

(1919) 10 MAD CK 0033
In the Madras High Court

Gopala Aiyar and Others

APPELLANT

Vs

Krishnasawmy Iyer Alias and Appa Aiyer

RESPONDENT

Date of Decision : 08-10-1919

Acts Referred:

Citation : 54 Ind. Cas. 473 : (1920) 11 LW 459

Hon'ble Judges : Sadasiva Aiyar, J; Burn, J

Bench : Division Bench

Judgement

Burn, J.—This is an application to revise an order made by the Sub Divisional Magistrate, Kumbakonam u/s 145, Criminal Procedure Code, on 1st July 1919. There are in fact two orders, the first is the one contemplated by Clause (1) of the section and the second is an order of attachment and the appointment of a Receiver, which purports to have been made under Clause (4), proviso (2), of the section. Both orders are called in question. The defendants are the four co trustees of a temple. Three of them are on one side and one on the other. The former will be referred to as party No. 2 and the latter as party No. 1. The first move was made by party No. 2 by a petition for action u/s 144, "Criminal Procedure Code. This was disposed of by the Stationary Sub-Magistrate by orders passed on 23rd January 1919 and 27th June 1919. Party No. 1 was restrained from interfering with the temple and its properties. The hearing was adjourned to 10th July 1919 for production of evidence by him. On the 27th June 1919 party No. 1 presented an application to the Sub-Divisional Magistrate for cancellation of the order u/s 141 and for action u/s 145. Thereupon the Sub-Divisional Magistrate stayed further proceedings by the Stationary Sub-Magistrate and made the orders now complained of.

2. The first objection is that the Sub Divisional Magistrate had no authority to pass such orders until the proceedings of the Stationary Sub-Magistrate had been can. celled. In the circumstances of the case Section 145 was the appropriate provision under which action should be taken. The facts show that a personal order against party No. 1 would be ineffective to prevent a breach of

the peace. I think the Sub-Divisional Magistrate had jurisdiction.

3. The second objection is that there was no material before the Magistrate on which he could come to a conclusion that a breach of the peace was probable. It is true that party No. 1 had alleged, for purposes of impugning the order of the Stationary Sub-Magistrate, that there was no evidence that a breach of the peace was likely to occur. The Magistrate has, however, to consider all the information before him and it cannot be said that this was not sufficient to justify his action. It is enough to refer to the allegations of party No. 2 in paragraph 5 of the petition of 19th June 1919 and of the fact that each party averred that it had let out the temple lands. The cultivation season was at hand and it was very probable that the rival lessees would come to blows. The third objection is that the Magistrate had no jurisdiction "to initiate proceedings or pass any order u/s 145, Criminal Procedure Code, in the present case, where admittedly all the trustees were entitled to joint possession and management of the temple and its properties." It is important to note that the proceedings have not got beyond the issue of the preliminary order. The inquiry contemplated by the section as to the actual possession has not yet been made. A Magistrate acting u/s 145 is not directly concerned with the title or rights of the parties. He may have to secure the possession of a person who has not merely got no title but who has obtained his possession by force, provided he has been able to maintain it for two months preceding the preliminary order.

4. As I read the contentions of the contesting parties, each is setting up exclusive possession. This is a matter which must be inquired into. The legal position of the parties may be of importance in judging of the weight to be given to the evidence as to actual possession. Circumstances which in the case of a stranger would indicate exclusive possession in himself may, in the case of co-owners or co-trustees, be quite consistent with actual possession remaining in all of them. If the contesting parties are in joint possession, then it is dear that no order can be made u/s 145, Clause (6). These are matters which have to be considered by the Magistrate before arriving at his decision. Interference at this stage is uncalled for and would in fact amount to prejudging the issue which has to be determined of *Srinivasa Pillay v. Sathayappa Pillay* 14 Ind. Cas. 759 : 13 CrI . L.J. 295. A number of rulings have been cited on behalf of the petitioners before this Court. I think it is unnecessary to refer to them in detail. They all relate to cases when the inquiry as to possession had been completed and all the facts and the findings were before the High Court. There are observations in *Makhan Lal Roy v. Baroda Kanta Roy* 11 C.W.N. 512 : 3 Cri. L.J. 296 which are so wide as to lend support to the contention advanced before up, but this decision is in conflict with the decision of a bench of this Court in *Narayana Asari v. Kandasami Asari* 29 Ind. Cas. 541 : 3 L.W. 164 : 16 Cri. L.J. 526 and the remarks have been explained as *obiter dicta* in a latter ruling of the Calcutta High Court itself: vide *Basanta Kumari Dasi v. Mahesh Chandra Laha* 19 Ind. Cas. 541 : 40 C.p 982 : 17 C.W.N. 944 : 14 Cri. L.J. 269.

