

Moni Vs. State of Kerala

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Court : Kerala

Decided On : Mar-17-2006

Reported in : 2006(2)KLT313

Judge : K. Padmanabhan Nair, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 134, 144, 144(1) to 144(7), 145 and 146

Appeal No. : Crl.M.C. No. 276 of 2006

Appellant : Moni

Respondent : State of Kerala

Advocate for Def. : P.M.A. Kalam, Public Prosecutor and; K. Gopalakrishna Kurup, Adv.

Advocate for Pet/Ap. : Joice George, Adv.

Judgement :

ORDER

K. Padmanabhan Nair, J.

1. The B party in M.C.No. 13/2006 on the file of the Sub Divisional Magistrate, Devikulam, are the petitioners in this Crl.M.C. The challenge in the Crl.M.C is

directed against an order passed by the Sub Divisional Magistrate, Devikulam, in exercise of the powers conferred on him under Section 144 of the Cr.P.C. On 25.1.2006 the respondents 5 and 6, who are the A party in the Crl.M.C. filed a petition before the Sub Divisional Magistrate. The Sub Divisional Magistrate forwarded the copies of that petition to the Dy. S.P., Munnar and the Tahsildar, Devikulam and called for their reports. On receipt of those reports the Sub Divisional Magistrate was of the opinion that the matter is of such urgency as to require an order under Section 144 of Cr.P.C and passed an order under Section 144 of Cr.P.C with intention to prevent the nuisance of apprehended danger. The operative portion of the order reads as follows:

The B party is therefore hereby directed to vacate the said building with immediate effect and not enter the premises of the said building. If the B party resists in vacating the building they will be evicted by the Dy S.P., Munnar for the A party to exercise their legal rights until the issue is settled by a competent court.

2. Challenging that order, this Crl.M.C is filed.

3. Sri. Gopalakrishna Kurup, the learned Counsel appearing for respondents 5 and 6 raised a preliminary objection regarding maintainability of this Criminal Miscellaneous Case. It is argued that the remedy available to A party against whom order under Section 144 is passed is to approach the Magistrate and if he takes a decision against aggrieved party, he can move the Government by filing a Crl. Revision Petition under Section 144(6)b of the Code and thereafter only the party can approach this Court. Section 144(1) gives power to the Magistrate for issuing orders in urgent cases of nuisance or apprehended danger. Section 144(1) provides that the Magistrate may by written order stating the material facts of the case and served in the manner provided by Section 134 direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management if such Magistrate considers that such direction is likely to prevent or tend to prevent obstruction, annoyance or injury to any person lawfully employed or danger to his man, life, health or safety or a disturbance to public tranquility or a riot or an affray.

(emphasis supplied)

4. Sub-section 2 confers power on the Magistrate to pass interim orders in case of emergency without hearing the opposite party. Sub-section 2 reads as follows:

An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex pane.

Sub-section 3 provides that an order under this section may be directed to a particular individual, or persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

Sub-section 4 provides that no order under this section shall remain in force for more than two months from the making thereof. Proviso to Sub-section (4) gives power to Government to extend the order for a period of six months from the date on which such an order was passed.

Sub-section 5 provides that any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section by himself or any Magistrate subordinate to him or by his predecessor-in-office. A reading of Sub-section 5 shows that the Sub Divisional Magistrate can rescind or alter any order passed by him.

5. Sub-section 6 of Section 144 of Cr.P.C deals with a the power of the State. It reads as follows:

The State Government may, either in its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to Sub-section(4).

Sub-section (7) of Section 144 deals with the procedure to be followed by the Magistrates and Government.

6. A careful reading of Section 144(6) shows that no revisional power is conferred on the Government against the order passed by the Magistrate. The power of the Government is confined to rescind or alter an order passed by Government under the proviso to Section 144(4) of the Code. The provisions of Sub-section (6) are

corresponding to the one under Sub-section (5) of the Code.

