
(1952) 11 KL CK 0011
In the High Court Of Kerala

Eralil Mathai Jacob and Others

APPELLANT

Vs

K. Ravivarman Thirupad and Another

RESPONDENT

Date of Decision : 20-11-1952

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 128, 145, 146, 147, 148

Citation : AIR 1953 Ker 202 : (1953) CriLJ 1013

Hon'ble Judges : Subramania Iyer, J

Bench : Single Bench

Judgement

Subramania Iyer, J.—This revision arises out of the following order passed by the District Magistrate of Trichur in M.C. No. 51 of 1952:

M.C. No. 51 of 1952.

1. K. Ravivarman Thirupad, Muthal- pidi of the Ayyampilli Deva- swom, Ayyampilli. 2. Mazhuvancheriparambath Tha- riath Ittiachen of Ayyampilli....
Petitioners. 1. Eralil Mathai Jacob. 2. Do. Mathai George. 3. Do. Vareed George, 4. Mazhuvancheripa- rambathu Paili Mathu. 5. Do. Paili Thariath. 6. Thekkekara Mathu Babastar. 7. Kochakkan Korath Jacob. 8. Thekkekara Vareed Varki. 9. Eralil Mathai Paul Poulouse. 10. Thekkekara Chakku Poulouse. 11. Puthusseril Ittikuriath Poulouse. 12. Kochak- kan Ittiain Korath?All of Ayyampilli Muri. ...Counter-Petitioners.

Preliminary Order.

Wet lands including From the facts set out in the varambas, chiras report dated 11.11.1952 of the Circle and chals in survey Inspector of Police, Always, and the Nos. 170 to 382 of enclosures thereto, I am satisfied that Ayyampilli Muri, there is a dispute between the par- Kuzhupilli Village. ties mentioned above regarding the right of fishing in the lands described in the margin and which is situated within the jurisdiction of this Court, and that there is every likelihood of an imminent breach of the peace, unless immediate action is taken to prevent the same. 2. I therefore, require, u/s 147, Criminal P.C. the parties mentioned above

to appear before this Court in person or by pleader at 11 A.M. on 26.11.1952 In the camp Court at Ernakulam and to put in written statements of their respective claims regarding the right of fishing in the marginally noted properties.

3. Since the matter is an emergent one, I hereby attach the properties in dispute and appoint the Sub-Inspector of Police, Munambam as Receiver thereof and further direct to allow the second petitioner to exercise the right of fishing in the disputed properties until otherwise directed from this Court.

Given under my hand and the seal of this Court this the 13th day of November 1952.

Sd/- P.A. Mohyiddin, District Magistrate.

2. The order was passed without hearing or issuing notice to any of the respondents. On the day next after the order, respondent 1 knew about it and immediately applied to the District Magistrate for a stay of its operation to enable him to file a revision in this Court. That application was allowed and the operation of the order was stayed until further orders. The next day, that is, on 14.11.1952, respondent 1 in the Court below filed this Criminal Revision Petition in this Court and obtained an order of stay for seven days. Notice was issued on the Criminal Revision Petition with an order to call for the papers forthwith and post the petition for hearing to 16.11.1952.

3. The respondents in this revision are the two petitioners shown as such in the order of the Court below and the Sub-Inspector of Police, Munambam who is the receiver appointed by that Court. Mr. M.U. Issac, learned Counsel for the petitioner, Mr. N.K. Narayana Pillai for respondent 1 and Mr. K.P. Abraham for respondent 2 addressed before me a somewhat lengthy argument which was commenced the day before and completed yesterday.

4. Paragraph 3 of the order is challenged on behalf of the petitioner as ultra vires the powers of the District Magistrate and void. The facts as represented before me are as follows:

5. Survey Nos. 170 to 332 noted in the margin of the impugned order from a block of lands measuring over one hundred acres with the backwaters on the east and poramboke canal touching the said backwaters on the south, on the west and north lie lands on a higher level. This block is protected from the backwaters as also from the said poramboke canal by bunds. Inside the block, there are canals, two of which touch the backwaters and one the aforesaid poramboke canal. The bulk of the lands comprised in this block belongs in jenmom to the Ayyampilli Devaswom and is outstanding with tenants on kanom and other tenures. The rest of the lands are stated to belong to other persons who hold the same on pandaravaka verumpattom tenure. There are in this block wet lands fit for paddy cultivation. There are also garden lands on which cocoanut & other trees are planted. On account of its vicinity to the backwaters, this block of lands has the advantage of being used for prawn fishing by taking in

seawater and letting the same out in the appropriate season and catching fish at the mouth of sluices made for the purpose in the aforesaid bunds on the east and south. The fishing industry appears to have been carried on for some years with the co-operation of all the concerned parties namely the Devaswom, the tenants and the other parties in possession all of whom would appear to have had advantages thereout. The license requisite for the purpose appears to have been obtained by the Devaswom and fishing done by persons to whom the right was given by the Devaswom on contract. The Devaswom does not admit that any of the parties in possession is entitled to or was given any part from out of the proceeds of fishing. This is a matter of controversy.