5. An argument has been based on the wording of Clause 6 of Section 145, i.e., that when the dispute is between persons who are admittedly entitled to joint possession, neither can be evicted" at the instance of the other and that, therefore, Section 145 must be held to be wholly inapplicable to such cases. In my opinion this is putting too narrow a construction on the clause. I think "evicted" may be taken to apply to cases where a person is found to be disentitled to the extent of possession which he claims as well as to cases where he is found not to be entitled to possession at all.

6. The fourth objection is as to the attachment and appointment of a Receiver. It was argued that the Magistrate had no authority to take possession of the properties in dispute. When an attachment is made u/s 146, the taking and keeping of possession is contemplated. I see no reason to suppose that attachment u/s 145 has any other meaning. One object of the provision appears to be to keep effective control of the subject in dispute so as to prevent the contesting parties from creating a breach of the peace in their attempts to obtain physical possession. With all respect I am unable to agree with the view expressed by Mullick, J. in *Mewa Lal v. Emperor* 44 Ind. Cas. 41 : 3 P.L.J. 147 : (1917) Pat 363 : 4 P.L.W. 359 : 19 Cr. L.J. 249 that such action has no greater force than any Civil Court attachment.

7. A mere restraint on alienation would generally be of no use in preventing a breach of the peace, and this is the object with which Section 145 is enacted. In order to keep possession a Magistrate must ordinarily act through some agent appointed by him in this behalf. In this case he has been designated a "Receiver." It may be that another name would be more appropriate and that a person appointed with reference to an attachment u/s 145 has not the powers which a Receiver appointed u/s 146 32 C.P 249 : 8 C.W.N. 885 : 1 Cr. L.J. 847 can exercise. It is unnecessary to consider this question, as the record does not disclose that the individual appointed was authorised to do more than take possession of the properties in dispute and submit an inventory of them or that there is anything in the particular circumstances of this case which made it improper for the Magistrate to authorize him to do so. In my opinion the order does not call for modification.

8. The last objection is that the order is bad in so far as it directs the attachment of moveables. This objection must be upheld, as Section 145 is inapplicable to such articles. In certain circumstances it may be the duty of a person entering into possession of Immovable property under the orders of a Magistrate to take proper steps to secure the movables which are on the property at the time: *Kochunny v. Manavikrama Rajah Amyal* 14 Ind. Cas. 318 : (1912) M.W. N. 540 : 13 Cri. L.J. 222 but the order of attachment is unsustainable and must be set aside.

9. The order of the Magistrate will be modified as indicated above. In other respects the petition is dismissed.

Sadasiva Aiyar, J.

10. The Court has no power to interfere with orders passed under Chapters XI and XII of the Criminal Procedure Code except by the use of Section 107 of the Government of India Act, because Section 435(3) of the Criminal Procedure Code precludes the use of the powers of revision contemplated in Clause (1) of Section 435. I need not say that interference u/s 107 of the Government of India Act should only be made in exceptional cases.

11. As my learned brother has pointed out, no final order has been made by the Sub-Divisional Magistrate. Hence it is undesirable to interfere at this stage except with such portions of the Sub-Divisional Magistrate's order as are clearly against law. The attachment of movables u/s 145, Criminal Procedure Code, is clearly such an illegal order and I agree with my learned brother that that portion of the lower Court's order should be reversed. As to what should follow the removal of the attachment it is for the Deputy Magistrate to look into and I am not prepared to give advice on the matter at this stage.

12. Whether there is a likelihood of the commission of a breach of the peace by the four trustees themselves may be a doubtful point, and the learned Sub-Divisional Magistrate says merely that the rival lessees on both sides are likely to break each other's heads very soon as the cultivation season has commenced." These rival lessees have not been made parties to this revision case and though the learned Sub-Divisional Magistrate may not have passed any express order directing the names of the lessees to be entered in the record as parties to the proceedings before him, his proceedings have virtually made them such parties and whatever may be the law on the question--whether one co-trustee in actual physical exclusive possession or in actual exclusive possession by receipt of rents could invoke Section 145 for the protection of such exclusive possession against his co-trustees who are entitled to revoke his authority to be in such exclusive possession--no case has been cited in which it has been held that the Magistrate could not take action u/s 145, when rival lessees claiming under separate trustees to be in actual possession are likely to cause a breach of the peace,

