

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

CrI.MC.No. 1285 of 2015

AGAINST A4 5297/2014 of SUB DVL.MAGI.COURT, THIRUVALLA

PETITIONER(S)/COUNTER PETITIONER:

SALLY BABU, AGED 42 YEARS,
NASRATHU VILLA, RAILWAY STATION ROAD
KUTTAPPUZHA VILLAGE, THIRUVALLA.

BY ADVS.SRI.T.P.PRADEEP
SRI.P.K.SATHEES KUMAR

RESPONDENT(S)/PETITIONER:

1. P.CHACKO VARGHESE
POOVAKKALA PADINJARETHIL
ANJILITHANAM MURI, KUNNAMTHANAM VILLAGE, MALLAPPALLY
689594.

2. SUB DIVISIONAL MAGISTRATE
THIRUVALLA, 689101.

3. STATE OF KERALA
REP.BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA
KOCHI-682031.

BY ADV. SRI.P.RAVINDRA NATH
BY ADV. SRI.N.KRISHNA PRASAD
BY PUBLIC PROSECUTOR SRI.JIBU P. THOMAS

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 10-
07-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CrI.MC.No. 1285 of 2015 ()

APPENDIX

ANNEXURES

ANNEXURE A: TRUE COPY OF THE O.S.NO.650/2014 DATED 05.11.2014.

ANNEXURE-B: TRUE COPY OF THE COMMISSION REPORT FILED BY THE
ADVOCATE COMMISSIONER.

ANNEXURE-C: CERTIFIED COPY OF THE INTERIM ORDER DATED 10.12.2014
ISSUED BY THE 2ND RESPONDENT.

ANNEXURE-D: TRUE COPY OF THE OBJECTION DATED 12.12.2014.

ANNEXURE-E: TRUE COPY OF THE ADDITIONAL OBJECTION.

ANNEXURE-F: CERTIFIED COPY OF THE ORDER DATED 10.2.2015 ISSUED BY
THE 2ND RESPONDENT.

TRUE COPY

P.S TO JUDGE

RAJA VIJAYARAGHAVAN.V. J

Crl.M.C. 1285 of 2015

Dated 10th July, 2015

ORDER

1. This petition is filed under S. 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') by the petitioner, who is the 2nd counter petitioner in proceeding No A4 – 5297/2014 of the Sub Divisional Magistrate .

2. Annexure-C and Annexure-F orders passed by the Sub Divisional Magistrate are under challenge. Annexure-C order is passed under S. 133 of the Code directing the petitioner to grant vacant possession of the building occupied by her and Annexure-F order dated 10.2.2015 is passed purportedly under S. 145 of the Code calling upon the petitioner to vacate the premises within 24 hours with specific direction to implement the order with police protection .

3. Facts falls within a small compass :

The petitioner herein and her husband Babu John were the owners of property having an extent of 5.3 ares in survey number 532/17-3 and 40 square meters in survey number 208/4-1 of the Thiruvalla village. The said property was sold to the first respondent as per sale deed number 2337/13 of the Thiruvalla Sub Registry Office. Since then the first respondent is in possession and enjoyment of the same. The aforesaid building and its premises was leased out by the first respondent to a tenant. While so , when the petitioner and her husband raised untenable claims over the property and the building situated therein , OS. No 650/14 was preferred by the 1st respondent before the Munsiff Court, Thiruvalla for injunction and other consequential reliefs. No order of injunction was obtained by the first respondent since the petitioner had filed a caveat. It is the further allegation that the petitioner displaced the tenant and took over possession over the property and the building. On these

allegations a petition was filed by the first respondent before the sub Divisional magistrate, Thiruvalla, seeking the relief of repossession of the building and premises.

4. On the date of filing of the petition itself , Annexure-C interim order, purportedly under S 133 of the Code, was passed by the SDM directing the petitioner and her husband to vacate the premises .They were also granted an opportunity to file objection within 7 days if aggrieved by the order .

