

(1969) 08 OHC CK 0038

In the Orissa High Court

Case No : Criminal Appeal No. 152 of 1966

Bhagabat Prasad Mohanty

APPELLANT

Vs

Chemei Jena and Others

RESPONDENT

Date of Decision : 04-08-1969

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 417(3)
Penal Code, 1860 (IPC) — Section 425, 430

Citation : (1969) 35 CLT 1176

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : R.N. Misra, R.C. Patnaik and P.B.V. Rao, for the Appellant; P.K. Dhal and S.C. Sahoo, for the Respondent

Judgement

S. Acharya, J.—The complainant on special leave preferred this appeal u/s 417(3), Code of Criminal Procedure against the judgment of acquittal passed by the Sub-divisional Magistrate, Bhadrak, acquitting the six Respondents who were charged, of an offence u/s 430, Indian Penal Code.

2. The prosecution case in a nut-shell is that on 26-11-1964 the accused persons closed by filling up a water course, flowing through a portion of Anabadi plot No. 1953 in village Kubera, through which the complainant was getting water to a tank in his enclosed homestead, which water he utilized for his agricultural and domestic purposes.

3. The defence put forward by Respondents 1, 2 and 3 was that there was no such Nala, as alleged by the complainant, which was filled up by them on the date of occurrence, and that they on a previous occasion filled up a Nala which they themselves had dug on the Anabadi land in the village for irrigating their own land, and this filling up was "not in any way detrimental to the interest of the complainant, and that this was a false case foisted against them. Respondents 4, 5 and 6 pleaded, in short, that they had nothing to do with the filling up of the Nala in question, and that this false case was instituted against

them to harass them. It is to be noted here that Respondents 1 and 2 are two brothers, and Respondent No. 3 is the son of Respondent No. 14. The learned Magistrate on a discussion of the evidence on record and the defence taken by Respondents 1 to 3, arrived at a finding that on a small portion of Anabadi plot No. 1953, there existed the Nala in question, which was not a natural water course, but was dug out from the nearly natural water channel just to divert from its flow of some water through the Anabadi land, evidently for the benefit of the adjoining land owners including the complainant and the accused Chemei Jena. I am satisfied that the ,above is a correct finding being amply supported by the materials in record.

5. Mr. P.V.B. Rao, the learned Counsel for the Appellant, seriously contended that the learned Magistrate did not direct his attention to the ingredients of the offence u/s 430, Indian Penal Code of which all the accused persons stood charged; and also overlooked certain salient features of the prosecution case, and as such arrived at an incorrect finding.

6. One of the reasons which impelled the learned Magistrate to acquit the accused persons was his own appreciation and consideration of Ext. 2, a petition dated 1-7-1964 by the complainant to the S.D.O. Bhadrak, alleging that the Respondents 1 to 3 filled up a small portion of the Nala in question on or about 28-6-1964. As that petition was made about five months before the alleged date of occurrence it led the learned Magistrate to conclude that there was no occurrence on 26-11-1964 as alleged by the complainant. I am not satisfied with the reasonings adopted by the learned Magistrate in arriving at the aforesaid finding. In Ext. 2 the complainant, then praying for the S.D.O's. intervention, mentioned inter alia, that the opposite party therein, i.e. the Respondents 1 to 3 filled up only a small portion of the Nala, but were prevented from further filling it up by the constable on duty and the gentlemen of the village. There is nothing in Ext. 2 from which the Magistrate should have arrived at the conclusion that Ext. 2 belied the entire prosecution story, and that the eye-witnesses were not witnesses of truth and were not worthy of credit. The learned Magistrate in considering the above aspect of the matter did not bestow proper consideration to a few other documents and the evidence on record. In connection with the complainant's above mentioned petition Ext. 2, the Revenue Inspector reported to the R.D.O. on 10-10-1964 by Ext. 5 that because of crops on the land and water in the Nala and accumulation of rubbish at the place he could not measure the plot in question, and prayed for further time to do the same. Ext. 6 dated 1-12-1964 submitted by the same Revenue Inspector to the S.D.O. only a few days after the occurrence, shows that the Nala about which he mentioned in his previous report Ext. 5, had been filled up in the meantime, and plantain trees were implanted thereon, and that to the further west of the filled up portion the Nala continued to exist. These two documents go to show that the portion of the Nala on the said laid which existed till 10-10-1964 was filled up by 1-12-1964. P.ws. 1 to 5 consistently and unequivocally stated on oath that on the date of occurrence, that is, on 26.11.1964, the flow of water through the Nala to the

tank of the complainant was blocked by filling up a major portion of the said Nala and plantain trees were implanted thereupon. The defence could not satisfactorily assail their above evidence in cross-examination. Some of these witnesses belonged to the neighbourhood, and nothing convincing could be elicited from the complainant's witnesses as to why they should falsely depose to the above facts. On a perusal of their evidence and on a consideration of Exts. 5 and 6 I am satisfied that the filling up of a major portion of the Nala in question on 26-11-1964, as alleged by the complainant, has been established beyond reasonable doubt. Thus, the learned Magistrate's finding that there was no occurrence on 26-11-1964, based mostly on a consideration of Ext. 1, and without any consideration of Exts. 5 and 6 and the evidence on record, cannot be justified and sustained. The Court below also committed a mistake in discarding the evidence of p.w.s. 1 to 5 and branding all of them unworthy of credit by almost one sweep, without any proper discussion or assessment of their evidence.

7. The other findings of the learned Magistrate which influenced him to pass the order of acquittal were that there was no evidence that the complainant ever blocked the said Nala; that the complainant had no manner of right, title or interest in the land covering the portion on which the Nala in question was flowing; that the accused Chemei Jena had been in long use and occupation of a substantial portion of the Anabadi plot No. 1953; and that the complainant miserably failed to establish that he had a legal right to the Nala in question, and that there was unlawful and intentional interference and infringement of his said right by the accused on the date of occurrence.

