

Abraham and Another Vs Kuriakose and Another

Court: High Court Of Kerala

Date of Decision: March 17, 1994

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 151
Criminal Procedure Code, 1973 (CrPC) â€” Section 145, 147

Citation: (1994) 1 KLJ 918

Hon'ble Judges: L. Manoharan, J

Bench: Single Bench

Advocate: K.N. Narayana Pillai, for the Appellant; M.M. Abdul Aziz and Babu Karukapadath, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

L. Manoharan, J.

Defendants 2 and 3 in O S. 204 of 1992 of the Munsiff's Court, Perumbavoor who are counter petitioners 1 and 2 in I.

A. 30 of 1993 in the said suit are the revision petitioners. First respondent is the plaintiff in the aforesaid suit and second respondent is the first

defendant in the said suit. First respondent instituted the said suit on 31-3-1992 for a permanent injunction restraining that revision petitioners and

the second respondent from trespassing into the plaint schedule property or interfering with the possession and enjoyment of the first respondent.

He moved I. A. 945 of 1992 for a temporary injunction. On 31-3-1992 itself defendants 2 and 3, the revision petitioners entered appearance, and

after hearing them also the learned Munsiff ordered the revision petitioners to keep statusquo; and issued an interim injunction against the first

defendant. A commission was taken out by the plaintiff on the, same date. He filed Ext. C2 report and Ext. C2 (a) sketch. He visited the property

at 4.30 PM on 31-3-1992. According to the plaintiff then is no canal through the plaint schedule property. But the revision petitioners contended

that from, the Periyar Valley Canal water was being taken through a small canal running north to south through the plaint schedule property

immediately to the south of its eastern boundary. The defendants maintained that after purchasing the said property the plaintiff filled the canal filed

the suit and got the said order from court.

2. On 2-4-1992 the revision petitioners filed a petition before the Sub Divisional Magistrate u/s 147 Cr. P.C. He passed a preliminary order on

22-9-1992 calling upon the first respondent-plaintiff to restore the thodu within three days of the receipt of the order or to appear before him and

show cause. Pursuant to the said order the first respondent filed a written statement stating that the matter is pending before the Civil Court in O.S.

No.204 of 1992 and that he has already obtained a temporary injunction. The learned Magistrate passed an order on 10-12-1992 confirming the

preliminary order and directed the first respondent to restore the said thodu within two days, and further directed the Sub Inspector of Police to

restore the thodu if the first respondent failed to restore it. The first respondent filed a revision against the said order before the Sessions Court and

obtained a stay. But before the stay could be communicated, the canal was opened through the plaint schedule property. Later the revision was

dismissed as it was reported to have become in fructuous.

3. Subsequent to the same the first respondent filed I. A. 30 of 1993 before the lower court u/s 151 CPC to direct the defendants to close the

thodu which was unauthorisedly formed across the plaint schedule property, The lower court allowed the said petition. That order is under

challenge in this revision.

4. Learned Counsel for the revision petitioners contended that so long as the order of the learned Sub Divisional Magistrate stands, and since the

canal has already been formed pursuant to the order passed by the Sub Divisional Magistrate it was wrong for the lower court to have invoked its

inherent jurisdiction u/s 151 CPC to direct the petitioners to restore the same in its original position within a week from the date of the said order.

The impugned order also directed that if the revision petitioners fail to implement the order, the first respondent can get the same done through

court with the assistance of an Advocate Commissioner, Learned Counsel for the revision petitioners contended that the whole proceedings before

the Sub Divisional Magistrate, in the circumstance since was only an abuse of process of court, the order therein can in no way affect the

jurisdiction of the civil court in seeing that the order passed by it is maintained and respected.

5. The order to keep statusquo was rendered on 31-3-1992 and on the same day the plaintiff took out a commission who after giving notice to

both sides filed Ext. C2 report and Ext. C2(a.) sketch. Est. C2(a) sketch shows the relative position of the. properties of the plaintiff and

defendants. Defendants property is on the south of the plaintiff's property. According to the defendants, the canal started from the northern Periyar

Valley canal, ran across the plaint schedule property along its eastern boundary to reach the south of the plaint schedule property where it joined a

small canal through which the defendants used to get water for irrigating their property. The plaintiff maintained that there was no canal as alleged

and since the defendants threatened to open a canal through the plaintiff's property, he had to institute the suit. For the present it need be

noted that the court passed an interim order to keep status quo on 31-3-1992 after hearing the revision petitioners also. It was after that, the

revision petitioners moved the Sub Divisional Magistrate. In answer to the preliminary order the plaintiff filed objection stating that the matter is

already pending before the Civil Court and the Civil Court had already passed an interim order. In spite of that the learned Magistrate proceeded

to enquire into the matter and ultimately passed the final order as afore indicated.

