Mathuralal v. Bhanwarlal and another ((1979) 4 SCC665 has clearly laid down that a preliminary order is the basic requirement under Section 145 Cr.P.C. and it is by making this order that a Magistrate assumes jurisdiction to proceed under Sections 145 and 146 Cr.P.C. It goes without saying that the preliminary order should conform to the standards set by Section 145 Cr.P.C. In this context, the decision rendered by the learned Single Judge of this Court in Thankayyan v. Perumal Nadar (1977 KLT511 is relevant. The dictum laid down therein reads as follows: "The section provides a summary remedy and is intended to meet an emergent situation and to avoid a breach of the peace occurring. On a careful reading of S.145 as a whole, particularly sub-section (1), it could be seen that the very foundation of an action under the sub-section is the satisfaction of the Magistrate that a dispute likely to cause a breach of the peace existed on the date of the preliminary order, concerning the possession to any land or water or

boundaries thereof situated within his or her local jurisdiction. There is nothing in the section to indicate that the Executive Magistrate is bound to pass a preliminary order as enjoined under sub section (1) of Crl.MC No.2361/2013 15 S.145 of the Code, immediately on receipt of a report of the police or complaint or other information that a dispute regarding the possession of an immovable property exists and that such dispute is likely to cause a breach of the peace. The section does not authorise or confer jurisdiction on the Magistrate to initiate proceedings merely on the strength of the complaint or the police report or other information about the likelihood of a breach of peace on account of a dispute regarding the possession of an immovable property. It is only on being satisfied that there is a real dispute existing concerning the possession of immovable property and that such dispute is likely to cause a breach of the peace, as is clear from subsection (1), that the Executive Magistrate gets jurisdiction to initiate proceedings and pass a preliminary order under S.145 of the Code. This satisfaction he or she may get from a report of the police officer or upon other information. The magistrate must be satisfied of the necessity to take action under S.145 of the Code before a preliminary order is passed and it cannot be said that in every case such satisfaction would automatically follow from a report of the police officer or upon other information. The question whether on the materials before the Magistrate, be or she should initiate proceedings or not is in his or her discretion and this discretion, no doubt, has to be exercised in accordance with the recognised rules of law in this Crl.MC No.2361/2013 16 regard." Based on another decision of the Supreme Court in Ashok Kumar v. State of Uttarakhand and others (2012 KHC4741, it is contended by the learned counsel for respondents 3 and 4 that the ingredients necessary for passing an order under Section 145(1) Cr.P.C. would not automatically attract for the attachment of the property. The Magistrate has to see whether the conditions prescribed in Section 146 Cr.P.C. have been satisfied before passing an order of attachment.

16. Shri K.P.Sreekumar, learned counsel for the petitioners submitted that the SDM had given several opportunities to respondents 3 and 4 to appear before him and to present their case at the hearing. Annexures-A1 to A6 are the notices issued by the SDM. It is the case of the petitioners that despite receiving notices, the contesting respondents did not appear before the SDM and try to establish

their case. Annexure- A1 was issued by the SDM on 23.09.2011, ie., previous to Annexure-A7 order dated 24.10.2011. Other notices issued by the SDM to the contesting respondents were subsequent to the passing of Annexure-A7 order. Learned counsel for the petitioners relying on the treatise on 'Legal Maxims' by Herbert Broom contended that where, an irregularity has been committed and where the opposite party knows the irregularity, it is a fixed rule observed by all the courts that the respondent should come in the first CrI.MC No.2361/2013 17 instance to avail himself of it and not allow the other party to proceed to incur expense. This contention perhaps would have been good, had the SDM complied with the mandatory provisions under Sections 145(1) and 146(1) Cr.P.C.

17. On an evaluation of the entire facts and circumstances and the legal aspects, I am of the view that the impugned order (Annexure-A9), passed by the learned Additional Sessions Judge holding that the order issued by the SDM on 24.10.2011 (Annexure-A7) is in utter disregard of the law under Sections 145 and 146 Cr.P.C. is legally correct and sustainable. In the result, the CrI.M.C. is dismissed affirming the order passed by the learned III Additional Sessions Judge, Kollam in CrI.R.P.No.64 of 2011. All pending interlocutory applications will stand dismissed. A. HARIPRASAD, JUDGE. cks

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