5. The petitioner entered appearance and filed a detailed objection in which it was contended that the proceedings were not maintainable before the Sub Divisional Magistrate and the provisions of S.133 of the code cannot be invoked as the dispute involved was purely private in nature and no public rights were involved. It was pointed out that the second counter petitioner had borrowed a sum of rupees 37,40,000/ from the first respondent and it was by way of a security that

the sale deed was executed in favor of the first respondent. The 1st respondent had agreed to re-convey the property on payment of Rs. 10 lakhs towards interest together with the principal amount borrowed. In terms of the agreement, the petitioner and her family members were residing in the property. Later, the husband of the petitioner approached the first respondent and offered to repay the amount covered under the sale deed together with the accrued interest of Rs. 10 lakhs. This was not agreeable to the first respondent and he insisted that it was an out and out sale deed. When the petitioner did not vacate the premises, Original Suit number 650/14 was preferred before the Munsiff Court, Thiruvalla, by the first respondent seeking an order of permanent injunction. An Advocate Commissioner was appointed by the Civil Court to ascertain the nature and lie of the property and the Commissioner has submitted a report in which it has been asserted that the petitioner was in possession and enjoyment of the promises. Finally, it was contended basing on various pronouncements of this court that the

dispute between the parties being private and not involving public rights or breach of peace the powers under S. 133 or S.145 of the Code cannot be invoked and sought for dismissal of the petition .

6. It appears that the learned Sub Divisional Magistrate was not convinced with the objections preferred and Annexure-F order purportedly under S. 145 of the Code was passed directing the petitioner and her husband to vacate the premises within 24 hours. The said orders are under challenge in this Criminal Miscellaneous Case.

7. I have heard the learned Counsel for the petitioner, the learned counsel for the 1st respondent and the learned Public Prosecutor .

8. The learned counsel for the petitioner argued that this is a classic case of abuse of powers as S. 133 of the Act could not be invoked as no public rights were involved. Basing on the pending Civil Suit before the

Munsiff Court, it was contented that the Sub Divisional Magistrate, had no jurisdiction to entertain the matter and pass orders settling possessory rights of the parties. It was pointed out that after passing Annexure-C order, finding that this was not a case of public nuisance, the Sub Divisional Magistrate has passed orders under S. 145 without complying with the statutory safeguards. Reliance was placed on **Ashok Kumar V State of Uttarakhand and others (2013 (33) SCC 366)** and **Mahar Jain and Others V State of Delhi (2014 (3) SCC 241** to drive home the point that the object of S. 145 is to maintain law and order and to prevent breach of peace and not for evicting any person from possession. It was also pointed out that the question of possession of the property in a case of this nature was to be decided by the competent civil court and that the Sub Divisional Magistrate was bereft of any jurisdiction.

9. Per contra the learned counsel for the 1st respondent has asserted that in a case involving breach of peace , the

Sub Divisional Magistrate was bound to interfere and attempted to sustain the impugned orders. The learned public prosecutor on instructions submitted that if the 1st respondent attempted to vacate the premises by force , breach of peace is likely to occur and that is sufficient enough reason to let the order stand as such.

10. I have anxiously perused Annexure-C order passed u/s 133 of the Code and Annexure-F order passed u/s 145 of the Code.

11. Admittedly, after receipt of a petition from the 1st respondent seeking exercise of powers to grant re-possession of the premises, the Sub Divisional Magistrate initially passed Annexure-C order under S. 133 of the Code. It is trite that proceedings under S. 133 of the Code is invoked essentially to prevent public nuisance and in those cases of emergency where the public will put to great inconvenience and may suffer irreparable injury if the nuisance is not abated at once. Conditional order can

be issued only in cases where the officer is satisfied that clauses (a) to (f) of S. 133 (1) are satisfied. Obviously S. 133 has no application in the facts of the instant case and expression of satisfaction of the Sub Divisional Magistrate bringing the dispute within S. 133 of the Code is lacking in Annexure-C .