6. The period for the fishing operation commences from the 1st of Vrischigom that is, about the 16th of November and continues until the end of Makaram, that is about the 15th of February, The season for the cultivation of paddy would start thereafter and would end before the next Vrischigom. The paddy lands in the block would appear to have been cultivated with only one crop in a year. The two processes of paddy cultivation and prawn fishing would appear therefore to be possible and profitable. Indeed there is agreement between the parties that during the season for prawn fishing that industry was being and ought to be carried on.

7. This year the Devaswom auctioned the right of fishing and the 2nd petitioner in the court below who is the 2nd respondent in this revision was the highest bidder. No licence has been taken this year either by the Devaswom or by any other party, though several of them have applied therefor. The aforesaid bunds separating the block of lands from the backwaters and the poramboke canal which are called ring bunds and the sluices therein have to be annually repaired for purposes of fishing and when that work which has got to be done by the Devaswom was attempted this year, obstruction was offered by some of the respondents in the court below, but the work was nevertheless done with the assistance of the Police on 6.11.1952. The thing done was however not permitted to remain and it was done away with the very night. Some of the tenants in their turn put up sluices in the bunds for the purpose of fishing. Both parties approached the authorities for redress and a petition was filed before the Police and two or more petitions were filed before the Sub-Magistrate who forwarded the same to the Police for enquiry. The Police enquired into the matters mentioned in the various petitions and submitted a report to the District Magistrate on 11.11.1952. This is the report mentioned in his order dated 13.11.1952, The said report of the Police indicates the existence of a dispute of possession without particularly ascribing fault to any party and contains a recommendation to take action u/s 145, Criminal P.C.

8. A person called Abraham is stated in that report to be possessed of a considerable extent of property in the block of lands and who has been making large profits out of fishing in the block.

9. The District Magistrate, however, drew up the aforesaid preliminary order, not

u/s 145, tout u/s 147. It is significant that the aforesaid Abraham is not one of the respondents in the order. The date fixed in the order for the parties to file their respective written statements is 26.11.1952.

10. The only question that arises for decision in this revision is whether the attachment of the property, the appointment of a receiver and the direction to permit the second petitioner to exercise the right of fishing in the disputed property is with or without jurisdiction. Section 147 does not expressly authorise either the attachment of property or the appointment of a receiver. As regards the direction to permit the second petitioner to exercise the right of fishing, Clause (2) of Section 147 authorises the Court to pass an order. That however, can be done only after and as a result of the enquiry provided in Clause (1) and in the event of the Court finding that the right alleged exists. No interim or interlocutory order is contemplated by the section.

The authorities are uniform upon this question. Reference may be made to - Khoda Bux v. Mozaharul Haque 44 CWN 623 , corresponding to Sk. Khoda Bux and Others Vs. Mozaharul Haque and Others, ; - Ramchandra v. Shankarrao AIR 1932 Nag 83 (B) and Bhanwar Singh and Others Vs. Rama and Others, . Indeed I did not understand learned Counsel for the respondents contending to the contrary. The latter part of para 3 of the District Magistrate's order which says "and further direct to allow the second petitioner to exercise the right of fishing in the disputed properties until otherwise directed from this Court" would therefore appear to be beyond the competence of the District Magistrate because it in terms is like the order under Clause (2) of Section 147. Learned Counsel for the respondents, however, contend that though the language of this part of the order is unhappy, it has to be liberally interpreted and understood as not a direction given to the respondents in the Court below to permit petitioner 2 to exercise the right but a direction given to the receiver to so permit petitioner 2. Even on the basis of the interpretation contended for on behalf of the respondents what the Court does is to ask its own officer to permit petitioner 2 to exercise the right claimed by him. This, upon the language of the section and upon the authorities already cited, the Court could not do. What the Court cannot do directly cannot also do indirectly. That part of the order is, therefore, beyond the District Magistrate's jurisdiction and should be quashed.