7. The jurisdiction conferred on the Magistrate under Sub-section(5) is not an appellate or revisional jurisdiction. It is true that Sub-section (5) confers power on the Magistrate to rescind or after any order made under this Section by himself or by any Magistrate subordinate to him or his predecessor in office. But it does not authorise the Magistrate to substitute a new order as held in *Cherappai v. Mathoo* 1960 KLT 724. Further Sub-section (5) is not the only remedy available to the aggrieved party. In *B. Linga Murthy v. Hussain Sahela* 1979 (2) Cri. L.J. 1147 it was held that, Section 144(5) cannot take away the jurisdiction of this Court to quash an order passed by the Magistrate under Sub-section (1) or (2) if such action is warranted by the circumstances of a case. In appropriate cases this Court can invoke the powers conferred on it under Articles 226 and 227 of the Constitution of India. If the impugned order is one without jurisdiction the existence of alternative remedy is no bar. So, there is no merit in the contention raised by the counsel for the respondents that the aggrieved party shall first approach the Magistrate and then the Government and thereafter only approach the High Court for redressal of the grievance.

8. Now I shall consider the merits of the case. As I have already noted, Sub-section 4 provides that an order passed by the Magistrate under Section 2 can remain in force only for a period of two months. In this case reading of the order shows that it is for a indefinite period. It is not limited to two months. The order of the Sub Divisional Magistrate issuing a direction to the Dy. S.P., Munnar to evict B party from the possession of the building and handing over the possession to A party is without jurisdiction. In *Alexander v. Ida Mathew* 1983 KLT 839, this Court has considered the circumstances under which the Magistrate can invoke power under Section 144. This Court has also considered the issue whether the Magistrate has got power to issue directions under Section 144 of Cr.P.C It was held as follows:

It is only a situation of emergency which enables a Magistrate to exercise jurisdiction under Section 144 of the Code. That being so, he has to apply his mind to that question and to see whether the matter is of such urgency as to require an

order under Section 144.

9. In *Gulam Abbas v. State of U.P.* : 1981 CriLJ1835 the Apex Court has laid down the factors to be borne in mind by the Magistrate before passing an order under Section 144 of the Code. It was held that the power can be exercised if an urgent situation exists warranting the power under Section 144 of Cr.P.C for maintaining public peace and tranquility. It was also such power shall not be exercised to adjudicate title or entitlement of property or adjudication of disputes of civil nature.

10. In *Parathodu Panchayat v. Kanjirapally Panchayat* 1984 KLT 204 this Court has considered whether an order passed by the Magistrate can be have an indefinite duration are irrevocable in nature. This Court held as follows:

Any order under Section 144, whether it directs a party to abstain from a certain act or to take certain order with certain property in his possession etc, must be of a temporary character, which means that it must not be irrevocable in its nature or partake of the character of a perpetual injunction. The Magistrate has no jurisdiction under Section 144 to pass an order which is not limited in time, but on the face of it purports to be of the nature of a perpetual injunction. The order of the Magistrate in this case is indefinite in duration and is irrevocable in nature. After the order is implemented either by the 6th respondent voluntarily or by the 4th respondent coercively, the cause of the complaint would have completely disappeared, in other words the order would have completely destroyed the cause. It follows that the order of the Magistrate is not sustainable.

11. A reading of the order passed by the Sub Divisional Magistrate shows that it is irrevocable and indefinite in duration. The Sub Divisional Magistrate had exercised his power in excess of the jurisdiction vested on him.

12. The Sub Divisional Magistrate has directed the Dy. S.P., Munnar to evict the petitioners from the building and then handed over the possession of the building to respondents 5 and 6. The Sub Divisional Magistrate has no such power under Section 144 of Cr.P.C. It is well settled position of law that a Magistrate acting under Section 144 of Cr.P.C has no right to adjudicate upon the rights he has no jurisdiction to decide upon any question of title or possession. He can pass an

order only to prevent to breach of peace while passing an order Section 144 of Cr.P.C the Magistrate has no right to disturb possession of the party who is in possession or put the property in dispute in possession of the Court. In Hafizuddia v. Laborde AIR 1928 All. 14 it was held that it is not permissible for a Magistrate under an order under Section 144 to dispossess a particular individual from certain property and direct delivery of possession of the property by an order under Section 144.

