

(1920) 03 MAD CK 0040
In the Madras High Court

Velu Malavarayan and C. Muthusawmi Pillay and Others
Vs

APPELLANT

T.M.C. Kuppusawmi Pillai alias Kuppusawmi

RESPONDENT

Date of Decision : 01-03-1920

Acts Referred:

Citation : 59 Ind. Cas. 378 : (1920) 12 LW 315

Hon'ble Judges : William Ayling, J; Coutts-Trotter, J

Bench : Division Bench

Judgement

Ayling, J.

.

1. These revision petitions arise out of proceedings u/s 145 of the Code of Criminal Procedure before the Sub-Divisional Magistrate of

Kumbakonam (Miscellaneous Case No. 49 of 1919 on his file) regarding certain lands in five villages of Papanasam Taluk. These proceedings

were initiated by an order of the Magistrate, dated 26th September 1919, which runs as follows:

Whereas I am satisfied that a breach of peace will take place unless action u/s 145, Code of Criminal Procedure, is taken in respect of lands, etc,

now in dispute, noted here below in the schedule, both parties will appear on 8th October 1919 at Kumbakonam and put in written statements of

their respective claims as respects the facts of actual possession of the subject of dispute.

2. An attachment order under the last portion of Clause 4 of Section 145 followed; a schedule of the lands in dispute was appended; and also a list

of the parties called on to appear and put in written statements. These were:

3. Petitioner.--T.M.C. Kuppasawmi Pillai.

4. Counter-petitioners.--1. C. Muthusawmi Pillai, 2. Venkatachella Thinnapiriyar, 3. Murugayya Malavarayan, 4. Gopalasawmi Kurakondan, 5.

Varada Nandiar, 6. Velu Malavarayan.

5. Criminal Revision Case No. 625 is based on a revision petition presented by 6th counter petitioner, asking that this order may be set aside as without jurisdiction.

6. The Magistrate subsequently held an enquiry and on 10th October 1919, passed an order under Clause (6) of Section 145 in favour of

petitioner, Kuppaswami Pillai. Against this order all the counter petitioners petitioned (Criminal Revision Case No. 668 of 1919); 5th counter-

petitioner has since died.

7. It is necessary to set out briefly the history of the proceedings. The properties in question appear to have belonged to a Vakil, named

Knmaraswami Pillai, who died on the 13th March 1919. Petitioner and 1st counter-petitioner are his sons and he also left four daughters and a

widow. After his death disputes arose as to his properties. Petitioner claimed to be entitled to hold all of them as managing member of an undivided

family after the death of his father. His brother and sisters set up a Will and apparently also alleged partition. On 15th August 1919 petitioner

Kuppasami Pillai petitioned the Sub-Divisional Magistrate to restrain the 6th counter-petitioner, whom he named, from interfering with his exclusive

possession and management of the properties. A report on this was submitted by the Police on 26th August 1919 which will be referred to later;

and, on 30th August 1919, the Magistrate passed an ex parte order u/s 14 of the Code of Criminal Procedure prohibiting the counter-petitioners

from interfering with the lands. This is stated only to be a temporary measure, pending an enquiry to be made on 15th September 1919. This ex

parte order was cancelled by the District Magistrate on 22nd September 1919 on the ground that, as long as the whole dispute was sub judice

with the Sub Divisional Magistrate, no breach of the peace was to be apprehended. The order concluded thus: ""The Sub Divisional Magistrate

should conduct his enquiry and pass such orders as he deems fit.

8. The enquiry posted to 15th September 1919 had apparently been adjourned to 26th September 1919; and on the latter date, the Sub Divisional

Magistrate took the matter up again but took action not u/s 144, Criminal Procedure Code, but u/s 145, passing the order set forth above.

9. Against this the 6th counter-petitioner presented a revision petition to this Court (Criminal Revision Case No. 625 of 1919) and obtained an

order, dated 7th October 1919, staying further proceedings in the Magistrate's Court pending disposal of his petition. This stay order was

unfortunately not communicated direct to the Sub Divisional Magistrate but only through the District Magistrate; and as a fast did not reach the Sub

Divisional Magistrate till 10th October. Meanwhile, on 8th October 1919, the Magistrate had taken up the enquiry as d treated in his preliminary

order. None of the counter petitioners was present or represented. The Magistrate, nevertheless, proceeded with the enquiry treating the 1st

counter petitioner as ex parte and excluding the other counter petitioners from the proceedings. On his final order, of two days later, he thus

explains his action:

2. The enquiry was taken up on 26th September after notice to the parties and both sides were represented by Vakils. After hearing their

arguments, I decided to proceed u/s 145, Code of Criminal Procedure, and passed orders accordingly at once on the same date and attached the

properties in dispute and placed them in charge of the Sub-Magistrate, Valangiman, Notices attaching the properties and sailing on the parties to

put in written statements of their respective claims on the 8th instant were issued the next day, and were personally served on the petitioner and on

the 1st counter-petitioner on 28th September 1919. The endorsements on the other notices show that the other counter-petitioners except

counter-petitioner No. 6 who could not be found refused to receive the notices without the order of the 1st counter-petitioner. The counter-

petitioners Nos. 2 to 6 are merely servants of the 1st counter petitioner and the dispute about possession is only between the two brother?, the

petitioner and the 1st counter-petitioner.

The others are, therefore, excluded from these proceedings.

3. On the 3th instant when the case was taken up none of the counter-petitioners was present or represented. The petitioner filed his written

statement and his documents. As the absence of the 1st counter-petitioner was deliberate and wilful, I declared him ex parte and proceeded to

take the evidence produced by the petitioner.

10. On the evidence adduced by the petitioner, the Magistrate found that the latter was in possession of all the schedule properties, declared him

to be entitled to remain in possession until evicted in due Bourse of law, and forbad any disturbance by ""1st counter-petitioner or his men."" The

attachment was released and the properties were directed to be banded over to petitioner. This is said to have been done on 14th October 1919.

11. Now, both the order of 26th September 1919 and the order of 10th October 1919 are orders with which we can only interfere on the ground

of defeat of jurisdiction: Vide Kamal Ruttu v. Udayavarmu Raja Valia Raja of Ohirakal 17 Ind. Cas. 65 , and, as regards the latter, we have to

consider whether the Magistrate gave himself jurisdiction by his order of 26th September 1919, and also whether anything occurred subsequently

to affect his jurisdiction to proceed in the matter.

12. Two preliminary grounds of attack on the order of 26th September 1919 may be disposed of in a few words. It is argued that the order is bad

in law in that the Magistrate failed to"" record his reasons for being satisfied that there was danger of a breach of the peace; and, in the second

place, that it is in contravention of the order of the District Magistrate of 22nd September 1919 in that the latter held that there was no danger of a

breach of the peace.

13. As regards the first, the Magistrate's failure to record his reasons, though a ulpable irregularity does not affect his jurisdiction. Vide Kamal

Kutty v. Udaya-varma Raja Valia Raja of Ohirakal 17 Ind. Cas. 65 36 M 275 : 13 Cr. L.J. 753. As to the second objection, the District

Magistrate in his order merely held that there was no such danger of a breach of the peace as would justify an ex parte order and specifically

directed the Sub-Divisional Magistrate to proceed with his enquiry and pass such orders as he deems fit. The Sub-Divisional Magistrate had

perfect discretion to take action u/s 145 instead of Section 144 and was probably well advised to do so. There remains another ground of

objection which really goes to the question of jurisdiction and calls for the most serious consideration. Briefly; it is this, that, as regards a

considerable portion of the property affected by the order, the Magistrate has decided the dispute as to possession without having the disputants

on both sides before him or giving them an opportunity of being heard.

14. The effect of Section 145 is to give the Magistrate a special jurisdiction to decide a dispute as to actual possession of Immovable property,

conditionally on his being satisfied that the dispute is likely to cause a breach of the peace. The decision must of course, be judicial, not arbitrary,

and must be arrived at after giving each of the disputants an opportunity of being heard. Common sense and equity, to say nothing of the provisions

of the latter part of Clause (1) of Section 145, alike indicate that this is the nature of the jurisdiction conferred. One such dispute may, of course,

embrace several items of property and, provided the disputants are the same for cash, there can be no possible objection to the lumping together

of all the several items in a single enquiry. But, on the other hand, the disputants on one or both sides might be different for different items of the

property covered by the dispute. Here, again, as long as the dispute regarding the various items was substantially the same, there would be no

objection always provided that all the disputants (meaning those concerned in each item) were given an opportunity of being heard. But the

Magistrate would in such a case have no jurisdiction to decide the question of actual possession of a number of items after only hearing the parties

who claimed possession of one or two of them. Take a simple case. A, and B. are rival claimants to three adjoining fields, each claiming all the

fields under a single title. B. transfers his title by sale to X, Y, Z, each for a single field; and a dispute arises between A. on the one hand and X., Y.

and Z, on the other, A. claiming actual possession of all three fields and X., Y. and Z. actual possession each of one field. The Magistrate,

provided he is satisfied that the dispute is likely to cause a breach of the peace, has jurisdiction to determine the fact of actual possession of all the

three fields in a single enquiry giving A., X., Y. and Z. all an opportunity of being heard. But he has no jurisdiction to determine the possession of

the fields claimed by Y. and Z. in an enquiry held only as between A. and X. I am not here considering cases where the Magistrate is mistaken or

misled as to the identity of parties; what I say is that, as regards each item of property of which the Magistrate decides the possession, the

jurisdiction vested in him presupposes that he shall have the two parties to the dispute arrayed before him against each other.