11. The question that remains is as regards the validity of the former part of para 3 of the order which consists of the attachment of the properties shown in the margin as also the appointment of respondent 3 here as receiver. There is dearth of direct authority as to whether a Court is competent to appoint a receiver in proceedings u/s 147. There is no express authority conferred upon the Court to do so. Learned counsel for the respondents however urge that the provision in Section 147 to the effect that the Court "shall thereafter enquire into the matter in the manner provided in Section 145 and the provisions of that section shall, as far as may be, be applicable in the case of such enquiry must be interpreted as enabling the Court to use all the powers that the Court has u/s

145. Proviso 2 to Clause (4) of Section 145 which authorises attachment of property and appointment of a receiver is claimed to be a provision whose use is authorised by Section 147. The answer to the argument is afforded by the section itself. The use of the provisions of Section 145 authorised by Section 147 does not relate to all the provisions of that other section but only to "such of the provisions therein "as far as may be". The entirety of the provisions of Section 145 not being thus applicable, the question is, what are the provisions that are applicable and what are not. This question can be determined with reference to the subject matter of the enquiry and the applicability of the provisions regarding the enquiry will depend upon the nature of the subject matter.

Section 147 says "shall thereafter inquire into the matter in the manner provided in Section 145". The matter to be enquired u/s 147 is different from the matter for enquiry u/s 145. The provisions of Section 145 whose application for purposes of the enquiry is sanctioned by Section 147 would therefore, be only those provisions which are germane to the matter for enquiry u/s 147, that is to say, the manner of enquiry will depend upon the matter for enquiry. The matter for enquiry u/s 147 is an abstract right though that abstract right has relation to the use of Immovable property. The right itself is abstract and has no concrete existence and does not, therefore, admit of being possessed physically. Possession of Immovable property is not within the ambit of Section 147; that comes within the ambit of Section 145.

Under Section 147 the Court is only authorised to pass an order in terms of Clauses (2) and (3). If the Magistrate finds that the right claimed exists, he may make an order prohibiting any interference with the exercise of such right and if the Magistrate finds that the right does not exist, he may make an order prohibiting any exercise of the alleged right. No order regarding possession of property is contemplated by Section 147 because possession of property, as already stated, is beyond the scope of that section and is expressly within the scope of Section 145. The manner of enquiry, provisions regarding which are contained in Section 145, that are permitted to be applied in an enquiry u/s 147 must, therefore, have relation to the matter for enquiry u/s 147 and that matter not having any relation to possession of Immovable property, any provision contained in Section 145 relating to possession of Immovable property cannot be applied in proceedings u/s 147. Under proviso 2 Clause (4) of Section 145, the Court is entitled to attach immovable property and appoint a receiver for its management. At the conclusion of the enquiry, if the Court is able to find possession with one or the other of the parties such possession may be made over to the successful party who would be entitled to retain it until dispossessed in execution of a decree of a civil Court resort to which is permitted u/s 145. If, however, a Magistrate is not able to find possession in one or the other of the parties, then Section 146 enables the Court to keep the property under attachment until a competent civil Court shall have determined the rights of the parties and the persons entitled to possession. When possession of property is assumed by the Court it must be able to retain it until determination of the party

entitled to it or its possession. Section 145 contemplated the said determination as also, inability to make that determination and the next section provides for the contingency of the Court being unable to find possession in one or the other of the parties. Section 146, therefore, though numbered separately may really be considered as a part of Section 145 or as a complement to it.

In - *Rahim Baksha v. Abdul Wahad* ILR (1948) Cal 274 (D) the question whether attachment of property could be made and a receiver appointed in proceedings u/s 147 when the Magistrate finds it difficult to come to a conclusion one way or the other as regards the right claimed by the parties, arose for consideration and it was held that the Magistrate had no Jurisdiction either to attach the property or to appoint a receiver. The learned Judge says at page 375:

Now, in proceedings u/s 147, Criminal P.C. there is no conflict regarding the question of possession. This section deals with an alleged right of user of any land or water.... An attachment means dispossession and where there is no dispute regarding possession I cannot see how a Court can dispossess the party which is admittedly in possession of Immovable property.

The same question was considered by the Madras High Court and the same view taken in - *M.N.M. Chelliah Pillai Vs. Ramiah Thevar alias Ramalinga Thevar and Others*, . No doubt the question that arose in those cases was as regards the competency of the Magistrate to attach Immovable property and appoint a receiver at the conclusion of the enquiry u/s 147 and the question that arises in the present case relates to the jurisdiction of the District Magistrate to attach property and appoint a receiver at the commencement of the said enquiry. The nature of the dispute and of the subject matter in the proceedings u/s 147 is one and the same at the commencement, during and at the conclusion of the enquiry. The ratio of the decisions in the above said Calcutta and Madras" cases applies equally well to the state of things as at the commencement of the enquiry as well as at the stage of its conclusion. If possession of Immovable property is not within the scope of the provisions u/s 147, it is difficult to conceive how there could be either attachment of Immovable property or appointment of a receiver.

A decision of the Cochin High Court in - 27 Cochin 463 , and another of the Calcutta High Court in *Sk. Khoda Bux and Others Vs. Mozaharul Haque and Others*, , are relied upon, by learned Counsel for the respondents. In - 27 Cochin 463(F), it appears at page 464 that

the District Magistrate, therefore, called upon the parties u/s 128, Criminal P.C. to put in written statements of their respective claims as regards the fact of actual possession-and control of the subject of the dispute.

