

(1990) 08 KL CK 0058

High Court Of Kerala

Case No: O.P. No. 962 of 1990-M

Smt. Ummulkulus

APPELLANT

Vs

The Executive Magistrate, Union
Territory and Others

RESPONDENT

Date of Decision: Aug. 30, 1990

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 144, 144(2), 144(4), 144(5)

Citation: (1991) CriLJ 262

Hon'ble Judges: K.A. Nayar, J

Bench: Single Bench

Advocate: V.P. Mohan Kumar, for the Appellant; P.V. Madhavan Nambiar, (for Nos. 1 to 3) and P. M. Mohammed Ali, (for No. 4), for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K.A. Nayar, J.

Of the two prayers made in the Original Petition the first is to quash Exts. P2 and P3 order of the 1st respondent. The first of these orders was passed u/s 144 of the Code of Criminal Procedure on 17-1-1990 directing the petitioner to abstain from house No. ICE-3-12 of Kiltan Island belonging to Shri K. P. Abdulla, the 4th respondent and Ext. P3 order dated 18-1-1990 is also passed by him directing the Station House Officer to implement Ext. P2 order. Both these orders have been withdrawn by the 1st respondent by communication dated 22-1-1990. Exts. P2 and P3 orders admittedly are not in existence now. Hence there is no force in the prayer for quashing Exts. P2 and P3 as the same have already been withdrawn. The second prayer is for a writ of mandamus or direction directing respondents 1 to 3 to afford necessary protection to the petitioner and her three children for residing in the house of Kiltan Island. Petitioner says that she and her children have a right to stay

in the house of the 4th respondent, he being the husband of the petitioner and the father of the children.

2. In the counter affidavits filed on behalf of the respondents including 4th respondent it is stated that the husband has divorced her as early as on 2-12-1989. Under Muslim law applicable to the petitioner and the 4th respondent the dissolution of Marriage will take effect in any case from the date on which the counter affidavit is filed in this case and therefore a direction to respondents 1 to 3 to afford necessary protection to the petitioner to stay with her husband in his house also cannot be granted. Thus the petition, even though, is liable to be dismissed on these short grounds counsel on both sides argued the case at length and for doing justice to the arguments it is necessary to consider the case in brief.

3. The case of the petitioner is that she married the 4th respondent on 26-8-1979 and they have two sons, aged 9 and 2 years and one daughter, aged 5 years. Petitioner stated to be an illiterate woman and is a native of Kiltan Island. Her case is that she was staying with the 4th respondent in his house No. ICE-3-12. On 17-1-1990 when the petitioner woke up she found that the 4th respondent, her husband, had bolted the doors in the front and back from outside and gone away. The 4th respondent returned at 12 O'clock with two police constables to serve Ext. P2 order of the 1st respondent dated 17-1-1990 passed u/s 144 of the Code of Criminal Procedure directing her to abstain from the house. Large number of people collected at the place. But she did not leave the place. The next day the 3rd respondent, Sub-Inspector of Police came to the premises and served another order, Ext. P3, and thereafter literally pushed her and her three children out of the house. Petitioner's father sent a telegram to the 2nd respondent who is the District Magistrate, Kavaratti, on 18-1-1990 as soon as he became aware of the facts. It is on that fact petitioner approached this Court to quash Exts. P2 and P3. But the respondents have a different story. According to respondents 1 to 3, on 16-1-1990 the petitioner along with some political workers gathered around the house of the 4th respondent and entered into the said house. The so-called house is not a house, according to the 4th respondent. It is only a reading room. The customary practice in the Island is that the wife lives in the maternal house. When the news of the trespass of the petitioner into the house of the 4th respondent on 16-1-1990 spread, people gathered in front of the building dividing in two groups. The 4th respondent submitted a petition to the Executive Magistrate. True copy of the petition is Ext. R1(a). On receipt of the petition, the Executive Magistrate directed the local Amin to enquire and report as to where exactly the petitioner was living and sleeping. After enquiry the Amin reported on 17-1-1990 that the said house is owned and in the possession of the 4th respondent and that he had divorced the petitioner some two months ago and the petitioner criminally trespassed into the said house in the night on 16-1-1990. The Amin also deposed that in that building there is no convenience for ladies to live. Amin's report is produced as Ext. R1(b). On verification of the records such as ration card and the voter's list of the general election to the

