

(1988) 12 AHC CK 0036

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 23043 of 1988

Bal Bharti Nursery School through its Secy.Mohd.Haroon
Siddiqui and Anr

APPELLANT

Vs

A.D.M.(City) Allahabad & Anr

RESPONDENT

Date of Decision : 05-12-1988

Acts Referred:

Citation : (1988) 12 AHC CK 0036

Final Decision : Partly Allowed

Judgement

K. K. Birla, J.

By this petition Bal Bharti Nursery School through its Secretary Mohd. Haroon Siddiqui (hereinafter refer to as Sri Sddiqui) and its President Syed Mohd. Nasir Fakhri (hereinafter referred to as Sri Fakhri) wants a writ of certiorari quashing the order dated 18101988 passed under Section 144, Cr. P.C. and for issue of writ of mandamus commanding the respondents not to give effect to it.

In brief, Bal Bharti Nursery School Society runs Bal Bharti Nursery

School and Bal Bharti School (hereinafter referred to as the institutions). Earlier,

Km. Mughal Mahmood was the President and Sri Hashim Raza Aii Bakat (herein

after referred to as Sri Bakht) was its Secretary. There were certain complaints

of embezzlement etc. against Sri Bakht. On account of tension and the likeli

hood of disturbance of public tranquility the City Magistrate, Allahabad passed

an order under Section 144, Cr.P.C.. on 1571988, restraining Sri Bakht or any

person authorised by him from interfering in the affairs of the institution. This

order was effective till 3181988. It is alleged that an election of the Committee

of Management was held on 681988 in which Sri Fakhri was elected as President

and Sri Siddiqui as Secretary. The dispute between the parties continued resulting in apprehension of disturbance of public tranquility. The Additional District Magistrate (City) passed another order under Section 144, Cr. P.C. on 3181988, inter alia, restraining Sri Bakht and his agents to interfere in the management of the institutions or entering in the premises. This order was effective till 15101988.

The Inspector of P. S. Civil Lines within whose jurisdiction the institutions are situate, gave a report on 15101988. On the basis of this report the Additional District Magistrate (City) passed another order under Section 144, Cr. P. C. on 18101988. By this ex parte order the Additional District Magistrate (City) restrained both the groups from interfering in the management of the institutions or to enter in the premises. Over and above, it directed respondent No. 2 to manage the institutions in accordance with the directions issued by him. It also authorised the joint operation of the accounts of the institutions by respondent No. 2 and VicePrincipal of the institution. He also directed the Head Mistress and Sri Siddiqui to render accounts to him. This order is to remain in operation till 8121988. Being aggrieved the petitioners have preferred this Writ Petition for issue of the directions mentioned earlier.

4. Affidavit, counteraffidavit and rejoinder affidavit have been exchanged among the parties and the petition is being disposed of finally at the admission itself.

5. The learned counsel for the petitioners have contended that the impugned order travels far beyond the scope of Section 144, Cr. P. C. and is vague, that in earlier order Sri Bakht and his group was restrained and there was no material for restraining the petitioners from entering the institution or managing the same that the management could have not been entrusted to Respondent No. 2 nor other directions could be given in an order under Section 144. The learned counsel for respondent No. 2, besides supporting the order, contended that the petitioners' remedy against the ex parte order was to move the Magistrate under Section 144(5), Cr. P. C. or to prefer a revision, this Writ Petition is premature and, therefore, this writ petition not to be entertained and the power under Article 226 of the Constitution should not be exercised.

On the other hand, the learned Standing Counsel has contended that both the groups are fighting over the management of the institutions, they had made their smooth running impossible and there is continuous apprehension of

disturbance of public tranquility, that the directions in the impugned order were given in the interest of the management and in any case the court may direct the management of the institutions by a nominee of the District Magistrate till the parties get their rights determined by a competent court.

The learned counsel for the parties have advanced their arguments before us at length in support of respective contentions.

Section 144, Cr. P. C. is under Chapter X of the Cr. P. C. which is titled as "Maintenance of Public Order and Tranquility". SubHead C provides for "Urgent cases of nuisance or apprehended danger and contains Section 144 only. Its relevant provisions are as follows :

C. URGENT CASES OF NUISANCE OR APPREHENDED DANGER

1 44. Power to issue order in urgent cases of nuisance or apprehended danger.

