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indira and Others Vs. Dr. Vasantha and Others

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Court : Chennai

Decided On : Jan-19-1990

Reported in : 1991CriLJ1798

Judge : T.S. Arunachalam, J.

Appeal No. : Criminal Revision No. 440 of 1989; Criminal Revision Petition No. 437 of 1989

Appellant : indira and Others

Respondent : Dr. Vasantha and Others

Advocate for Def. : R. Kannan, Adv.

Advocate for Pet/Ap. : N.T. Vanamamalai, Adv., for ;M/s V. Rajendran and ;R. Sethumadhavan, Adv.

Judgement :
ORDER

1. The petitioners who are the members of the 'A' party in M.C. No. 4 of 1989 (R.O.C. No. 5001 of 1989) on the file of the Sub-Divisional Magistrate and Revenue Divisional Officer, Kodaikanal, challenge the correctness of the order dated 24-7-1989 made by the said Magistrate purporting to be one under S. 145 of the Criminal Procedure Code, declaring possession in favour of the first respondent, who was 'B' Party No. 1 before the lower Court in respect of a house

situated at Door No. 7/16, Mudaliarpuram Fourth Street, Kodaikanal.

2. The facts necessary for disposal of this revision will have to be stated now. The first petitioner is the owner of the disputed house. The second petitioner is the husband of the first petitioner. The third petitioner is the nephew of the second petitioner. The first respondent is a neighbour of the first petitioner and the second respondent is her husband. The third respondent is a house broker.

3. The Inspector of Police, Kodaikanal, who had registered Crime No. 227 of 1989 under S. 145, Cr.P.C., on the basis of an occurrence alleged to have taken place at 11 a.m. on 28-6-1989 at Door No. 7/16, Fourth Street, Mudaliarpuram, Kodaikanal, requested the lower Court to initiate proceedings under S. 145, Cr.P.C. The allegations therein show that the first respondent is a medical practitioner residing at her own house of No. 7/14, Mudaliarpuram Fourth Street and that the third respondent was the care-taker of the house situated at Door No 7/16 of the same street, which belonged to the first petitioner herein. It appears from the allegations made, that the disputed house bearing Door No. 7/16, had been let out on a monthly rental of Rs. 1,000/- on payment of an advance of Rs. 5,000/- by the second petitioner herein to R.I. through the third respondent, who is a house broker. It is also alleged in the said petition that R.I. had occupied the house on 16-6-1989. Petitioners Nos. 2 and 3 on 28-6-1989 attempted to evict respondents Nos. 1 and 2 forcibly from the disputed house. During the said process, some household articles belonging to respondents Nos. 1 and 2 were thrown out of the house, which was locked by petitioners Nos. 2 and 3. On a complaint preferred by the first respondent, a case in Crime No. 227 of 1989 was registered against petitioners 2 and 3 and some others for alleged offences under sections 448, 454, 427 and 506(ii), I.P.C. During the course of investigation, the third petitioner and another were arrested and remanded. Some of the household articles belonging to the first respondent were still in the disputed house. Under those circumstances, both the parties were trying to take possession of the disputed house and in that background breach of peace was anticipated.

4. On receipt of the requisition of Inspector of Police, Kodaikanal, to initiate proceedings under S. 145, Cr.P.C., the Sub-Divisional Magistrate, Kodaikanal

issued summons (Varnacular-omitted) on 4-7-1989 to the petitioners and the first respondent directing them to appear before him at 11 a.m. on 7-7-1989 for an enquiry regarding the dispute relating to Door No. 7/16, Mudaliarpuram, Kodaikanal. They were directed to appear before him without fail with the records in their possession. If they failed to appear, final orders would be passed on the available materials. Another summon (Varnacular-omitted) dated 20-7-1989 was sent to the petitioners as well as the respondents. By this memo the parties had been directed to appear before the Court below on 24-7-1989 for an enquiry concerning Door No. 7/16, Mudaliarpuram, Kodaikanal. The parties had been directed to appear before the lower Court with all the documents in their possession on 24-7-1989, failing which, final orders would be passed on the available records. Both these summons dated 4-7-1989 and the memo dated 20-7-1989 quote in the column 'reference' S. 145, Cr.P.C., and enquiry on the basis of a report dated 2-7-1989 from the Inspector of Police, Kodaikanal. The final orders had been passed on 24-7-1989 by which the Court below had declared possession of the disputed house, in favour of the first respondent Dr. Vasantha.