13. In Indrasan Rai v. Enayal Khan : AIR1952 Pat316 it was held that a Magistrate has no jurisdiction to seize property in the possession of a person and take it away from his custody when the property was already in possession or under the management of a person the Magistrate has no authority to put him in possession. See Rupan Singh v. Emporer AIR 1944 Pat. 213. A reading of Sub-sections 1 and 2 of Section 144 makes it very clear that a Magistrate while passing an order has no jurisdiction to deal with possession of any property or building. In Cherappai's case supra a learned Single Judge of this Court relying on the principles laid down in Hafizuddia's case and Indrasan Rai's case held that the Magistrate is not competent to direct the delivery of possession to another person.

14.1 respectfully follow the principle laid down in the decision referred to above. Hence the direction issued by the Magistrate to the Dy. S.P. to evict the petitioners from the building and put respondents 5 and 6 is without jurisdiction and liable to be set aside.

15. It is seen that there were disputes between the parties regarding the possession of the building. On an earlier occasion also the Sub Divisional Magistrate, Devikulam, had initiated proceedings under Section 145. An order under Section 146 was also passed. Correctness of those orders were challenged by the 5th respondent in this Crl.M.C. by filing Crl. R.P. No. 1449/2004. This Court held that the orders passed by the Sub Divisional Magistrate purportedly under Sections 145 and 146 are illegal and set aside those orders. That order was set aside. It was further directed that the possession of the building shall be returned to the A party who is the 5th respondent in this Crl. MC within seven days from the date of receipt of a copy of that order. It is admitted by both sides that in

pursuance of the order possession of the building was handed over to the 5th respondent.

16. The case of the petitioners in the CrI..M.C is that an election took place and petitioners are the newly elected office bearers of the union. It is contended that the new office bearers of the union are in possession of the office. That fact is disputed by the contesting respondents. According to them, till date no election took place and the petitioners are not in possession of the building.

17. The 5th and 6th respondents claiming to be the office bearers of the Union has filed O.S. 12/2006 against P.A. Joseph and K.S. Govindha Rajan before the Munsiff Court, Devikulam. They filed I.A. No. 82/2006 under Order XXXIX Rule I of Cr.P.C for injunction. That I.A. was dismissed. They filed C.M.A. No.4/2006 before the District Court, Thodupuzha. That CMA was dismissed as infructuous. While dismissing the appeal the following observations were passed by the learned District Judge:

In the result, the appeal is dismissed as infructuous. It is made clear that the authority of the newly elected office bearers to hold the office would be subject to the result of the suit. In case the election process was not complete or the office bearers had not taken charge, any election process taken hereafter or assuming charge hereafter shall stand injuncted. The lower court shall dispose of the suit at the earliest not later than six months from the date of receipt of the records.

18. It is not possible to decide the validity of the election in this proceedings. That is a matter to be decided by a competent forum in appropriate proceedings. The order passed under Section 144(2) can be in force for a period of two months only and it will lapse when that period is over. It is only just and proper that the parties are relegated to the position which they were before the proceedings started. If the Magistrate or police had taken possession of the key the same must be returned to the persons from whose possession the same was taken. It is the duty of the police to take effective steps to maintain law and order in the area. This order will not be a bar for the Magistrate to pass appropriate orders to abate public nuisances under Chapter X of the Cr.P.C.

19. In the result, the Crl.M.C is allowed in part. The operation of the order passed by the Sub Divisional Magistrate is limited for a period of two months from the date of the order i.e. from 26.1.2006. The direction issued by the Sub Divisional Magistrate to the Dy. S.P., Munnar to evict the petitioners from the building is set aside. If the Sub Divisional Magistrate or police had taken possession of the key of the building the same shall be handed over to the person from whose possession the same was taken.

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