(1) In cases where in the opinion of a District Magistrate a SubDivisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this Section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a 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 tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or disturbance of the public tranquility, or a riot, or an affray.

(2) An order under this section may, in case 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 parte.

An order under this section may be directed to a particular in or to persons residing in a particular place or area, or to he generally when frequenting or visiting a particular place or area.

No order under this section shall remain in force for more than two months from the making thereof :

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by he Magistrate would have, but

for such order, expired, as it may specify in the said notification.

(5) 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.

. 9. As regards the maintainability of this Writ Petition, the learned counsel for respondent No. 2 has relied on the case of Babulal Parate v State of Maharashtra, reported in AIR 1961 SC 884, in which it has been observed that the High Court has power to entertain a revision against an order under Section "144, Cr. P. C. The learned counsel for the petitioners have relied on the case of Gulam Abbas v. State of U. P., reported in AIR 1981 SC 2198 and has referred to headnote (e) wherein it is mentioned that AIR 1961 SC 884 is no longer good law in view of new Cr. P. C. The perusal of the case of Gulam Abbas, (supra) will show that the above observation is on a different point namely, the nature of the order passed under Section 144, Cr. P. C. and not on the point whether a revision will lie against that order or not. On the other hand in para 23 of this case it is observed that :

"It is also true that such an order made by the Executive Magistrate is revisable under Section 397, of the Code because under the Explanation to that section all Magistrates, whether executive or judicial or whether exercising appellate or original jurisdiction, are deemed to be inferior courts for purposes of the revisional power of the High Court or Court of Session."

But this controversy should not detain us further. In this very case at the end of para 23 it has been observed that :

"In our view, however, these aspects cannot make the order a judicial or quasijudicial order and such an order issued under Section 144 of the present Code will have to be regarded as an executive order passed in performance of an executive function where no lis as to any rights between rival parties is adjudicated but merely an order for preserving public peace is made and as such it will be amenable to writ jurisdiction under Article 62 of the Constitution. We would like to mention in this context that the power conferred (under?) Section 144, Criminal P. C, 1973 is comparable power conferred on the Bombay Police under Section 37 of the Bombay Police Act, 1951 both the provisions having been put on the statute book to achieve the objective of preservation of public peace and tranquility and prevention of disorder and it has never been disputed that any order was issued under Section 37 the Bombay Police Act is subject to writ jurisdiction of the High Court under Article 226 of the Constitution on the ground that it has effect of violating or infringing a fundamental right of a citizen

The nature of the power under both the provisions and the nature of function performed under both being the same, by parity of reasoning an order made under Section 144, Cr. P. C., 1973 must be held to be amenable to writ jurisdiction either under Article 32 or under Article 226 of the " Constitution if it violates or infringes any fundamental right.

Therefore, the impugned order is amenable to the writ jurisdiction. The parties have been heard at length on merits. Therefore, even if another remedy is available to the petitioner, it is not a proper case on its facts and circumstances otherwise should decline to exercise our jurisdiction under Article 226 of the Constitution.

The impugned order was passed ex parte and the petitioners could have approached the Magistrate under Section 144(5), Cr. P. C. quoted above. But as discussed above, the order is still amenable to the writ jurisdiction. This proposition, in fact, has not been seriously disputed. What has been contended is that we should not exercise our jurisdiction and reject the petition. The learned counsel for the parties have addressed at length on merits. The dispute between the parties is continuing for a considerable period and there have been more than one orders touching the same subject matter. Therefore, we feel that it is a proper case where we consider the matter on merits.

In the impugned order in the beginning the reasons for being satisfied to take action under Section 144, Cr. P. C. have been given and then the main operative order has been passed. In para 1 of the same Sri Hasim Raza Ali Bhakat on his representatives or employees or other persons connected with him have been abstained from interfering in the matter of the institution and they have also been abstained from entering into the premises. In para 2 the similar order with respect to Fakhari, Siddiqui and the alleged management committee etc. have been passed.

12. It is contended by the learned counsel for the petitioner that this order is vague and does not clearly mention the persons who will be actually covered by this order. In our opinion this contention cannot be accepted. The intention of the order is clear which restrains the persons of either groups to interfere in the management of the institution or to enter the premises. From the reasons leading to the satisfaction of the Magistrate it is clear that this has been done with a view to prevent the disturbance of the public tranquility. Therefore, this portion of the order cannot be said to be vague or one which is not contemplated under Section 144, Cr. P. C.