12. A perusal of Annexure-F order will reveal that the Sub Divisional Magistrate has passed Annexure-F order under S. 145 of the Code in continuation of Annexure-C order. It does not appear that a conditional order under S. 145 (1) of the Code was issued to the petitioner prior to passing an order of summary eviction and that too within 24 hours of issuance of the order. The procedure contemplated under S. 145 has not been complied. The object of the Section is not to authorize the Magistrate to settle private disputes but only to prevent breach of the peace. It is trite that the Sub Divisional Magistrate must be satisfied before taking action that there is a dispute which is likely to cause a breach of the peace. Importance

is not to the dispute but to the likelihood of the breach of the peace consequent on the dispute. Therefore, it is the imperative duty of the Magistrate to record in writing in clear and unambiguous terms that a dispute likely to cause breach of the peace exists and also the grounds of himself being so satisfied. Even if the order does not make it clear in so many words it must at least appear otherwise from the order and the records that there were grounds for such satisfaction and the Magistrate applied his mind and had the requisite satisfaction. Annexure-F order will not reveal that the magistrate was convinced that the dispute is likely to cause breach of peace.

13. There is yet another aspect to the matter. After having issued a preliminary order under S. 133 which falls under Chapter X Part B relating to public nuisance, the Sub Divisional Magistrate without exhausting the proceedings have issued final orders under Chapter X – Part D – which deals with disputes relating to immovable property. Both operate in different planes and will apply

only if necessary ingredients are satisfied. The procedure adopted by the Sub Divisional Magistrate is clearly illegal.

14. I am of the considered view that the Sub Divisional Magistrate has not appreciated the scope of S. 133 or S. 145 of the Code. The object of S.145 of the Code is merely to maintain law and order and to prevent breach of peace by maintaining one or other of the parties in possession, and not for evicting any person from possession. The scope of inquiry under S.145 of the Code is in respect of actual possession without reference to the merits or claim of any of the parties to a right to possess the subject of dispute. (See Ashok Kumar V State of Uttarakhand and Others 2013 (3) SCC 396)

15. Further, a civil suit is pending and merely because the plaintiff was not able to obtain an injunction as the matter was contested, the aggrieved party cannot invoke jurisdiction under S. 145 of the Code to get an order on the sly . This is a dispute of Civil nature, pure and simple,

and the civil suit was instituted by the 1st respondent himself prior to approaching the Sub Divisional Magistrate. The reason for invoking the powers is that the 1st respondent/plaintiff was not able to obtain an injunction in his favor owing to a caveat which was filed by the petitioner. Admittedly, the Commissioner was appointed by the learned Munsiff and the Advocate Commissioner has also reported that the petitioner is in possession. It is for the 1st respondent to pursue the matter and bring it to its logical conclusion . It is not for the Sub Divisional Magistrate to intervene in these private disputes which are best left to the Civil Courts to decide.

16. The Apex Court in **Ram Sumer Puri Mahant V State of U.P. (AIR 1985 (1) SCC 427)** has observed as follows :-

“When a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, we see hardly any justification

for initiating a parallel criminal proceeding under S.145 of the Code. There is no scope to doubt or dispute the position that the decree of the Civil Court is binding on the criminal court in a matter like the one before us. Counsel for respondents 2-5 was not in a position to challenge the proposition that parallel proceedings should not be permitted to continue and in the event of a decree of the Civil Court, the criminal court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the civil court and parties are in a position to approach the civil court for interim orders such as injunction or appointment of receiver for adequate protection of the property during pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be wasted over meaningless litigation. We are, therefore, satisfied that parallel proceedings should not continue and the order of the learned Magistrate should be quashed.”

17. I do not see any reason for allowing the proceeding before the Sub Divisional Magistrate to continue,

particularly because of the fact that the 1st respondent himself has approached the Civil Court and owing to the procedural flaws in the passing of the impugned orders. The parties are directed to pursue the matter before the Civil Courts and bring the matter to its logical conclusion .

18. In the result, Crl.M.C is allowed. All further proceedings in Proceedings No A4 – 5297/2014 of the Sub Divisional Magistrate are quashed.

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

Mrcs

//True Copy//

P.S.ToJudge