5. At this stage it has also to be mentioned that the first petitioner had filed a civil suit. In O.S. No. 86 of 1989 on the file of the Court of the District Munsif, Kodaikanal, on 27-6-1989 against the respondents for an injunction, restraining them either directly or through their men from interfering with her possession of house No. 7/ 16, Fourth Street, Mudaliarpuram, Kodaikanal. The respondents have also appeared before the Civil Court and filed their statement of objections to the appointment of a Commissioner in the civil suit on 10-8-1989, subsequent to the passing of the impugned order.

6. Before considering the contentions of the learned counsel for the petitioners and the respondents, it is better to look into the impugned order itself. The first paragraph in the impugned order, is verbatim paragraph No. 3 in the petition filed by the Inspector of Police. Paragraph 2 in the impugned order is almost a reproduction of paragraphs 4 and 5 of the petition filed by the Inspector of Police, Kodaikanal, except the details regarding the registration of Crime 226 of 1989. The last paragraph in the impugned order states 'that the first respondent had spent Rs. 1,000/- for white washing, painting and minor repairs. Respondents 1 and 2

had also obtained electric service connection on 17-6-1989, which had already been disconnected by the Electricity Board for non-payment of current consumption charges. Petitioners 1 and 2, as an afterthought, wanted to let out the same premises to some other person for a higher rent and advance. With regard to the abovesaid dispute situated within the local jurisdiction of the Court below, all the parties were called upon to put in written statements of their respective claims as to the fact of the actual possession of the said disputed property. Both the parties were summoned for enquiry on 15-7-1989, 17-7-1989, and 19-7-1989. The claim of actual possession by Dr. Vasanthan, the first respondent, was found to be true. The second petitioner had not produced any evidence to support his case on those three days. Hence, the Court below decided and declared that the first respondent was in possession of the said disputed house and she was entitled to retain possession until ousted by due course of law, during which period, the Court below forbids any disturbance to her possession.

7. Mr. N. T. Vanamalmalai, the learned senior counsel appearing for the petitioners, contended that there was no preliminary order made by the Sub-Divisional Magistrate, which alone would invest him with jurisdiction to proceed further in the matter. The summons or memo dated 4-7-1989 and 20-7-1989, can by no stretch of imagination, deemed to be orders made under S. 145(1) of the Criminal Procedure Code. Further on the date fixed for hearing, by the memo dated 20-7-1989, the first petitioner had sent a telegram to the Court below, praying for an adjournment, in view of her husband, the second petitioner, attending a meeting at Palani. No opportunity was given to the petitioners to adduce evidence and the final orders had been abruptly passed. There was no opportunity to file written statement. No enquiry had been conducted and no witness was examined before the impugned order was promulgated. He would seriously challenge the observation that 'A' party had not produced any evidence, as incorrect and wrong. The procedure followed by the Sub-Divisional Magistrate was contrary to the mandate of S. 145(4), Cr.P.C. He finally contended that initiation of parallel proceedings under S. 145, Cr.P.C., should not have been made especially when O.S. No. 86 of 1989 between the same parties, was pending, on the file of the Court of the District Munsif, Kodaikanal. The lower Court ought to have dropped further proceedings at least when it had been brought to its

notice that a civil suit was pending between the parties regarding the same subject-matter.

