

(2009) 02 MAD CK 0165

Madras High Court

Case No: Criminal R.C. No"s. 1527 and 1637 of 2008 and M.P. No"s. 1 of 2008

Dayalan Rajes and Shiv Dayalan
Rajes

APPELLANT

Vs

The Revenue Divisional
Officer-cum-Sub Divisional
Executive Magistrate, Salem and
Mohan Rajes

RESPONDENT

Date of Decision: Feb. 12, 2009

Citation: (2009) 1 LW(Cri) 373

Hon'ble Judges: R. Regupati, J

Bench: Single Bench

Advocate: D. Shivakumaran, for the Appellant; R. Muniyappa j, Govt. Advocate for R-1 and Mr. S. Sethuraman, for R-2, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R. Regupati, J.

Challenging the final order, dated 13.7.2007, passed u/s 145 Code of Criminal Procedure in Na. Ka. No. 3718 /2007 (A2) by the first Respondent/Revenue Divisional Officer-cum-Sub Divisional Magistrate, Salem, the Petitioners have filed Crl.R.C. No. 1637 of 2008.

Questioning the correctness and validity of the subsequent order dated 30.10.2008 passed by the said authority in Na. Ka. No. 3482/2008 (A2), in and by which several directions came to be issued, Crl.R.C. No. 1527 of 2008 is preferred.

2. Inasmuch as both the Revision Cases are interconnected and stemming from the orders passed by the very same authority viz., first Respondent, they are heard together and disposed of by this common order.

3. The second Petitioner is the son of the first Petitioner, who is the brother of R-2. The father of Petitioner No. I and R-2 owned vast extent of lands and during 1956, partition was effected. The father died on 25.12.2000 and after his demise, dispute arose between the brothers with regard to the properties which are not covered by the partition effected during 1956. As per the arrangement made between the parties, Jubilee estate fell to the share of the Petitioners while Stanmore Estate to that of the 2nd Respondent and water from common source was also divided between both the estates by common pipeline but separate water tanks and the water collected in the tanks is used for several purposes. In a dispute that arose with reference to sharing of water, R-2 lodged a complaint with the police against the Petitioners to the effect that the Petitioners trespassed into his property/Estate and destroyed the pipelines, diverting the water and preventing the flow of water by pipelines to the lands and further, they threatened the labourers working in his Estate with dire consequences. Due to the intervention of the well-wishers and the police, a Memorandum of Understanding has been entered into between the parties. Alleging trespass and vandalism as against the Petitioners, R-2 forwarded a representation to the first Respondent /Executive Magistrate. By order dated 04.05.2007, a preliminary order came to be passed by R-I, directing the parties to appear within 30 days for enquiry. The Petitioners did not appear and final order was passed by the first Respondent on 13.07.2007, confirming the rights of the 2nd Respondent and subjecting the Petitioners to criminal liability in the event of their transgressing or violating any of the conditions prescribed. The Petitioners claim that the preliminary order was not served on them and that, without hearing them and receiving materials from their side, final order was passed. Aggrieved thereby, an appeal has been preferred to the higher authority who directed the Petitioners to approach the civil forum. In the meantime, a writ petition has been filed by the 2nd Respondent before High Court, Madras, seeking to implement the final orders passed by the first Respondent. The writ petition was ordered on 30.04.2008, whereupon, further orders were passed by the authority on 30.10.2008, issuing certain directions. In such circumstances, the present revisions have been filed to set aside the final order passed u/s 145 Code of Criminal Procedure as well as the further orders passed subsequently by the first Respondent.

4. Learned Counsel for the Petitioners, by stating that both the orders passed by the Executive Magistrate are illegal and liable to be set aside, submits that the dispute between the parties are purely of civil nature and such dispute may have to be decided only by the competent civil court. Unless the learned Magistrate is satisfied about the actual existence of a dispute that would warrant exercise of jurisdiction u/s 145 Cr.P.C, an enquiry cannot be conducted by him in a manner contrary to the procedure. When the authority is aware of the fact that the issues pertaining to the right and entitlement of the parties to the properties cannot be gone into and decided by him particularly when proceedings are pending before the civil court, he should have directed the parties to approach the civil court. The exercise of the

Executive Magistrate in passing final orders on such aspects and issuing directions in the subsequent order is beyond his jurisdiction and therefore, this is a fit case where the orders passed by the authority are liable to be quashed.

5. Per contra, learned Counsel for the second Respondent submits that the Petitioners have trespassed into the property, destroyed the pipelines, prevented flow of water to the estate of the 2nd Respondent and threatened the labourers, resulting in lodging of the complaint. Further, though compromise has been reached and a memorandum of understanding entered into and signed between the parties, ignoring such compromise, the Petitioners continuously created problems, resulting in law and order problem and breach of peace; only under such circumstances, the proceedings u/s 145 Code of Criminal Procedure came to be initiated. Though sufficient opportunity was given during preliminary enquiry conducted u/s 145 (1) Cr.P.C, the Petitioners failed to appear and did not take up the proceedings; therefore, orders came to be passed in their absence. Also, in spite of such order having been passed, the same was not implemented by the first Respondent and that is the reason why, the Writ Petition was filed before the High court. The writ petition was ordered and only subsequent thereto, the first Respondent passed further orders issuing certain directions to the authorities. The dispute arose from sharing of water from common source, hence, such dispute can very well be enquired by the first Respondent u/s 145 Code of Criminal Procedure Inasmuch as sufficient reasons are assigned for issuing the directions, the orders need not be disturbed and the Revision Cases may be dismissed.