13. It seems to me that in such a case, the Magistrate has ample jurisdiction to pass order after inquiring which of the two sets of rival lessees are in actual possession and to secure them in such possession. It may be that in the final order passed under Clause 6 after the enquiry under Clause 4 of Section 145 the Magistrate may ignore the trustees and confine his order so as to affect the rival lessees alone. The jurisdiction of the Magistrate thus being established, I am not inclined at this stage to consider the conflicting rulings quoted before us and I shall only note them below for the information of the Sub-Divisional Magistrate: *Nritta Gopal Singh v. Chandi Charan Singh* 10 C.W.N. 1088 : 4 Cri. L.J. 215; *Makhan Lal Roy v. Baroda Kanta Roy* 11 C.W.N. 512 : 3 Cr. L.J. 296; *Radha Raman Ghose v. Baliram* 32 C.P. 249 : 8 C.W.N. 885 : 1 Cr. L.J. 847; *Akalu Chandra Das v. Mohesh Lal* 4 Ind. Cas. 696 : 11 Cri. L.J. 28 : 36 C.P. 986;

Gurudas Kundu Chowdhury v. Rai Kedar Nath Kundu Chowdhury 11 Ind. Cas. 592 : 38 C.P 889 : 12 Cr. L.J. 408 15 C.L.J. 184; Basanta Kumari Dasi v. Mohesh Chandra Laha 19 Ind. Cas. 541 : 40 C.P 982 : 17 C.W.N. 944 : 14 Cr. L.J. 269; Emperor v. Debendra Nath Boss 1 C.L.J. 682 : 2 Cri . L.J. 658; Veerabhadra Pillai v. Shunmugani Pillai 32 Ind. Cas. 668 : 17 Cri. L.J. 76; Sankara Kylasa Mudaliar v. Kuthalinga Mudaliar 47 Ind. Cas. 877 : 19 Cri.L.J. 977 Lachmi Singh v. Bhusi Singh 2 Weir 110; Bhaskaruni Kesavrayudu v. Bhaskaruni Chalapati Rayadu 31 M.P 318 : 18 M.L.J. 343 : 8 Cri. L.J. 205 : 4 M.L.T. 301; Kandasami Asari v. Narayana Asari 26 Ind. Cas. 644 : 2 L. W. 107 : 16 Cri. L.J. 52; Narayana Asari v. Kandasami Asari 29 Ind. Cas. 541 : 3 L.W. 164 : 16 Cri. L.J. 526; Mewa Lal v. Emperor 44 Ind. Cas. 41 : 3 P. L.J. 147 : 1917 Pat 863 : 4 P.L.W. 359 : 19 Cri. L.J. 249; Subadramma v. Satyam Swami 7 Ind. Cas. 895 : 8 M.L.T. 314 : (1910) M.W.N. 821 : 11 Cri. L.J. 536; Muhammad Koolayappa Rowthan v. Sheik Abdul Khadhir Rowther 25 Ind. Cas. 324 : 27 M.L.J. 169 : 15 Cri. L.J. 572; Kachaunny v. Manavikrama Rajah Amyal 14 Ind. Cas. 318 : (1912) M.W.N. 540 : 13 Cri. L.J. 222 and Srinivasa Pillay v. Sathayappa Pillai 14 Ind. Cas. 759 : 13 Cri L. J. 295

14. My decision in Kandasami Asari v. Narayana Asari 26 Ind. Cas. 644 : 2 L.W. 107 : 16 Cri. L.J. 52 was reversed by a bench of this Court in Narayana Asari v. Kandasami Asari 29 Ind. Cas. 541 : 3 L.W. 164 : 16 Cri. L.J. 526 but was followed by single Judges of this Court in two later decisions. But I have no stronger view either way and I shall not be sorry if it be held that actual physical possession of even a confessed agent can be protected as against his admitted principal by the Magistrate in order to preserve the peace. As regards the cancellation of the Sub-Magistrate's order before taking action u/s 145, I think that such order may be taken as having been impliedly passed, even if it is necessary to do so, and the order passed by the Sub-Magistrate has become spent even it has not been cancelled. I might finally state, with great respect, that I have grave doubts as regards the correctness of the opinion expressed in two of the cases cited to the effect that the power to appoint a Receiver of attached property is given under Clause (2) of Section 146, only when the attachment is made u/s 146(1), but not when it is made u/s 145. It may be fairly argued that the fact that Clause (2) is a part of Section 146 is not sufficient to narrow the scope of the plain words of Clause (2) which relate to all property attached by the Magistrate. (See Craies on Statutes at page 107.) However, it is unnecessary to express a final opinion on this question, as the petitioners cannot be aggrieved whether the properties are in the direct custody of the Court or in that of a Receiver or custodian appointed by the Court.