8. Per contra, Thiru R. Kannan, the learned counsel appearing for the respondents would contend that satisfaction of the Magistrate as contemplated under S. 145(1), Cr.P.C. must be presumed on the basis of the summons and memo issued on 4-7-1989 and 20-7-1989 respectively. He would submit that once the final orders had been passed, we cannot go back either into the illegality in passing of the preliminary order or nonexistence of such an order, under S. 145(1), Cr.P.C. According to the learned counsel, the non-passing of a preliminary order would only be an irregularity curable under S. 465, Cr.P.C. The pendency of the civil suit is not disputed. The argument of the learned counsel for the petitioners, on non-compliance of procedure prescribed under S. 145(4), Cr.P.C. is not seriously disputed. The learned counsel for the respondents would urge that the impugned order will have to be sustained and both the parties should be allowed to sort out their differences in the Civil Court. Both the parties have placed before me certain rulings of various Courts, which I shall refer to, in the course of discussion.

9. The jurisdiction conferred upon an Executive Magistrate under S. 145 of the Code of Criminal Procedure is an exceptional one and the provisions of the section should have to be strictly followed while taking action under it. The object of the section is not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manoeuvring for possession for the purpose of the subsequent civil litigation, but to arm the Magistrate concerned with power to maintain peace within his local area. Therefore, a duty is cast on the Magistrates, to guard against abuse of provisions by persons using it with the object of getting possession of property while attempting to drive the other side to a Civil Court. The very jurisdiction of the Magistrate to proceed under this section, arises out of his satisfaction, of a dispute likely to cause breach of peace either on a report of a Police Officer or upon other information, which satisfaction must be reflected in the order which he should make in writing, stating the grounds of his satisfaction. This order which is the sine qua non of the proceedings, initiated under S. 145, Cr.P.C., must require 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 the irrespective claims as respects the facts of actual possession of the subject of dispute. After the passing of the preliminary order, a copy of the order shall be served in the manner provided for service of summons by the Criminal Procedure Code, upon such person or persons as may be directed by the said Magistrate and at least one copy should be affixed at some conspicuous place at or near the subject of dispute. This service of the copy of the order is provided under S. 145(1) and (3) together, it is apparent that the service of a separate summons is not contemplated and the preliminary order itself shall have to be served in the same pattern as service of summons. This Court on more than one occasion, had held, that under S. 145(1), Cr.P.C., a Magistrate having jurisdiction, shall make an order in writing that he was satisfied either from a police report or other information that a dispute likely to cause breach of peace existed, and the grounds of his satisfaction should be stated clearly to indicate the application of the mind of the Magistrate in passing the preliminary order. The provision of making the order in writing after initial satisfaction and stating the grounds of his satisfaction have been held to be mandatory. Though the Magi rate was not obliged to elaborately set out the entire details of the information received by him, the preliminary order, on the face of it, should set out the grounds of the Magistrate being so satisfied or at least employ language to similar effect so as to indicate that he had applied his judicial mind to the information, in coming to the conclusion that there was inexistence a dispute, which dispute was likely to cause breach of peace, necessitating initiation of proceedings under S. 145, Cr.P.C. If there was absolutely nothing in the preliminary order showing expressly the grounds of his being so satisfied, which are in the nature of conclusions arrived at by him, on the report or information placed before him, it would be impossible for the parties called upon to put in their claims before him, to predicate as to what had led the Magistrate to pass such an order and to make their effective representations before him. This legal position is apparent from the decisions of this Court in Nagammal v. Mani 1966 LW 101 Peria Mannadha Gounder v. Marappa Gounder 1968 LW Cri 179 Manikyaraja Ballal v. K. Jayaraja ballal 1981) LW Crl 10 and Janaki Ramachandran v. State, 1988 LW 147 : 1989 CLJ 590. On facts, has already been noticed, that except summons and memo dated 4-7-1989 and 20-7-1989 there is no material on record, to indicate the promulgation of a

preliminary order as contemplated under S. 145(1), Cr.P.C., which as stated earlier, is the foundation, for the exercise of jurisdiction by the Executive Magistrate.

