

(1981) 08 KL CK 0003
In the High Court Of Kerala

Kottarathil Mavunni and Another

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 26-08-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145, 146, 148

Citation : (1982) CriLJ 468 : (1982) 1 ILR (Ker) 96

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Judgement

P.C. Balakrishna Menon, J.—Crl. R. P. No. 166 of 1981 is by the B party in M, C. No. 14/81 on the file of the Sub-Divisional Magistrate Perinthalmanna. The revision is against a composite order dated 4-4-1981 under Sees. 145 (1) and 146 (1) of the Criminal P. C. 1973, as per which the Magistrate has stated that for the reason of credible information laid by the Circle inspector of Police, Malapuram through the Deputy Superintendent of Police Tirur, that there exists serious likelihood of breach of peace concerning the property in R. S. No. 196/IA of Cherukevu amsom and Village he is satisfied that there are sufficient grounds for taking proceedings. The A and B parties were directed to attend the Court of the Sub-Divisional Magistrate at 11 A. M. on 9-4-1981 either in person or by pleader and put in written statements and documents in respect of their claims to prove actual possession of the subject of dispute and also to adduce evidence if any that the parties want to rely upon in support of their claims. The third paragraph of the order reads as follows:?

3....I am satisfied that there is serious tension concerning the possession of the above said property and also this being a case of emergency I further order the attachment of the property u/s 146(1) Cr. p. C. pending decision. The village Officer Cherukevu will be in charge of the attached property.

It is the latter part of the order that is challenged in this revision.

2. On admission of the revision-petition, this part of the order had been stayed

by this Court in Crl. M. P. No. 378 of 1981 and the attachment has not taken effect until this date.

3. The only question is whether a composite order of the nature passed by the Magistrate incorporating a preliminary order u/s 145(1) and an order of attachment u/s 146(1) Crl. P. C. can be sustained in law.

4. Section 146(1) of the Crl. P. C. empowers the Magistrate to attach the subject of dispute until a competent court has determined the rights of parties with regard to the person entitled to possession of the property. Section 146(1) is extracted below:

146. ? power to attach subject of dispute and to appoint receiver.?

(1) If the Magistrate at any time after making the order under Sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof;

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard to the subject of dispute.

Only on satisfaction of any one of the three conditions mentioned in the Section and after a preliminary order under Sub-section (1) of Section 145 has been made, can the Magistrate pass an order of attachment under Sub-section (1) of Section 146.

5. Janaki Amma J. in Lilly Franklin v. Wilson 1977 KLT 871 stated in paragraph 9 as follows:

9. The learned Additional Sessions Judge has held that in the instant case, the order of attachment does not conform to the requirements of Section 146(1) of the Code of Criminal Procedure, The conclusion seems to be well-founded, The order of the Magistrate extracted above shows that it is a composite order initiating proceedings u/s 145(1) and at the same time attaching the subject of dispute on the ground that there is an emergency. In other words, the initiation of proceedings u/s 145(1) and the attachment of property are seen effected by the same order. This is not warranted by the provisions of Section 146(1), Section 146(1) begins with the words:

If the Magistrate at any time after making the order in Sub-section (1) of Section 145....

The expression "after making the order" makes it clear that proceedings u/s 145(1) should precede the order attaching the property. Section 146(1) does not contemplate a simultaneous exercise of jurisdiction u/s 145(1) and Section

146(1). The order u/s 145(1) becomes complete only when the Magistrate puts his signature therein. It is only thereafter that he is expected to consider whether it is a case of emergency requiring attachment of property, Since the order attaching property in the instant case did not satisfy the above requirements, it was rightly set aside by the Additional Sessions Judge. Now that the preliminary order u/s 145(1) has been confirmed by the Additional Sessions Judge, it is open to the Magistrate to consider whether a case of emergency exists and whether the property should be attached and if he is so satisfied it is up to him to issue fresh order of attachment followed by appointment of receiver.

