

(1977) 08 PAT CK 0005

In the Patna High Court

Case No : Criminal Rev. No. 542 of 1975

Babuji Mukhia and Others

APPELLANT

Vs

Sahdeo Mukhia and Others

RESPONDENT

Date of Decision : 02-08-1977

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1978) 26 BLJR 82

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Madan Mohan Prasad, J.—This is an application in revision against a final order u/s 145 of the Code of Criminal Procedure hereinafter called "the Code") declaring the possession of the opposite party over a jalkar land.

2. In view of the points raised before me it is not necessary to enter into the facts at any length. Two points have been urged. Firstly, that the proceedings is vague and secondly that the procedure adopted during the course of inquiry is illegal.

3. With regard to the first contention the proceeding shows that the disputes relates to "Bhadaul Kamla Chour Ghat" within Thana Kuseshwar Asthan. The petitioners appear to have filed an objection before the Magistrate to the vagueness of the proceeding, which was rejected on the ground that the place is too well known by the name aforesaid. It appears from the written statements of the parties that they know what is the; subject-matter of the dispute. There is thus no substance in this contention.

4. The second point raised by counsel for the petitioners must prevail. It appears that the petitioners had filed an application for examination of two witnesses who were in attendance. This is said to have been done on the 20th March, 1975. That petition is on record at page 112. The learned Magistrate, however, thought

that in view of the documents being decisively in favour of the opposite party there was no necessity of examining witnesses. Accordingly he did not examine the witnesses produced by the petitioner. The order to this effect, however, was passed as a part of the final order declaring possession of the opposite party on the 24th of March, 1975.

5. In this respect the learned Magistrate was clearly in error. The proceeding u/s 145 of the Code was started on the 10th of January, 1975 and thus is to be governed by the Code of Criminal Procedure, 1973. Sub-section (4) of Section 145 of the Code is as follows:

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 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).

Prior to the coming into force of the present Code there was the Code of Criminal Procedure, 1898, as amended by the Code of Criminal Procedure Amendment Act, 1956. It is well known that under the law then, affidavits were to be filed and it was open to the court to examine any of the deponents in that respect. Prior to the amending Act, however, the provisions of Section 145(4) were similar or that which are to be found in the present Code of 1973. Comparing the two provisions, I find that but of a few words it is almost in the same words. The effect thereof is that the law as laid down prior to the amending Act aforesaid, must be deemed to be the law to hold the field today. This I have said because I propose to refer to the fact that it was well settled that the Magistrate acting u/s 145 of the Code could not shut out the evidence altogether and was bound to examine witnesses if produced by the parties. A reference in this connection may be made to the cases of Bishwanath Mahapatra and Ors. v. Shivanand Saraswati and Ors. 2 P.L.T. 330. and Gaya Prasad Singh and Ors. v. Ram Sarohar Saran Singh and Ors. 15 P.L.T. 453. In the last mentioned case the Magistrate had thought that it was not necessary to take evidence even as in the present case, and it was held that he was under a legal obligation to receive all such evidence as might be produced by the parties respectively and consider the effect of such evidence. In the order case another learned Judge of this Court has laid down that even though the Magistrate has jurisdiction to curtail the number of unnecessary witnesses, but apart from this the parties have an undoubted right to examine their witnesses. The Magistrate was thus clearly in error in refusing

to examine the witnesses produced by the petitioners.

6. There is another aspect of the matter and that is that the provision of Section 145(4) itself makes it mandatory by the use of the word "shall" in Sub-section (4) thereof in respect of his duty to receive all such evidence as may be produced. The new Code of 1973 has gone back to the old Code of 1898 prior to the amendment of 1956 and thereby made production of oral evidence possible in place of affidavits. Evidence, as is well known, may be oral or documentary. If the law requires a Magistrate to receive all evidence, obviously it means both documentary and oral, irrespective of the fact that one may be decisive by itself and the other may not be necessary. The entire evidence has to be looked at in order to arrive at the conclusion. Obviously, therefore, if any Magistrate shuts out either oral or documentary evidence he shuts out part of the evidence and therefore, decides on partial evidence, which certainly is not the intent of the Legislature. From this point of view also I think that it is the right of the parties to adduce oral and documentary evidence both, and the Magistrate is bound to receive all such evidence as may be produced. These principles which I have mentioned are not absolute in the sense that if a party makes frivolous applications for examination of witnesses who are irrelevant or wants to prolong the enquiry by producing unnecessarily large volume of oral evidence on the same point, or does not choose to produce evidence within the time allowed. It may be open to the Magistrate to refuse such evidence. I am not, however, trying to lay down exhaustively the exceptions to the principle slated above. Ordinarily, however, the Magistrate must grant an opportunity to the parties to produce evidence and he is bound to examine witnesses who are in attendance.

7. For the reasons aforesaid, the order of the learned Magistrate declaring possession of the opposite party must be set aside. It is accordingly done. Nearly two years and a half elapsed since the date of the order. Thus if the Magistrate still finds an apprehension of breach of peace and a bona fide dispute to be substituting it will be open to him to start a fresh proceeding in accordance with law.

8. In the result, the application is allowed.