6. I have meticulously perused the materials available on record and carefully considered the rival submissions made on either side. It seems that major portion of the properties were already partitioned between the parties and after the death of the father, a memorandum of understanding has been entered into for management of other properties; however, dispute arose and continued with regard to sharing of water and in that regard, a complaint was given by the 2nd Respondent to the police on the allegation that the Petitioners made an attempt to damage the pipelines, threatened the workers and prevented free flow of water to his estate.

It is seen that, in the preliminary order passed u/s 145 Cr.P.C, the Executive Magistrate observed as if the rights of the parties would be decided. In the final order, an elaborate discussion has been made with reference to the right of sharing of water by relying on the MOU entered into between the parties. While directing the police to proceed against the person violating the terms of the MOU, the parties were asked to adhere to the MOU, not to damage the pipelines and not to disturb the fencing, else, stringent action would be initiated by the police.

It is curious to note that the one and only issue for consideration viz., dispute over sharing of water, has not been discussed at all in detail, rather, those aspects which are irrelevant and outside the purview of jurisdiction and such issues which could be

exclusively dealt with by the civil court have been discussed and directions have been issued. Both the orders lack clarity on the aspect of the actual dispute involved between the parties. Even the existing arrangement between the parties is not discussed. Though the dispute between the parties has been taken into account, enquiry has not been conducted as contemplated u/s 145 Cr.P.C.

The specific allegations in the complaint viz., the Petitioners trespassed into the lands of R-2 and attempted to destroy the pipelines and threatened the workmen, have the potential to attract penal provisions and thereby warrant investigation by the police by registering a case against the Petitioners so as to punish the offender and transgressor; however, the scope of Section 145 Code of Criminal Procedure is altogether different, for, it relates to such dispute which is likely to cause breach of peace concerning any land or water. It is relevant in this regard to refer to Section 145 (4) and (6) (a) Code of Criminal Procedure which read thus:

145 Procedure where dispute concerning land or water is likely to cause breach of peace.

(4) The Magistrate shall then, without reference to the merits or the claims of any of the parties, to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under Sub-section (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under Sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under Sub-section (1).

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to Sub-section (4) be treated as being, in such possession of the said subject he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and for bidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to Sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

The provision is succinctly clear that the purpose of enquiry u/s 145 Code of Criminal Procedure is to decide as to which of the parties was, at the date of the order made by the authority under Sub-section (1), in possession of the subject of the dispute and if it appears to the Magistrate that one of the parties, who should be treated as being in possession, has been wrongly dispossessed, he may treat such party as the party in possession and proceed further to declare that such party is entitled to

possession thereof until evicted from there in due course of law.

But, in the case on hand, it appears that the first Respondent conducted inquiry into a civil dispute that too in the absence of one of the parties and arrived at a conclusion assuming the role of civil court and issued several directions beyond the scope of the proceedings u/s 145 Code of Criminal Procedure Those directions could be issued only by a civil court after receiving materials from both sides during the course of trial. Proceedings u/s 145 Cr.P.C, meant to create interim arrangement and grant interim relief, cannot be exhausted by deciding larger issues which can exclusively be dealt with and decided by the civil court. Since directions have been issued to the authorities including Highways Department, after touching the issues outside the scope of the proceedings viz., right and claims of the parties over the properties, particularly when litigation is said to be pending before civil court, I am of the considered view that the orders of the first Respondent are not sustainable in law.

It is pertinent here to refer to the case law in *Shandi Kumar Panda v. Shakuntala Devi* (2004 SCC (Cri) 320 , wherein, it has been observed as follows:

Possession is nine points in law. One purpose of the enforcement of the law is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc., as defined in Sub-section (2) of Section 145 having arisen, causing a likelihood of a breach of the peace, Section 145 of the Code authorises the Executive Magistrate to take cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings under Sections 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive or police action. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in the proviso to Sub-section (4) of Section 145 and maintain the status quo as to possession until the entitlement to possession was determined by a Court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned.

As pointed out earlier, in the present cases, even on the actual issue involved, material aspects such as,

- a) satisfaction arrived at by the authority on the basis of the police report that the dispute was likely to cause breach of peace;
- b) adequacy of the materials made available; and
- c) the grounds which compelled to take action,

are not reflected in the order. Though the incidents, which led to initiation of the proceedings, have been mentioned, the reasons for issuing several directions amongst the one to maintain status quo are not elaborated. At any rate, the Executive Magistrate is not competent to decide with regard to rights of the parties particularly in a case where the right claimed by one party and denied by the other side is a matter for adjudication by the competent civil court. It must be borne in mind that the Executive Magistrate is not the forum where rights of parties to properties can be decided and that he has no business to deal with or delve into such aspect. When litigation is pending between the parties before civil court, the Executive Magistrate could have directed the parties to approach the civil court for decision on the issues. The dispute in question started in the year 2007 and preliminary order was passed on 4.5.2007 and thereafter, the parties have been canvassing the major issues of right over the property, possession, title, violation of MOU etc. before the Executive Magistrate without agitating the same before appropriate forum. Even though nothing untoward had ever occurred in the meantime, in view of the reason that both the orders have been passed by the first Respondent exceeding the jurisdiction prescribed, they are liable to be set aside.

7. In the light of the foregoing reasons and observations, the Revision Cases are ordered, the impugned orders passed by the first Respondent/Executive Magistrate are set aside and the parties are directed to approach appropriate forum/ civil court for adjudication of the issues in accordance with law. Connected Miscellaneous Petitions stand closed.