Section 128 of the Cochin Code under reference-corresponds to Section 147 of the Indian Code. If the notice was u/s 128, the contents thereof could not be as in the above extract. If, on the other hand the contents of the notice were one asking the parties to file written statements in the manner and regarding the

matter shown in the abstract, it is clearly a notice u/s 145, Indian Criminal P.C. corresponding to Section 126 of the Cochin Code. Either there is a mistake in the number of the section or in the contents of the notice in the above extract. In the subsequent portion of the judgment, the proceedings under consideration were taken to have been instituted u/s 128 and the judgment concludes as follows:

The other objection raised is that in Section 128 there is no provision to attach the subject matter of the dispute or appoint a receiver. True the section does not contain the provision. But the procedure u/s 128 should be the same as that for Section 126. Having found that the case in hand was one of emergency and possession was alleged to be common, we cannot say that the Court in passing the order of attachment and appointment of a receiver acted ultra vires.

This is the portion relied upon by learned Counsel for the respondents. Here again with great respect to the learned Judges responsible¹ for that decision, I am constrained to observe that the confusion that there is in the extract regarding notice at page 464 continues-here as well. If it is Section 128 that was under contemplation, how did the question of possession arise and if the question of possession did arise, how could the proceedings be u/s 128. The facts of that case are, therefore, in this state of confusion and I can only say with respect that the decision must have been rendered per incuriam. The question that arose in *Sk. Khoda Bux and Others Vs. Mozaharul Haque and Others*, was whether an interim order could be passed in terms of the final order contemplated in Clause (2) and (3) of Section 147 and the learned Judges say "No". They added at the close of the judgment at page 330, that

should it appear to him to be necessary to-pass an ad interim order of any kind he may-do so in the manner provided by Section 148, Clause 4, proviso 2.

This passage is Interpreted as meaning that In proceedings u/s 147, proviso 2 of Clause 4 of Section 145 can be used.

In the first place, I do not think that the learned Judges meant that, because to attribute that meaning would be to make them say something which did not arise for decision and which is not, as already stated, correct. The meaning rather is that, should there be an interim order by way of attachment or appointment of a receiver, the proceedings should be u/s 145 when the second proviso of Clause 4 could be availed of. If the meaning of the learned Judges is as contended for by learned Counsel for the respondents, I must, with great respect, record my dissent from that view. Section 146 has no application to proceedings u/s 147. Section 147 does not refer to Section 146 and provide for the procedure therein to be followed as it does in the case of Section 145. If the Magistrate cannot continue the attachment and the receiver, the property has to be restored back to the person or persons and in the state of things in which it was at the time the attachment was made and receiver appointed. The situation to avoid the consequence of which proceedings u/s 147 were started and the interim order of attachment and appointment of a receiver was passed would thus be again

restored to avert which similar proceedings have to be restarted and repeated in the above manner interminably. To hold that, the Magistrate has jurisdiction to attach Immovable property and appoint a receiver in a proceeding, u/s 147 would lead to this result and in my judgment a consideration merely of that consequences would clinch the question and not only justify but necessitate the view that the Magistrate has no jurisdiction either to attach Immovable property or to appoint a receiver therefore in proceedings u/s 147.

12. Learned Counsel for the respondents argued before me the urgency and importance of the matter with special reference to the large stake involved with a view to persuading me to maintain the order for attachment of property and appointment of a receiver. While appreciating that the situation is such that heavy loss might arise if the fishing process is not started and conducted, I do not find my way to upholding the order passed by the District Magistrate because, in my view, it is altogether beyond his competence to pass it. The provisions contained in Chap. 12 Criminal P.C. are not such as to meet every situation that might arise. They are meant merely as temporary provisions to meet the exigencies of an emergent situation. The reliefs are temporary in character. The final adjudication of the rights of parties must be by the civil Court. As observed by the Full Bench of the Calcutta High Court in - Hem Chandra Banerji Vs. Abdur Rahaman, , "If the aggrieved party wishes any fuller or further relief from the Courts, the Civil Courts are open to him." There are in the Code of Criminal Procedure also other provisions resort to which may be appropriate. It is not for me to consider or advise as to the appropriate kind of action to be pursued.

13. I ought not to omit to mention the fact that one Abraham who is seen to be in possession of a considerable extent of property and who is reported as the doer of fishing operations in the block of land in question is not, as already stated, before Court and in his absence, it is illegal, to attach or to appoint a receiver over the property which is in his possession.

14. In the result I allow the Criminal Revision Petition and quash para 3 of the order, passed by the District Magistrate on 13.11.1952 as ultra vires his powers and void as such.