6. Pursuant to the final order, the canal was opened across the plaintiff's property. The revision filed before the Sessions Court was

dismissed as infructuous. It must be noted that cognizance u/s 147 Cr. P. C. is possible when the Executive First Class Magistrate is satisfied that

a dispute likely to cause breach of the peace exists regarding the alleged right of user of a land or water. The final authority to adjudicate as to the

rights of the parties with respect to immovable property rests with the Civil Court. Therefore, if the question at issue between the parties has

already been the subject matter of a suit in a civil court, ordinarily the Magistrate will not get the jurisdiction to initiate proceedings u/s 147 Cr. P.

C. When a civil court has already passed an interim order the concerned authority must see that the order is implemented, it cannot invoke the

jurisdiction u/s 147 Cr. P. C. as to annul the order of the civil court. It is more so as it is the function of the civil court to settle the dispute regarding

possession or user of the immovable property. Instead of moving the civil court to modify or set aside the order passed by it, the revision

petitioners filed a petition before the Magistrate u/s 147 Cr. P. C.

7. The commissioner's report Ext. C2, particularly Ext. C4 which he filed after the canal was opened would clearly show that, on the date of the

order of status quo there was no canal in the plaintiff's property. Undoubtedly, therefore the new canal was formed when the order of status

quo passed by the civil court was in force. In the decision in *Narayanan Embran v. State of Kerala* (1988 (2) ELT S. N. page 22 -Case No. 27)

when a suit for injunction was pending before the Civil Court, the police sent up a report to the Sub Divisional Magistrate who on the basis of the

same took cognizance u/s 145 of the Code of Criminal Procedure and a Village Officer was appointed to be a receiver. this Court observed;

In such a situation, learned Magistrate ought not have passed an order appointing Village Officer as Receiver. He should have directed the parties

to have their rights established by competent civil court which is seized of the matter. Learned Sub Divisional Magistrate should have taken only

such of the steps as are required for maintaining law and order. He should not have passed any order dealing with the property.

(Emphasis supplied)

The decision in Jose v. Dr. Thomas (1988 (2) KLT S.N. 1) also held that when the Civil Court is seized of the matter the jurisdiction of the

Executive Magistrate u/s 147 of the Code cannot in any way over ride the decision of the Civil Court. The court observed :

Since the civil court is seized of the matter, the exercise of jurisdiction by the learned Sub Divisional Magistrate is unwarranted.

8. Now having noted that the position is as afore indicated the question for consideration is whether it was proper for the learned Munsiff to have

invoked Section 151 CPC to restore the original position. The question as to whether there was a canal as is maintained by the defendants and

whether there is prima facie evidenced regards the same are matters that would arise for" consideration in disposing of the injunction petition and

the same naturally will be one of the issues to be adjudicated in the suit. At this stage the short question to be considered is, having noted that in the

given circumstances the revision petitioners should not have moved the Sub Divisional Magistrate u/s 147 Of. P. C. and the learned Magistrate

after having been informed that the civil court is already seized of the matter and has already passed an order should not have invoked the

jurisdiction u/s 147 Cr. P. C, whether it was appropriate for the lower court to have passed the impugned order u/s 151 CPC. In the decision in

Lakshmikutty Amma v. Krishna Pillai (1992 (2) KLT 256) this Court held that when a party comes into possession of property violating an order

of injunction, it is the duty of the court to restore possession, by recourse to its inherent powers u/s 151 CPC. To the same effect is the decision of

the Division Bench of the Allahabad High Court in Hari Nandan Agrawal and Another Vs. S.N. Pandita and Others, and also the decision of he

Calcutta High Court in Satish Chandra v. Saila Bala (AIR 1978 Calcutta 499). The very spirit of the said decisions is to the effect that a party will

not be allowed to retain a benefit which he got by violating the order of the court. When the order of Court is violated it is competent for the court

to invoke its inherent jurisdiction recognised u/s 151 CPC to restore the property to the original position. The order of the Magistrate u/s 147 Cr.

P. C. can in no way affect or limit the said jurisdiction of the civil court. Here, the revision petitioners after having entered appearance and

participated in the hearing of the injunction matter, and after having ""suffered an order of statusquo, moved the Sub Divisional Magistrate u/s 147

Cr. P.C.; and the Sub Divisional Magistrate in spite of having been informed that the civil court is already seized of the matter directed to open the

canal through the plaint schedule property. This was against the order. of the civil court. The learned Magistrate in" the said circumstance could not

have taken cognizance; the proceeding itself was an abuse of process of court. In such circumstance the concerned authority if at all should have

taken steps to keep law and order so as to give effect to the order of the civil court. The exercise of the power by the learned Munsiff u/s 151

CPC, in the circumstance, cannot be called in question. The order of the lower court does not suffer from any infirmity; the same is only to be

confirmed. However, with due regard to the facts and circumstances of the case the lower court is directed to dispose of the injunction petition and

the suit expeditiously. The. revision is without merit and hence the same is dismissed.