10. The learned counsel for the respondents relied upon the judgment of the Full Bench of the Allahabad High Court in Kapoor Chand v. Suraj Prasad : AIR1933 All264 for the proposition that non-compliance with strict letter of law in formulating the order under S. 145(1), Cr.P.C., would not prevent the Magistrate from exercising jurisdiction to proceed with the case and that any defect in the procedure whether of illegality or irregularity was cured by S. 537, Cr.P.C. (new S. 465, Cr.P.C.) if there was no prejudice. As stated earlier, it is his submission that reference in the summons and memo dated 4-7-1989 and 20-7-1989 to the dispute regarding house No. 7/ 16 and proceedings having been initiated under S. 145, Cr.P.C., would be sufficient to presume, not only application of mind by the Magistrate to the facts placed before him, but also his satisfaction arrived at on the materials so placed. The law laid own by the same High Court Parmatma v. State, : AIR1954 All24 and, Narain Singh v. Mst. Suraj Kishore Devi, : AIR1951 All826 , the view of the Patna High Court in Wazir Mahton v. Badri Mahton, : AIR1950 Pat372 , the dictum of the Rangoon High Court and the view of the Judicial Commissioner, Peshawar enunciated in MG. PO. LON. v. MG. BA ON 26 Cri LJ 324and Municipal Committee, Kohat v. Piari 48 Cri LJ 159respectively are to the same effect. In all these cases the Courts were considering the effect of the lack of a preliminary order or defects in the said order and held that they were only irregularities curable under S. 537, Cr.P.C. (new S. 465, Cr.P.C.) on the ground that no prejudice had been caused to the parties in each one of those cases. This Court in Janaki Ramachandran v. State 1988 LW Crl 147 held that requirements for passing a preliminary order under S. 145(1), Cr.P.C., was the satisfaction of the Executive Magistrate about the information with regard to breach of peace which grounds ought to be apparent on the face of the order itself and non-compliance with those legal requirements constituted an illegality affecting the very jurisdiction of the Magistrate, which could not be cured as an irregularity under S. 465, Cr.P.C. The difference between illegality and irregularity need not have to be gone into, though S. 465, Cr.P.C. takes within its fold only irregularity for two reasons, one is that I would prefer to follow the law laid down by this Court and the

other is, in any event, the prejudice to the petitioners, leading to the failure of justice is apparent in these proceedings, in view of non recording of evidence and consideration of the same as provided under S. 145(4), Cr.P.C.

11. A reference was also made to the decision of the Privy Council in Abdul Rahman v. King Emperor, to justify the approach of the Allahabad High Court and some other High Courts, holding that S. 537, Cr.P.C. would cure irregularities, if any, in the passing of the preliminary order. The Privy Council was concerned with a criminal trial. It was held therein that no serious defect in the mode of conduct of a criminal trial could be justified or cured by the consent of the Advocate of the accused. While dealing with the provisions of S. 360, Cr.P.C., as it then existed, relating to reading over of the depositions to witnesses to obtain an accurate record and to provide an opportunity to the witness to correct the words which occurred or the clerk had taken down and not to enable the accused or his counsel to suggest corrections, the Privy Council held that a more non-compliance of the provisions of S. 360, Cr.P.C., was not enough to quash the conviction, unless it was accompanied by occasioning of any failure of justice. In that context S. 537, Cr.P.C., was referred to.

12. The Privy Council in Subramania Iyer v. Emperor (25 Madras 61) observed as follows :

'The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission or irregularity.'

The view of the Privy Council in both aforementioned cases would be sufficient to steer clear of a 'curable irregularity', since not only illegality is patent, but also prejudice to the petitioners is apparent.

13. The impugned order of the Sub-Divisional Magistrate does not disclose the documents placed before him by either party or his consideration of the same, to arrive at a conclusion. List of documents has not been appended to the order and

the order does not also indicate any marking given to the documents produced by the respondents. Section 145(4), Cr.P.C., enables both the parties to adduce oral and documentary evidence and the Magistrate is bound not only to receive all such evidence as may be produced, but also is empowered to take such further evidence, if any, as he thinks necessary. The Magistrate under the 1974 Code cannot dispose of a proceeding on the basis of affidavits and, therefore, the evidence of witnesses will be essential for deciding the question of possession. The evidence contemplated includes both oral and documentary. In order to enable parties to adduce evidence, reasonable opportunity has to be given to produce documents and witnesses and the Magistrate will also have a duty to summon such witnesses as may be required by either party. This procedure prescribed under sub-sec. (4) must be followed, for it is mandatory and the oral evidence adduced will have to be recorded and the documents properly proved according to rules of evidence. After the production of the oral and documentary evidence, the Magistrate will have to decide the question of possession on the evidence placed before him, which necessarily implies discussion of evidence placed before him.

