
(1990) 07 MAD CK 0044

In the Madras High Court

Case No : Criminal M.P. No. 9520 of 1990

M. Mokkaraj and others

APPELLANT

Vs

The Executive Magistrate, Thirumangalam and others

RESPONDENT

Date of Decision : 13-07-1990

Acts Referred:

Constitution of India, 1950 — Article 19, 25, 26
Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (1991) CriLJ 2150

Hon'ble Judges : Janarthanam, J

Bench : Single Bench

Advocate : Mr. Nedunchezhiyan, for the Appellant; A.S. Chakravarthy, Government Advocate, for the Respondent

Judgement

1. There are two tanks going by the name "Meenakshipuram Kanmoi" and "Chettikulam Kanmoi" at B. Ammapetti Village, Uthamapalayam taluk.

These two tanks are public tanks vested with State. The Government, in order to develop fishing industry and avoid indiscriminate clashes and

disputes, framed Rules and Regulations bringing the public tanks under the control of the Fisheries Department and enabling it to entrust the

fisheries rights to specified individuals. Disputes arose with regard to fishing in the aforesaid two tanks among the residents of the village leading to

the filing of O.S. No. 500 of 1990 on the file of District Munsif, Uthamapalayam. The group represented by the first petitioner M. Mokkaraj ("A"

party) was the plaintiff and the group represented by V. K. Govindaraj ("B" Party) was the defendant in that suit. Both the plaintiff and defendant

groups are the members of Bodi Fishermen Co-operative Society. Certain specified members of the said Society ("A" party and "B" party) were

selected and fishing rights in those two tanks were entrusted to them. Since disputes arose among the selected members of the society as to the

fishing rights in those two tanks, a peace committee was formed headed by the Assistant Director of Fisheries, Tirumangalam and a compromise

had been effected on 10-5-1990 and in and by the said compromise, "A" party was allotted Meenakshipuram Kanmoi while the other group,

namely, "B" party was allotted Chettikulam Kanmoi. "B" party exercised their right to fishing in Chettikulam Kanmoi on 12-5-1990 and 13-5-

1990. "A" party in their turn took steps to auction fishing in Meenakshipuram Kanmoi on 14-6-1990. "B" party also wanted to fish in the very

same tank. Consequently, "A" party filed I. No. 705 of 1990 in O.S. No. 500 of 1990 on 15-6-1990 and obtained interim injunction restraining

the "B" party from interfering with their fishing rights in Meenakshipuram Kanmoi, till 21-6-1990. The same had been extended from time to time

and it expires on 27-7-1990.

2. Thereafter, "A" party on 16-6-1990 gave a petition for police protection to the Inspector of Police, Bodi informing\$ him about the interim

injunction in their favour. Another petition on 19-6-1990 was also sent to the Deputy Director of Fisheries intimating their intention to fish in the

tank the next day, namely, 20-6-1990. The Tahsildar and the Executive Magistrate, Uthamapalayam issued proceeding in Roc. No. 8070/90 C6

dated 19-6-1990 u/s 144, Cr.P.C. prohibiting fishing operation in Meenakshipuram Kanmoi and all processions, meetings etc. within the limits of

the village for a period of thirty days commencing from the mid night of 19th June, 1990. The aggrieved petitioners have come forward with the

present petition to set aside the order passed by the Executive Magistrate.

3. Learned Counsel appearing for the petitioners would make two submissions and they are.

(1) The impugned order passed ex-parte is not sustainable, inasmuch as a cursory perusal of the order does not reveal an emergency situation and

as well the existence of circumstances, which do not admit of serving in due time of a notice upon the petitioners against whom the order is

directed; and

(2) The right conferred on the petitioners to fish in Meenakshipuram tank should, if at all, be regulated and not prohibited altogether under the

ficade of avoiding breach of peace or disturbance to public tranquillity.

4. A perusal of the order no doubt indicates the absence of penning down of the circumstances, which warranted the passing of the impugned

order without service of notice to the petitioners. Further, the order, though contained a mere statement of emergency situation does not at all

contain the relevant material facts, which made the Executive Authority to come to a conclusion, for the existence of such a situation. In the

absence of such adumbration of circumstances in the order, learned Counsel would say that the order is vitiated and in support of such a

contention, he would place implicit reliance upon the decision in *Bijinibemula Linga Murthy Reddy and Others Vs. Binji Hussain Saheb and*

Another, A learned Judge of the Andhra Pradesh High Court has laid down therein as follows (at pp. 1148-49 of Cri LJ).

The grounds urged to say that the impugned order is one made without jurisdiction and is illegal are that the essential factors which give jurisdiction

to the Sub-Divisional Magistrate to act u/s 144, Cr.P.C. are conspicuously absent in his order and that it does not also contain anything to justify

the denial of an opportunity to the petitioners to be heard before making the order. S. 144 finds place in Chapter X of the Code dealing with

maintenance of public order and tranquillity. The important conditions necessary to justify action u/S. 144, as can be seen from the provisions

thereof, are that the Magistrate must be satisfied about the necessity for immediate prevention of an act by the person or persons in possession of

property, which in his judgment is likely to cause obstruction, annoyance or injury to any person lawfully employed, danger to human life, health or

safety, or disturbance of the public tranquillity or a riot, or an affray. It is the urgency of the case calling for a speedy remedy or immediate