13. Annexure IV of the writ petition is the copy of the order, dated 15/8/88 passed under Section 144, Cr. P. C. By that order Sri Bakht and his agent were asked to abstain from interfering in the management of the institution. That order was challenged by Sri Bakht in this Court on various grounds including that simultaneous direction to Sri Bakht and his agents etc. and to Smt. S. Perry

(Principal of the Institution) could not be given under an order under Section 144, Cr.P.C. This contention has been repelled by the Division Bench in Writ Petition No. 12767 of 1988, Bal Bharti Nursery School Allahabad and another v. District Magistrate and another, decided on 14/10/1988. Therefore, the petitioners' contention in this regard has no force.

14. It was next contended that the petitioners were managing the institution, there was no apprehension of disturbance of public tranquility from their side and as such the impugned order could not have been passed. Under Section 144, Cr.P.C. it is the satisfaction of the Executive Magistrate (in the instant case that of the Additional District Magistrate) whether speedy immediate prevention was necessary and whether there was likelihood of the disturbance of public tranquility etc. The Additional District Magistrate received a police report on 15/10/88. Earlier too, on account of the apprehension of the disturbance of public tranquility, he had passed orders, though against the rival group. According to the police report the other Committee (that of the petitioner) was hobnobbing with bad elements, that both the groups had started taking the help of bad elements and there was likelihood of disturbance of public tranquility and violent incidents. According to this report there was grave danger to the safety of the teachers, students and other employees of the institution. Therefore, in our opinion passing of the order under Section 144, Cr. P. C. in these circumstances cannot be said to suffer from any infirmity under law. No doubt according to the police report the petitioners' committee was running the institution. The further contention on behalf of the petitioner is that, therefore, (the order ought not to have been passed against them, in our opinion this contention cannot be accepted.

15. The powers under Section 144, Cr. P. C. are exercised when immediate action has to be taken. This is an extraordinary power given to the Magistrate and under this section they can even direct the persons to abstain from doing certain act even they may otherwise be lawfully entitled to do the same.

16. In the case of Gulam Abbas (*supra*) it has been observed that :

The entire basis of action under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility. Preservation of the public peace and tranquility is the primary function of the Government and the power under Section 144 is conferred on the executive Magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to override temporary private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest and private right the former must prevail,

Therefore, though a person may have a right to use his property as he

pleases, but if the mode of enjoyment of the property results or tends to result in a breach of public peace, a Magistrate has power to abstain him temporarily from so using" his property. In the instant case therefore, the petitioner could be restrained temporarily from managing the institutions or visiting the premises in case it was necessary to prevent the disturbance of public tranquility or rioting. As pointed earlier the Magistrate felt satisfied in this regard. Therefore, as an urgent measure, the order contained in para 2 mentioned above could have been passed by the Additional District Magistrate and it does not suffer from any illegality.

In Paragraph 3 of the impugned order certain directions for the running of the institutions have been given. Respondent No. 2 has been directed to manage the institutions according to the directions of the Additional District Magistrate. It is further provided that the respondent No. 2 and the Vice Principal will operate jointly Bank accounts. It is contended on behalf of the petitioner that the said directions are beyond the scope of Section 144, Cr. P. C. and that under that section the management could not have been entrusted to any person. In our opinion the contention cannot be brushed aside lightly. The directions in respect to the property may be given only to the person who is in possession of the same or in whose management the property is. In the impugned order it is mentioned that respondent No. 2 was managing the institution. In the police report on the basis of which the Magistrate has passed the impugned order it is mentioned that the other committee (that of the petitioner) was running the management but was misusing the school funds. In the impugned order it is also mentioned that there were complaints against the other management committee and it was not beyond the circle of suspicion. Therefore, the direction in this regard does not appear to be in conformity with the provisions of Section 144 Cr. P. C.. The Magistrate is right in considering that some arrangement for the running of the institution should be made till the order is in force. Day to day running of the institution is done by the Head Mistress/Principal and, therefore she will be the proper person to whom necessary orders in this regard ought to have been given and she may run the same under the directions given by the Magistrate such a direction may also include the direction regarding the fees, the disbursement of salary and necessary arrangement for day to day running of the institution. Directions in subclauses (7)

and (8) to abstain the petitioners and the alleged management committee from taking away the records of institution and also from not withdrawing any amount from the Bank without the permission of the Magistrate. These directions are covered within the power of the Magistrate given under Section 144, Cr. P. C. and appear to be proper. Similarly the directions contained in paras 4, 5 and 6 are also in accordance with the section and their propriety has not been challenged before us.