In paragraph 7 of the judgment the learned Judge held that once an order is passed u/s 148(1) Cr. P. C. the Magistrate is not expected to proceed with the enquiry u/s 145 or to decide whether any and which of the parties was in possession of the subject of dispute on the date of the preliminary order. According to the learned Judge, the order of attachment puts an end to the proceedings so far as it relates to the enquiry by the Magistrate as to who was in possession of the property and in that view an order of attachment is a final order, against which a revision would lie to this Court, The correctness of this decision was questioned before a Division Bench of this Court and this Court in *Bapputty v. Kayyu* 1979 Ker LT 143, following the decision of the Supreme Court in *Chandu Naik and Others Vs. Sitaram B. Naik and Another*, held that the view expressed by Janaki Amma J. in *Lilly Franklin's* case 1977 KLT 871 that the Magistrate ceases to have jurisdiction to proceed with the enquiry once an order is passed under Sub-section (1) of Section 146 is no longer good law, and the Magistrate has jurisdiction to proceed with the enquiry and pass appropriate orders u/s 145 of the Code of Criminal Procedure. In paragraph 4 of the decision of the Supreme Court reported in *Mathuralal Vs. Bhanwarlal and Another*, :

4...A preliminary order is considered so basic to a proceeding u/s 145 that a failure to draw up a preliminary order has been held by several High Courts to vitiate all the subsequent proceedings. It is by making a preliminary order that the Magistrate assumes jurisdiction to proceed under Sees. 145 and 146. In fact, the first of the situations in which an attachment may be effected u/s 146 of the 1973 Code has to be "at any time after making the order under Sub-section (1) of Section 145." while the other two situations have, necessarily to be at the final stage of the proceedings initiated by the preliminary order.

From this, it is clear that the Magistrate gets jurisdiction to pass an order of attachment under Sub-section (I) of Section 146 only after a preliminary order under Sub-section (1) of Section 145 is passed. The view expressed by Janaki Amma J. in 1977 KLT 871 that a composite order under Sub-section (1) of Section 145 and under Sub-section (1) of Section 146 is beyond the jurisdiction of the Magistrate is not overruled by the Division Bench of this Court in 1979 Ker LT 143. What was overruled was only that part of the dictum laid down in the decision that by effecting an attachment under Sub-section (1) of Section 146 the Magistrate ceases to have jurisdiction to proceed with the enquiry and for

that reason the order itself is rendered a final order. From the wording of Section 146(1) as well as from the decision of the Supreme Court extracted above, it is clear that a composite order under Sub-section (1) of Section 145 and under Sub-section (1) of Section 148 cannot be passed as an order of attachment under Sub-section (1) can be passed only after the preliminary order under Sub-section (1) of Section 145 had already been passed by the Magistrate. The impugned order of the Magistrate dated 4-4-1981 is valid as a preliminary order under Sub-section (1) of Section 145, but the later part of the order placing the disputed property under attachment under Sub-section (1) of Section 146 is without jurisdiction and cannot be sustained in law.

6. C. R. P. No. 166 of 1981 is allowed in part, setting aside the order of attachment under Sub-section (1) of Section 146 and dismissed in other respects. The Magistrate is directed to dispose of the proceedings u/s 145 Cr. P. C. within three months after the receipt of records in his Court,

This judgment will not preclude the Magistrate if occasion arises to pass appropriate orders under Sub-section (1) of Section 146, Cr. P. C.

7. Despatch records immediately.

Crl. R. p. 207 of 1981.

8. This revision is against the order of the Sub-Divisional Magistrate, Perinthalmanna rejecting an application submitted by the petitioners under Sub-section (5) of Section 144 of the Cr. P. C. The Magistrate had on 4-4-1981 passed a prohibitory order u/s 144(1) Crl. P. C. preventing the general public from entering into the land in Sy. No. 196/1B of Cherukay amsorn. This order was extended from time to time. The revision petitioners claiming to be persons in possession of the land in R. S. No. 196/1B submitted on application under Sub-section (5) of Section 144 to rescind the order under Sub-section (1) of Section 144 and this application has been rejected by the impugned order of the Magistrate. It is brought to my notice that the Government had extended the period of the prohibitory order passed by the Magistrate in exercise of its powers under the proviso to Sub-section (4) of Section 144 Crl. P. C., and the order passed by the Government is even now in force. On the satisfaction of the Magistrate that immediate steps are required to be taken to prevent danger to human life and safety. The prohibitory order has been passed to prevent breach of the peace and that order has been extended by thee Government under the provisions of Section 144 of the Code of Criminal Procedure. Until the petitioners satisfy the Magistrate of their right to possession of the property, it cannot be said that the Magistrate was wrong in passing an order prohibiting them also from entering upon the property and it is not shown that the order is in any way defective, I do not find any error or illegality in the order of the Magistrate. This revision petition is accordingly dismissed.