preventive action that invests the Magistrate with jurisdiction to act u/s 144. It can also be seen from the marginal heading that S. 144 is intended to

clothe the Magistrate with powers to issue orders in urgent cases of nuisance or apprehended danger. So, if there is neither urgency calling for the

application of a speedy remedy or preventive action nor apprehension of danger to human life, health or safety etc., resulting from obstruction,

annoyance or injury to any person lawfully employed, the Magistrate cannot clutch at jurisdiction for issuing an order u/s 144, Cr.P.C. A mere

statement in the order that the Magistrate considers it necessary to take urgent action is not sufficient if the facts show that in reality, there is no such urgency for the preventive action the effect of the order under challenge would be suppression of their legal rights even for a temporary period and should not have been made unless the action was absolutely necessary to avert a breach of peace. But it was already seen that there was absolutely no justification for apprehension of any breach of peace or danger to human life, health or safety The Section does not confer arbitrary power and the power in question being discretionary should be used only when it is really called for in order to prevent danger to human life, health or safety or disturbance of public peace. But, as already stated, there is nothing in the impugned order suggesting that the material available before the sub-Divisional Magistrate in this case was sufficient to Justify action u/s 144, Cr.P.C. and it must, therefore, be said that it is an order made without jurisdiction When once a competent civil court granted an injunction restraining Hussain Saheb from interfering with the rights of the respondents in relation to their lands, the sub-Divisional Magistrate had no jurisdiction to make the order in contravention or violation of that injunction.

Even assuming for a moment that there was need for some preventive action in the opinion of the Sub-Divisional Magistrate, he ought not to have made the impugned order without giving an opportunity of being heard to the respondents. S. 144(2), Cr.P.C. provides for an ex parte order being made only in cases of emergency or where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed. Ordinarily, therefore, an order should not be made under S. 144 without affording an opportunity to the person against whom it is proposed to be made, to show cause against the same and if no notice is issued, the magistrate should record his reasons to show that the occasion is considered to be one of emergency, failing which the order made ex parte cannot be sustained. Since the High Court has power to interfere where the order is made without jurisdiction and the proceedings are judicial in nature, the order should not be held but should contain at least some reasons to show that the Magistrate has applied his mind and was satisfied about the existence of factors necessary for action u/s 144,

Cr.P.C.

5. In support of the second submission, implicit reliance is placed upon the decision in Gulam Abbas and Others Vs. State of Uttar Pradesh and

Others, and the decision in Prabhas Kumar Roy v. The Officer-in Charge of Raninagar Police Station 1985 Cri LJ 957 (Gal). It is laid down in the

former cited decision as follows -

It is further well settled that the section does not confer any power on the Executive Magistrate to adjudicate or decide disputes of civil nature or

questions of title to properties or entitlements to rights but at the same time in cases where such disputes or titles or entitlements to rights have

already been adjudicated and have become the subject matter of judicial pronouncements and decrees of Civil Courts of competent jurisdiction

then in the exercise of his power u/S. 144 he must have due regard to such established rights and subject of course to the paramount consideration

of maintenance of public peace and tranquillity. The exercise of power must be in aid of those rights and against those who interfere with the

lawful exercise thereof and even in cases where there are no declared or established rights the power should not be exercised in a manner that

would give material advantage to one party to the dispute over the other but in a fair manner ordinarily in defence of legal rights, if there be such

and the lawful exercise thereof rather than in suppressing them. In other words, the Magistrate's action should be directed against the wrong doer

rather than the wronged.

Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right

by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration

to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant

..... legal rights should be regulated and not prohibited altogether for avoiding breach of peace or disturbance of public tranquillity

It is held in the latter decision as follows :-

The exercise of power u/s 144, Cr.P.C. must be in aid of legal rights and against those of who interfere with the lawful exercise thereof. The

proper course was for the Magistrate to ascertain which party was in the wrong

and was interfering with legal exercise of the legal rights of the other party and to bind down that party restraining them from committing any act which may lead to a breach of peace.

The right of citizens to take out procession flows from the right in Art. 19(1)(b) of the Constitution. In the Instant case, a section of the Hindu

community was going to exercise their customary and religious rights through the public streets. It is well established that playing of musical

instruments near mosques are not at all contrary to any of the religious rights of the people of that community and if any person belonging to any

other religion or community intends to obstruct such lawful procession with the image of Goddess Durga with playing drums and musical

instruments, it was the duty of the Police to apprehend those persons and to proceed against them for creating breach of peace and communal

harmony. The Magistrate had no right and/or jurisdiction and/or authority under S. 144 of the Criminal P.C. to interfere with fundamental rights

guaranteed under Arts. 25 and 26 of the Constitution and in the facts and circumstances of the case, the said prohibitory order passed by the

Magistrate had the direct effect of encouraging and supporting wrongdoers against the persons wronged and creating dissatisfaction amongst one

section of the community against the other

The aforesaid decisions are in all fours applicable to the facts of the present case. As such, the two submissions made by learned counsel for the

petitioners are well founded. Consequently, the petition deserves to be allowed.

6. In the result, the petition is allowed by setting aside the impugned order of the Executive Magistrate, Uthamapalayam dated 19-6-1990 in Roc.

No. 8070/90 C6 passed u/s 144, Cr.P.C.

7. Petition allowed.