In view of the above discussions, part of the impugned order deserves to be quashed.

It has been contended by the learned Standing Counsel that as there is a dispute between the rival groups, any person nominated by the District Magistrate may be ordered to manage and run the institution till further orders. No doubt this Court exercises very wide power while exercising its extraordinary jurisdiction under Article 226 of the Constitution of India and it may be that any arrangement may be made by this Court in the interest of justice. However, in our opinion the Court should take into consideration the nature of the dispute leading to the filing of the writ petition. There should be some nexus between the order passed and the nature of the proceedings.

21. This writ petition has arisen out of an order passed under Section 144, Code of Criminal Procedure. It is only in urgent cases of nuisance or apprehended danger to human life health or safety, or disturbance of the public tranquility, or a riot, or any other law that the powers under this section are exercised by the Magistrate. Neither rights of the parties nor the title is being determined. In fact for the purposes of this section there is no issue to be decided by the Magistrate. It is on account of this that the extraordinary power is given to the Magistrate which can even override the normal legal right of the person as pointed out earlier. The duration of the order under this Section has been limited for two months only. Even in case where the State Government seeks to take action, the maximum duration is six months. Therefore, any arrangement made which may continue for indefinite period or for a sufficiently long period will not be in consonance with the spirit of Section 144, Cr. P. C. In our opinion this aspect should not be lost sight of while

passing orders in this case.

22. Before concluding it may be pointed out that the Magistrate should

exercise the power under Section 144, Cr. P. C. only in exceptional cases particularly when it relates to the management of some immovable property and relates to a private dispute. This section is part of Chapter X titled as "Maintenance of Public Order and Tranquility", and deals with preventive aspect of the admission of criminal justice. Section 107 deals with the cases where a Magistrate may take action to prevent the breach of peace or disturbance of public tranquility. Section 129 and onwards gives power to the Executive Magistrate in cases of unlawful assembly and public nuisance. Section 145 provides for the procedure where dispute concerning the breach of peace is likely to be caused on account of dispute concerning land and water (immovable property). Therefore the action to be taken in ordinary cases of the likelihood of disturbance or public Tranquility or public nuisance etc have already been dealt with and ordinarily Executive Magistrate need not resort to the powers given under Section 144, Cr. P. C. It is only when the Magistrate feels that there is urgency and immediate steps are necessary and the orders passed under abovementioned provisions like Sections 107, 133 and 145, Cr. P. C. may not serve the purpose, the Magistrate should exercise this extraordinary power given under Section 144, Cr. P. C. The Magistrate has to balance the public interest and private right. A temporary power of overriding private right has been given in this provision, it is needless to say that (his power should not be exercised in routine manner.

In the instant case the Magistrate has passed three orders namely

15788, 31888 and then the impugned order. The tendency of passing the

successive orders under Section 144, Cr.P.C. with regard to the same property and

on the same basis has been deprecated even by the Hon"ble Supreme Court.

We may not be taken to express the view that successive orders cannot be passed

by the Magistrates. If necessary, they may be passed but the above guidelines

should be borne in mind. Under the scheme of Section 144, Cr.P.C., if it is found

that the order passed should operate for more than two months then the State

Government has been given power for the extension of such period not exceeding

six months under the proviso to subsection (4) of Section 144, Cr. P. C. In our

opinion, the intention of Law is clear that the rights of the parties should be got

decided by the competent courts and only in urgent situation the Magistrate

should resort to this power and that too for a very limited period. Therefore, where such necessity of operation of order for more than two months is felt the proper course would be to apprise the State Government about the same who may pass the necessary orders.

In view of the above discussion we are of the opinion that part of the impugned order as mentioned above should be quashed.

In the result, the writ petition is partly allowed. Clause 3 except subclauses (7) and (8) of the operative portion of the impugned order is quashed. The remaining impugned order is maintained subject to the condition that the Principal/Head Mistress of the Institutions will be responsible for day to day running of the Institutions under the supervision of and in accordance with the direction given by the concerned Additional District Magistrate, Allahabad with due advertence to the observations made above.