14. The impugned order of the Magistrate extracted earlier, certainly shows that the enquiry contemplated under S. 145(4), Cr.P.C., which is mandatory, had not been done and the petitioners had no opportunity to adduce evidence and their request for a short adjournment had been turned down summarily. It is not as though the parties did not want to produce any evidence either oral or documentary. It is conceded that no oral evidence was recorded. The impugned order of the Sub-Divisional Magistrate, on the face of it, appears to be unsustainable, for having violated, not only the provisions of the Code, which invest him with jurisdiction, but also the mandatory provisions regarding further enquiry. I had an occasion earlier to consider the effect of non-compliance of S. 145(4), Cr.P.C. in Palaniappan K. v. The Executive First Class Magistrate, (1989 LW (Crl) 321).

15. The Andhra Pradesh High Court in Tenugu Ramulu v. Manik Reddy 1981 MLJ 387 observed that under the present Code it was incumbent on the Magistrate to receive all such evidence as may be produced by the parties by recording the

same in the manner provided under S. 274(1). The Magistrate should hear the parties and receive all such evidence as may be produced by them and take such further evidence as he thought necessary. It was generally repugnant to the principles of natural justice that evidence should be allowed to go in without calling the person whose evidence is admitted and without allowing the parties to test that evidence by cross-examination. Holding that non-compliance with the provisions of S. 145(4), Cr.P.C. would be an irregularity, the Andhra Pradesh High Court set aside the proceedings in that case an the ground of prejudice, as well.

16. The Karnataka High Court in Mahadev Anand Patil v. Smt. Huwakka Anand Patil 1966 MLJ 826 while considering similar provisions under section 145(4) of the old Code, held that the provision was mandatory and that the nonconsideration of the Magistrate of the evidence adduced by the petitioner was clearly illegal, leading to the unsustainability of the impugned order therein. On this ground, as well, the impugned order is liable to be set aside.

17. The last ground relates to the initiation of parallel proceedings, when the identical matter in respect of the disputed property was pending in the Civil Court. The Supreme Court in Ram Sumer Puri Mahant v. State of U.P. : AIR 1985 SC472 observed that when a civil litigation was pending in respect of the property wherein the question of possession was involved, initiation of a parallel criminal proceedings under S. 145 of the Code would not be justified. This Court in Govindaswami Pillai v. S.I. of Police Aranthangi 1987 LW 111 and Magdoom v. Jalal 1988 LW 89 applying the dictum of the Supreme Court aforementioned, held that in view of the parties agitating the same subject-matter in a competent Civil Court, parallel proceedings should not be allowed to go on by wasting public time. There was no other option, except to terminate the proceedings commenced by the Executive Magistrate, when a civil litigation was pending between the same parties, in respect of the same property, for whatever relief that could be obtained under S. 145, Cr.P.C., would also be available to the parties in the Civil Court.

18. It has already been noticed that a civil suit had been filed by the first petitioner long before the initiation of the impugned proceedings. It has also been argued that the pendency of the civil suit between the parties was brought to the notice of

the Executive Magistrate and this fact was discernible from the records. I hold that the law laid down by the Supreme Court in Ram Sumer Purir's case : AIR 1985 SC472 and followed by two learned Judges of this Court will squarely apply to the facts of this case.

19. The learned counsel for the respondents pleaded for a remand of the mater for a fresh enquiry. I am unable to accede to this request. Taking the background of the case, coupled with the pendency of civil proceedings, I do not think that any useful purpose will be served by remanding the matter for a fresh decision after a de novo initiation of the proceedings, since interim orders can be obtained in the pending suit by either of the parties. This criminal revision deserves to be allowed and it is accordingly allowed. The impugned order is set aside.

20. Revision allowed.

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