I am constrained to mention that the learned Magistrate misdirected himself in considering this case u/s 430, Indian Penal Code on the perspective of the above findings only, without being mindful of the essential ingredients of an offence u/s 430, Indian Penal Code. In a case u/s 430, Indian Penal Code one has to examine if the elements that constitute mischief u/s 425, Indian Penal Code and the following essential ingredients are proved or not:

- (i) that the mischief in question caused or was likely to cause diminution of the supply of water;
- (ii) that such supply of water was for purposes of agricultural, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture;
- (iii) that such mischief was done with the knowledge that it would or was likely to cause such diminution of the supply of water.

The learned Magistrate did not consider the matter in the light of the above essential ingredients of the offence u/s 430, Indian Penal Code, and as such his finding cannot be upheld.

8. In the instant case it is important therefore to consider whether the mischief in question caused or was likely to cause diminution of the supply of water and

whether the said water was meant for any of the purposes mentioned in Section 430, Indian Penal Code as enumerated above. It is the admitted case of the defence that there existed a water channel on the above mentioned Anabadi land; and, as has been found above, a major portion of the said channel was filled up on the date of occurrence, thus blocking the flow of water to the complainant's tank. P.w.s. 1 to 5 stated in a convincing manner that the complainant and some of the villagers used the water of the said tank for drinking purposes, and the complainant utilised the water for growing vegetables and wheat in his Bari, and that the Nala in question was the only source of water supply to the said tank which again was the only source of irrigating the complainant's land. Thus it is established that by the filling up of the Nala in the aforesaid manner the only source of supply of water to the complainant's tank was obstructed, which inevitable resulted in the diminution of supply of water to the said tank, which water was used and utilised for agricultural, drinking and other such purposes.

9. The complainant's right to take water from the said channel is also a factor to be taken into consideration in this case. Complainant asserted that he was getting water through that Nala to his tank since generations. The complainant's witnesses stated that the said water channel existed since a long time, and was the only source of feeding the tank of the complainant. The complainant, as per Exts. 1 and 2, approached the police and the appropriate authorities as soon as some interference with the flow of water in the channel was caused by some of the accused persons. Moreover, it is also seen from Ext. 10 that the S.D.O. Bhadrak, after a spot enquiry ordered Respondent Chemei Jena to clear up the water channel filled up by him, as found on S.D.O's. enquiry. It is also in evidence that in accordance with the S.D.O's. order and with police help the said filled up portion was cleared up later during the pendency of this criminal case. All these go to show that the complainant had a right to take water from the said channel. Moreover, the evidence that the complainant was in occupation of land in the neighbourhood and was taking water through the channel to his tank since a long time to irrigate his said lands, is pretty good evidence that he had some right so to do, and the enjoyment of such right as that is evidence of right itself- Ismail Biswas and Others Vs. Emperor, .

10. As the complainant's right to take water from the said channel is thus established, and the alleged obstruction to the flow of water to the tank is proved as stated above, the question whether there was intention to cause wrongful loss to the complainant is one of drawing necessary inference Kanniah Chettiar v. Kupuswami Chettiar 1961 Cri. L.J. 501. Thus the intention of causing wrongful loss to the complainant is also established.

11. From all that has been discussed above, there can be no doubt that the filling up of the Nala was done with the knowledge that it would or was likely to cause diminution of supply of water in the tank, which ultimately affected the supply of water for agricultural and other purposes as proved by the complainant. It is

sufficient for Section 430, Indian Penal Code if the supply of water available for a particular person or a class of persons for any of the purposes mentioned in the said section is diminished by the Act of the accused Vadavalli Narasimha Rao and Others Vs. V. Ayyanna Rao, .

12. On the above findings I am satisfied that the complainant in this case has been able to prove an the necessary ingredients constituting an offence u/s 430, Indian Penal Code, and as such the judgment of acquittal as passed by the Court below cannot be maintained.

13. It is only Respondents 1, 2 and 3 Chemei Jena, Sukuti Jena and Kailash Jena respectively, as stated earlier, took the bold stand that they filled up the Nala which they themselves had dug on the Anabadi land. Respondents 4, 5 and 6, that is, Bari Mohan Biswal, Kinei Jena and Bidyadhar alias Bhala Basantaray respectively, pleaded complete ignorance about the occurrence stating that they had nothing to do with the filling up of this Nala, and that this was a false case foisted against them due to their previous enmity with the complainant. The complainant also admitted that previously he had "some litigations with Respondent Nos. 4, 5 and 6. The evidence against these three Respondents is of a general nature, without ascribing any particular Act in the aforesaid occurrence to anyone of them. None of the witnessess including the complainant, specifically named these three Respondents in their deposition excepting implicating them in the general manner as accused persons. Nothing is stated as to why and in what capacity and with what degree of deliberation they participated, if at an, in the aforesaid, occurrence. The dispute regarding the Nala and the supply of water therefrom is confined only to the complainant and Respondents 1, 2 and 3. So I would prefer to give Respondents 4, 5 and 6 the benefit of doubt in this case and absolve them of the charge framed against them.

14. In the result, the order of acquittal in favour of Respondents Chemei Jena, Sukuti Jena and Kailash Jena passed by the learned A.D.O. Bhadrak, is set aside, and they are convicted of the offence u/s 430, Indian Penal Code, and sentenced to pay a fine of Rs. 70/- each and in default to undoing rigorous imprisonment for one month each. The order of acquittal with respect to Respondents Bari Mohan Biswal, Kinei Jena and Bidyadhar alias Bhala Basantaray is maintained.