Parliament as well as the voter's list in the Council Election, it is found that the petitioner was a resident in House No. C-2-1 and the disputed house is ICE-3-12. Petitioner's serial number was shown as 135 for the Council Election and serial number 382 in the General Election to the Parliament. She was a resident and head of the family in House No. C-2-1 (Island Council Election House No. 3-112). The situation in the house and around was still tense and there was every chance of danger to human life and disturbance of public tranquillity. After carefully considering the petition of the 4th respondent, the local customary practice of residence of wife, the enquiry report of Amin and the situation prevailing inside and around the house, the Executive Magistrate, Kiltan came to the opinion that there is sufficient ground for proceeding u/s 144, Cri. P.C. and felt immediate and speedy remedy is desirable to prevent injury to human life and disturbance of the public tranquillity due to trespass of the petitioner into the said house. He issued Ext. P2 order directing the petitioner to abstain from house No. ICE-3-12 belonging to the 4th respondent. Thereafter the Station House Officer, Kiltan who was directed to serve the order reported that he has served the original copy of the order to the petitioners but the petitioner did not obey the order and hence requested to intimate further steps to be taken. True copy of the report dated 17-1-1990 of the Station House Officer is produced and marked as Ext. R1(f). Therefore the Executive Magistrate directed the police to remove her from the said house by force if needed Ext. R1(g) dated 18-1-1990 is the report submitted by the Station House Officer stating that he has served the order to the petitioner and advised her to abstain from the house No. ICE-3-12. Accepting the order the petitioner abstained from the house. The situation was reviewed after three days, and after having satisfied that the situation around the house No. ICE-3-12 has improved, the Executive Magistrate withdrew the order issued u/s 144, Cri. P. C. True copy of the order is produced and marked as Ext. R1(h).

4. The 4th respondent in his counter affidavit has stated that building No. ICE-3-12 is not a residential building. It has not even the primary facilities such as kitchen, Bathroom, latrine and even shutters to the windows. It is a single room with dimensions 4.5 metres x 3.5 metres. It is used as a reading room named as "Islamic study circle". That building belongs to the respondent. He further says that the relationship between the petitioner and the respondent was strained about 10 months back and the 4th respondent had divorced the petitioner on 2-12-1989, which fact is known to the petitioner.

5. The counsel on behalf of the petitioner referred to me a large number of decisions on the scope of Section 144 Cr. P.C. The first of such cases referred to is the decision reported in *Ramnad Zamin v. Kadarmeera*, AIR 1932 Madras 294 : (1932-33 Cri LJ 605). In that case the Second Class Magistrate in exercise of power u/s 144 restrained A & B Parties from taking processions in the street. It was held that the Magistrate should enquire relative rights of the parties before making an order u/s 144. In the second case referred to namely [Sairu Seikh and Another Vs.](#)

[Shyamlal Sardar](#), the Magistrate restrained the petitioners therein from entering upon the disputed property by an injunction and that injunction was vacated by the High Court. The Court held u/s 144 the Magistrate is concerned with possession and prevention of breach of peace. The third case referred to is [Indrasan Rai Vs. Enayat Khan and Another](#), In that case the Sub-Divisional Officer directed to seize the bus and to hand over the bus to the opposite party with the police aid. The High Court set aside the order observing that there was no apprehension of breach of peace and the summary power of the Sub-Divisional Officer was not used to prevent the breach of peace. The next case referred to is in [Radha Kishen and Another Vs. Inder Parkash](#), In that case the Magistrate ordered eviction of the tenants with the help of the police for construction of a hospital. At the instance of the landlord the order was set aside. The court held that Section 144 of the Cr. P.C. does not entitle the landlord to secure the eviction of a tenant through the intervention of a criminal court. The court also held that Section 144 Cri. P.C. is not intended to empower a Magistrate to decide disputes of a civil nature between private individuals and to usurp the functions of a civil court. The next case referred to is in [\(Hafiz\) Hafizuddin Vs. C. Laborde](#), . In that case the Sub-Divisional Magistrate ordered an agent to give the register and goods in his possession to a company which was the opposite party on termination of the agency. The agent refused to give the register and goods on the ground that his accounts had not been settled. There was no apprehension of any injury or nuisance. Therefore the order of the Magistrate was set aside and the goods and register were directed to be restored to the applicant. It was held in that case that the section is not intended to vest a Magistrate with the power to decide disputes of a civil nature. The private disputes have to be settled by the civil court.

6. Section 144 of the Cr. P.C. gives wide power among others to the Executive Magistrate specially empowered by the State Government. In cases where, in the opinion of a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in that behalf, there is sufficient ground for proceeding under the section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case direct any person to abstain from certain acts if he considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray. The section empowers the Magistrate to take action in urgent cases. He gets jurisdiction if he is satisfied that an immediate prevention or speedy remedy is desirable. His opinion as to the existence of sufficient ground for proceeding u/s is the foundation for the proceedings and the satisfaction that the direction is needed to prevent nuisance or disturbance of public tranquillity is the requisite of the section. The Magistrate should resort to section 144 only if there is no time or opportunity for any other course. The order must set out the material facts of the case. But if there are materials on the record justifying such an order, the order will not be vitiated. The

Magistrate, no doubt, should not usurp the functions of a civil court. But the Magistrate will not be precluded from considering the nature of the claims set up by the parties. Sub-section (2) of Section 144 stated that in cases of emergency or in cases where the circumstances do not permit of the serving in due time of a notice upon the person against whom the order is directed, orders can be passed ex parte.

