

(1972) 03 PAT CK 0014

In the Patna High Court

Case No : Criminal Rev. No. 1820 of 1969

Aklu Mahto and Bhupan Mahto

APPELLANT

Vs

Jhari Mahto

RESPONDENT

Date of Decision : 28-03-1972

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 147, 147(2)

Citation : (1972) 03 PAT CK 0014

Hon'ble Judges : C.P. Sinha, J

Bench : Single Bench

Advocate : S.R. Ghosal, for the Appellant; Mathura Nath Boy, for the Respondent

Final Decision : Allowed

Judgement

S.P. Sinha, J.—This revision by the second party, who are father and son, is directed against the Magistrate's order, dated 6. 8. 1969, in a proceeding u/s 147 of the Code of Criminal Procedure (hereinafter referred to as the Code). As it appears, the first party Jhari Mahto (present opposite party) approached the concerned Gram Panchayat with an allegation that the village Galli on plot No. 171 existing on the adjoining north of his residential house as also of the other villagers, which had been in their use since a very long time to approach the village road on the east, had been blocked by the second party who had put thorny shrubs just by the side of his house. This place is indicated as point "B" in the map of the Survey Amin as submitted in the case after local inspection of the spot in pursuance to Magistrate's order. The village surpunch, on receiving that complaint, visited the site on 6. 11. 1963 and noticed the alleged obstruction in the shape of shrubs. Their efforts to bring the parties together also failed and apprehending breach of peace between the two sides the surpunch submitted his report on 13.12.1963 to the Sub-divisional Magistrate. On the basis of that report the Subdivisional Magistrate drew up a proceeding u/s 107 of Code against the second party. In due course they put in their show cause refuting the allegations. Subsequently, on 14.8.1964, as agreed by the two sides, learned

Magistrate converted that proceeding into a proceeding u/s 147 of the Code and served upon the parties, who, in due course, filed their written statements on 1.9.1965 and 6.8.1965, respectively. As expected, the second party seriously contested claim of the first party regarding his right of user of this galli. Their case was that the land in question was their jamabandi land over which they had all along been in absolute and peaceful possession. They had their ancestral house contiguous to the same and feeling the necessity for further accommodation in that house they had constructed another house on their contiguous jamabandi land and both the houses had been joined together with a common court-yard.

2. On behalf of the parties a number of witnesses (five for the first party and three for the second party) were examined and the learned Magistrate, after considering those evidences also the report and map of the aforesaid Survey Amin, as deputed by him, decided the proceeding in favour of the first party under the impugned order, whose concluding portion reads thus-

"The report of the Mukhia, Sarpanch, Dy. Sarpanch, which, found the basis of the proceeding also clearly lays down that the party has made an on spot inspection and they first found the galli obstructed by putting shrubs and then a small room with mud walls and straw thatched was also erected. The very nature of the obstruction shows the mala fide of the the second party. I therefore feel convinced that the claim of the first party is genuine for a passage for him and the villagers for an approach to the road and they have been in use of the same. The second party should remove the encroachment recently made by 30.8.69, failing which the obstructions will be removed with the police help and the cost will be realised from the second party as a public demand. Inform O/C Madhupur to submit a report about the actual removal of the obstructions by 5.9. 69".

3. Mr. S. R. Ghosal Learned Counsel for the petitioners, has assailed the legality of the impugned order mainly on two grounds. The first is that from the nature of the right claimed it would appear that the right is exerciseable at all times of the year and in that context it was incumbent upon the Magistrate to have recorded a clear finding that such right had been exercised within three months next before the institution of the enquiry. There is, however, no such finding by the Magistrate, and as such, his order is without jurisdiction. Secondly, he had called upon his clients to remove the alleged encroachment by a certain date failing which it had been ordered to be removed with the police help at their cost as a public demand. u/s 147 of the Code the Magistrate had however, no right to give any such mandatory order to remove that obstruction and all that the Magistrate was authorised under this Section to do was to make an order prohibiting any interference with the exercise of the claimed right of passage if he had found that such a right existed.

4. On the facts of the case, the above contentions, raised by Mr. Ghosal appear to be well founded and must succeed. I have carefully gone through the impugned order and have not come across any finding under which the

Magistrate can be said to have held that the alleged right of user of this galli had been exercised within three months next before the institution of the enquiry whose date in this case in the light of the Division Bench decision of this Court in (1) Bhagawan Swain Vs. Mathuri Swain, should not be beyond 13.12.1963 on which date the Magistrate had received the Gram Panchayat Sarpanch's above report bringing this matter to his notice for necessary action against the members of the second party. In (2) Chaturgun Turha and Others Vs. Jamadar Mian, , a Bench decision, their Lordships have laid down that the settled view of this Court is that in the case where the right claimed is exerciseable at all times of the year an order will be without jurisdiction unless it is based upon a finding that the right claimed has been exercised within three months next before the institution of the enquiry. This decision has further laid down that all that under Sub-section (2) of Section 147 a Magistrate can do is to prohibit any interference with the exercise of the right that may be held to exist and a Magistrate purporting to act under this section cannot pass a mandatory order asking the parties, against whom the prohibitory order is made, to remove the obstruction which was also the view taken by the Full Bench of Calcutta High Court in (3) Hem Chandra Banerji Vs. Abdur Rahaman, .

5. Because of the above glaring defect in the impugned order, it is manifest that it cannot be upheld and must be quashed.

6. A request has been made on behalf of the opposite party that after setting aside the impugned order, the case should be sent down to the Magistrate for recording a clear finding on the point of exercise of the claimed right by his client within three months next before the institution of the enquiry and then to dispose of the proceeding on merit on the evidence already on record. He should also be given option to take fresh evidence in the case if he feels it necessary for its decision. This suggestion is resisted by Mr. Ghosal on the ground that this dispute has already lingered for over 8 years and there could be no question of any likelihood of breach of the peace at this distant time, His submission further is that if the authorities get hold of materials apprehending breach of the peace on this account it will be always open to them to take necessary action in the matter, as enjoined by law. After taking into consideration all the relevant circumstances, I do not think, any useful purpose will now be served by any such remand. If any of the parties feels grieved to the situation at present he can well approach the authorities afresh for action against the other side according to law, and if and when the authorities are so approached, they can easily take such steps as they find necessary in the circumstance, in accordance with law. For the above reasons, the application is allowed and the Magistrate's impugned order, dated 6.8.1969 is set aside.