

(1978) 09 KL CK 0005
In the High Court Of Kerala

C. Vijayamma

APPELLANT

Vs

Padmanabhan Vasudevan and Others

RESPONDENT

Date of Decision : 19-09-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146, 411

Citation : (1980) CriLJ 119

Hon'ble Judges : S.K. Kader, J

Bench : Single Bench

Judgement

S.K. Kader, J.—The petitioner who is B-party in a proceeding initiated u/s 145 of the Cr. P. C., 1973, seeks to revise the order of the Court of Session allowing the revision petition filed by A-party and referring the question of possession of the property in dispute to the Munsiff for a finding thereon.

2. On the basis of a report received from the Sub-Inspector of Police, Karimkulam, and being satisfied that a dispute likely to cause breach of peace existed between A and B parties concerning the possession of 43\$ cents of land with a building thereon comprised in Sy. Nos. 149/6A and 149/6B in Karimkulam village, the Sub-Divisional Magistrate, Trivandrum, started proceedings u/s 145 of the Cr. P. C. and passed a preliminary order. Considering the case to be one of emergency, the Sub-Divisional Magistrate attached the property with the building thereon. Thereafter both parties adduced evidence in support of their respective contentions and the Sub-Divisional Magistrate stating that "this is not the proper forum to adjudicate the disputed possession over an extent of 31| cents of land in Sy. No. 149/6A and 149/6B of Karinv kulam village" stayed further proceedings and the case was "transferred to the Munsiff's Court" for decision along with a case already pending there,

3. This order was challenged by A-party in Crl. R. P. No. 34/76 before the Court of Session, Trivandrum. The learned Sessions Judge found fault with the Sub-Divisional Magistrate for having referred only the dispute regarding a portion of the property to the Munsiff and modified his order and referred the dispute

regarding the entire property and the building thereon to the Munsiff for a finding regarding the possession.

4. The order of the Sub-Divisional Magistrate as well as the Sessions Judge are clearly illegal and not warranted by the provisions of the Cr. P. C. 1973. The, learned advocate appearing for the revision petitioner rightly pointed out that either u/s 145 or u/s 146 of the Cr. P. C., 1973, the Magistrate or the Court of Session has no power to authority to refer the dispute regarding the possession of the property to a Civil Court for a finding on the question of possession. The learned advocate appearing for respondents 1 and 2 was finding it difficult to support the orders of the courts below-

5. It is regrettable that neither the presiding officers nor the advocates who appeared before them were aware of or alive to the changes introduced in Sections 145 and 146 of the Cr. P. C., 1973. u/s 146(1) of the Cr. P. C., 1898, if the Magistrate is of opinion that none of the parties was in actual possession at the material time, or is unable to decide as to which of them was then in such possession, of the subject of dispute, he may attach it, and draw up a statement of the facts of the case and forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in Sub-section (4) of Section 145; and he shall direct the parties to appear before the Civil Court on a date to be fixed by him. This novel scheme was introduced by the amendment of 1955.

6. Under the Code of Criminal Procedure, 1973, no such power is conferred on the Magistrate either u/s 145 or 146 Cr. P. C. The orders passed by the courts below are therefore clearly wrong and cannot be sustained. The procedure prescribed u/s 146 Cr. P. C. as it stood before the amendment of 1955, was comparatively short and simple. There was dissatisfaction expressed in many quarters regarding the practical working of the new procedure brought in by the amendment of 1955. The object of this amendment was to get the inquiry into the possession of the disputed property completed as quickly as possible and also to minimise the proceedings before the Magistrate. These new changes were examined by the Law Commission and noticing theoretical and practical objections, in its Thirtyseventh Report recommended restoration of the earlier position. The theoretical objection was that the procedure was anomalous, since it contemplated a reference to civil court as a part of the proceedings in the criminal court. The Law Commission of India in its Forty first Report on the Cr. P. C., 1898, finding that the object of the amendment of 1955 has not been achieved and that on principle it is better that the Magistrate is required to decide the important fact of possession on the basis of oral evidence tested by cross-examination in the presence of parties, recommended the restoration of the procedure, as it existed before 1955. One is at a loss to understand how the Sub Divisional Magistrate derived powers to transfer a proceeding before him to a civil court. Power of courts to transfer a criminal case is dealt with in the

various sections in Chap. XXXI of the Cr. P. C., 1973. Section 411, Cr. P. C is the only section pointed out by the counsel, which deals with the powers of the Executive Magistrates and even there no power to transfer a case is conferred on them. Under this section a District Magistrate or Sub-Divisional Magistrate may make over, for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him and also withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him and dispose of such proceeding himself, or refer it for disposal to any other Magistrate. A Magistrate whether Executive or Judicial has no power to transfer a criminal proceeding to a civil court for disposal. If the Presiding Officers had cared to look into the relevant provisions of the Cr. P. C., 1973, they would not have committed a serious mistake like this.

In the result, this revision petition is allowed. The orders of the courts below are set aside and the whole case is sent back to the Sub-Divisional Magistrate Trivandrum, for disposal afresh according to law.