7. The nature of the power and the authority of the Magistrate u/s 144 of the Criminal Procedure Code have been laid down by the Supreme Court in [Gulam Abbas and Others Vs. State of Uttar Pradesh and Others](#), as follows:

"25. Without setting out verbatim the provisions of Section 144 of the 1973 Code, we might briefly indicate the nature of power thereunder and what it authorises the executive magistracy to do and in what circumstances. In urgent cases of nuisance or apprehended danger, where immediate prevention or speedy remedy is desirable, a District Magistrate, a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf may, by a written order stating the material facts of the case, direct a particular individual, or persons residing in a particular place or area, or the public generally when frequenting or visiting a particular place or area, (i) to abstain from a certain act, or (ii) to take certain order with respect to certain property in his possession or under his management, if he considers that such direction is likely to prevent or tends to prevent obstruction, annoyance or injury to any other person lawfully employed, or danger to human life, health or safety, or a disturbance of public tranquillity or a riot or an affray. As stated earlier Sub-section (2) authorises the issuance of such an order ex parte in cases of emergency or in cases where circumstances do not admit of the serving in due time of a notice upon the person or persons against whom the order is directed but in such cases under subsection (5) the executive Magistrate, either on his own motion or on the application of the person aggrieved after giving him a hearing may rescind or alter his original order. Under Sub-section (4) no order under this section shall remain in force for more than two months from the making thereof unless under the proviso thereto the State Government by Notification directs that such order shall remain in force for a further period not exceeding six months.

26. The entire basis of action u/s 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity. Preservation of the public peace and tranquillity is the primary function of the Government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves, for, it is obvious that when there is a conflict between the public interest

and private rights the former must prevail. 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 of 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 wrongdoer 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."

8. In the counter-affidavit filed on behalf of respondents 1 to 3 it is stated that as per information gathered by the 1st respondent after conducting enquiry and as revealed from records he came to the conclusion that the petitioner was not actually residing in the house ICE-3-12 along with the 4th respondent. She was actually divorced by him. It was the customary practice in the island that the wife does not live in the house of the husband. Petitioner entered into the library of the 4th respondent with the ulterior motive on the night of 16-1-1990 with the help of certain party members and created a situation disturbing public tranquillity and danger to human life. She took law in her own hands. If the petitioner had a right to the property or to live with her husband in that house she should have taken appropriate action instead of taking law in her own hands. It is in that context the Magistrate bona fide exercised the power and passed Ext. P2 order and also implemented the same. He is a man on the spot. He came to the conclusion to avoid breach of peace such an action was required urgently.

9. Since Exts. P2 and P3 now remain withdrawn with effect from 22-1-1990 as stated already the same is not liable to be quashed. The question then is whether police protection can be extended to the petitioner for re-entry. The prayer is for a writ of mandamus. No request has been made for police protection for re-entry.

10. In the counter-affidavit filed on behalf of the 4th respondent it is stated that he has divorced the petitioner by talak on 2-12-1989. The talak is a dissolution of

marriage effected by husband by repudiation. In the decision reported in Mohammed Haneef v. Pathummal Beevi 1972 KLT 512 this Court stated that from the date of repudiation by the husband even through the written statement filed in a case divorce will be deemed to have taken place. In Pathayi v. Moideen 1968 KLT 763 a Division Bench of this Court held that a major husband of sound mind can effect divorce in Muslim Law, whenever he desires. No special form is, required. Even the presence of the wife is not necessary. Husband can effect the dissolution by conveying his intention to the wife. No direct communication is necessary and it is effective when the wife knows about it. Therefore when the wife knew from the counter-affidavit in any case the divorce has become effective and dissolution has taken place. It has been held in Rashid Ahmad v. Mt. Anisa Khatun, AIR 1932 PC 25, that a divorced Muslim husband cannot lawfully marry his divorced wife until she is married to another and the latter has divorced her. Therefore the petitioner has no right to live with the 4th respondent. The basis of the writ of mandamus is stated that the petitioner and her children have fundamental right to reside in the house of the 4th respondent, he being the husband of the petitioner and the father of the children. Since the petitioner has no legal right to stay in the 4th respondent's house, no writ of mandamus also will issue by this Court, to extend police protection for the reentry of the petitioner in the house of her former husband.

11. The Magistrate only passed a temporary order which now stands cancelled directing the petitioner to abstain from house ♦No. ICE-3-12. If the petitioner has a right against the 4th respondent or against his property or get the divorce cancelled that, right has not been taken away by any action of the 1st and 2nd respondents. The summary order passed without hearing the petitioner cannot affect the rights of the parties. Therefore petitioner's right, if any, against the 4th respondent will not be curtailed by any orders like Exts. P2 and P3.

I find no merit in the writ petition. The Original Petition is dismissed. No costs.