15. Now this is what he has not got in the present case. The lands in dispute, over 700 acres in extent, are situated in 5 different villages. Petitioner on the one side claims possession and title to them all; on the other side, the claimants are various and independent of each other although their title may be referred back to a common origin. Exactly what, items each claims is impossible to say in the absence of the written statements required by the Section but a reference to the Police report, dated 26th August 1919, on which the Magistrate took action, is sufficient for our purposes. The

Sub-Inspector reports:

16. First counter-petitioner when questioned by me stated that since the death of his father he has been in enjoyment of the lands which fell to his share, that his sisters likewise have been enjoying theirs, and that his brother, the petitioner, enjoys his." It is clear from this that 1st counter-petitioner makes no claim to title or possession of any but his own share of the family lands and that the Police report is correct in this respect is shown by the following passage in a petition subsequently filed by 1st counter-petitioner before the Additional Divisional Magistrate:

17. That this petitioner is only in possession of a portion of his father's lands in Amirthavalli, the portion being known as Chinnapanni, ever since the time when the village was being owned by the Nadar brothers of Poroyar. The hundred acres in the village bequeathed to the four sisters of the petitioner are in the possession of their lessees. In the village of Maruvathur the petitioner is only in possession of the lands allotted to him for his share, while in the village of Cheri Vadakkupattam the lands owned by the testator stood even during his lifetime only in the name of this petitioner who is now in possession thereof, the cultivation operations having far advanced." We must assume that the Magistrate acted on the Police report, the only record before him; and on this he had jurisdiction either to limit his enquiry to the lands in dispute between petitioner and 1st counter-petitioner, or, if he thought the dispute endangering the public peace extended to the sisters' share, to include the lands of those shares in the enquiry calling on the parties concerned in the dispute as to those shares also to file written statements before him. The only person who was in any sense concerned in the dispute as to the sisters' shares and who was made a party to the enquiry was 6th counter-petitioner who is one of several

lessees under the said sisters and whose own lease is said to cover only 2 Velis (14 acres). And even 6th counter-petitioner was, as already stated, subsequently excluded from the proceedings.

18. The Magistrate's action in including in his enquiry lands which on the record before him, were not claimed by the single counter-petitioner who remained on record, and regarding which no claimant was on the record is, in my opinion, without jurisdiction.

19. The irregularity probably arose out of the fact that the nature of the proceedings was changed. The original petition filed by petitioner on 15th

August 1919 requested orders u/s 144 of the Code of Criminal Procedure prohibiting interference with the petitioner's possession.

20. The six persons named therein were the persons whose interference was apprehended: and naturally these were the persons against whom the

order u/s 144 of the Code of Criminal Procedure was directed. The change of proceedings to proceedings u/s 145 necessitated a re-coast of the

parties. Those concerned in the dispute, in the language of Section 145, became the proper parties to be heard; and these are not necessarily the

same persons as those whose interference to the danger of the public peace was apprehended at the time of the previous order. In fact, counter-

petitioners Nos. 2 to 5 who are stated to be merely agents and friends of 1st counter-petitioner may very probably have been rightly excluded

from the enquiry u/s 145 as having no concern in the dispute, although their regard for their employer or friend may have been such as to justify the

apprehension that they would aid him in the interference prohibited by the order dated 30th August 1919.

21. This conclusion as to the Magistrate's failure of jurisdiction still leaves us in some doubt as to the proper extent of our interference. It is

suggested that we should limit our interference to the order so far as it concerns the sisters' shares of the lands, leaving it to stand as regards the

share claimed by 1st counter-petitioner. After some consideration I am forced to the conclusion that we cannot split up the order in this way.

Orders u/s 145 should be specific and intelligible on their face; and here it is impossible to say, without further detailed enquiry, which of the items

included, in the schedule the order should stand good. Moreover, we cannot ignore the fact that any of the parties who has a right to be heard is

entitled to show that no dispute likely to cause a breach of the peace existed, and it is conceivable that the whole proceedings might have to be vacated on this ground.

22. The only course appears to be to set aside the whole proceedings including the Preliminary order, dated 26th September 1919, as without jurisdiction and this, in my opinion, should be done.