

(1986) 02 OHC CK 0013

In the Orissa High Court

Case No : Criminal Revision No. 386 of 1979 and Government Appeal No. 5 of 1980

Bhagirathi Srichandan and Another

APPELLANT

Vs

Damodar ' Dama Baral and Others
 State of Orissa Vs
Ramesh Samantray and Others

RESPONDENT

Date of Decision : 04-02-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Penal Code, 1860 (IPC) — Section 188

Citation : (1986) 61 CLT 307 : (1986) 1 OLR 377

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : D.P. Sahoo, G. Bohidar, S.K. Mund and B.P. Ray in Cri. Revision No. 386 of 1979 and S.K. Das, Addl. Standing in Govt. Appeal No. 5 of 1980, for the Appellant; N. Patra and B. Sahoo in Cri. Revision No. 386 of 1979 and N. Patra and B. Sahoo, in Govt. appeal No. 5 of 1980, for the Respondent

Judgement

K.P. Mohapatra, J.—Criminal Revision No. 386 of 1979 and Government Appeal No. 5 of 1980 arise out of the order passed by the learned judicial Magistrate, Second Class, Puri, in C.R. Case No. 1572 of 1973 (T. R. No. 802 of 1978) acquitting the respondents of charges under Sections 143, 188 and 379 of the Indian Penal Code ("I. P. C." for short). Therefore, they were heard analogously and this common judgment will govern both.

2. The prosecution case relevant for disposal of the cases is stated below in brief. Bhagirathi Srichandan initiated a proceeding u/s 145 of the Code of Criminal Procedure ("Code" for short) (Misc. Case No. 279 of 1973) against respondent No. 18, Damodar Baral and respondent No. 21, Upendra Rautrai in respect of plot No, 230 bearing an area of Ac. 0.56 decimals and plot Nos. 286 and 287 bearing an area of Ac. 0.17 decimals in Khata No. 39 of village Badalpur, P. S. Satyabadi, District, Puri. The learned Sub divisional Officer-cum-Magistrate, First Class, Puri, on 16.10.1973 passed a preliminary order (Ext. 2) whereby he prohibited both

parties to the proceedings from entering upon the subject-matter of dispute till disposal of the proceeding and as he found that it was a case of emergency, he further directed the police to attach the subject-matter of dispute forthwith and keep the same under attachment till disposal of the proceeding. He also directed the police to suggest the name of a disinterested person for appointment of receiver in respect thereof. In accordance with the directions contained In the preliminary order, a police officer (P. W. 6) attached to subject-matter of dispute on 28-10-1973 in the presence of witnesses by beat of drums and duly intimated respondents 18 and 21 of the contents of the preliminary order who refused to receive copies thereof. At the time of attachment, there were standing paddy crops on the attached land and so he suggested that the Revenue Inspector, Ranipada, be appointed as the receiver. He submitted his report (Ext. 2/2).

On 24-12-1973 Debaraj Srichandan, late husband of Sundari Srichandan (petitioner in Criminal Revision No. 386 of 1979) submitted F. I. R. at the Kanas Police Out-Post stating therein that being fully aware of the order of attachment and prohibition passed in proceeding u/s 145 of the Code and in flagrant violation thereof, the respondents by forming an unlawful assembly on the same day reaped and removed the standing paddy crops which had been raised by him as a tenant of deity Shri Radhamohan Deb of village Ghanipur, P. S. Delang, District Puri, since the time of his fore fathers. On the said F. I. R. investigation commenced.

On the basis of the self-same allegation a petition (Ext. 3) was filed before the Sub divisional Officer-cum-Magistrate, First Class, Puri, to initiate a complaint against respondents u/s 188, I. P. C, in accordance with the provisions of Section 195(1)(a)(i) of the Code. On 24.5.1975 the Executive Magistrate, Puri, filed a complaint petition (Ext. 4) against the respondents for having committed an offence u/s 188, I. P. C.

By order dated 11-7-1975 the Executive Magistrate, Puri, recorded final disposal of the proceeding u/s 145 of the Code (Ext. 10) (Misc. Case No. 279 of 1973) and declared the possession of Bhagirathi Srichandan in respect of the subject-matter of dispute. The order of the Executive Magistrate was upheld by this Court in Criminal Revision No. 279 of 1976.

On the above facts charge was framed against the respondents for having committed offences under Sections 143, 188 and 379, I. P. C.

3. The plea of the respondents was denial of the charges simpliciter.

4. During trial the learned Judicial Magistrate on the basis of the oral and documentary evidence adduced by the prosecution recorded the following findings :

(i) The preliminary order u/s 145 of the Code was duly promulgated, the respondents had knowledge of such promulgation, copies of the preliminary order were duly served on the parties to the proceedings and they were

prohibited to enter upon the subject-matter of dispute which was kept under attachment.

(ii) The respondents reaped and removed the standing paddy crops from the subject -matter of dispute.

(iii) There was no evidence to prove that the act of the respondents had the tendency to cause obstruction, annoyance or injury to any person lawfully employed and so the offence u/s 188, I. P. C. was not made out.

(iv) There was no evidence to show that the Court remained in possession of the subject-matter of dispute and so the case u/s 379, I. P. C. could not be made out and

(v) There was no proof for an offence u/s 143, I. P. C.

After arriving at the aforesaid conclusions, he acquitted the respondents of the charges which order has been assailed by the State in the Government Appeal and the aggrieved parties in the Criminal Revision.

5. Learned Additional Standing Counsel urged that on the findings recorded by the learned Judicial Magistrate the only conclusion that can be drawn is that respondents 18 and 21 who were the main architects of the crime were guilty of the offences under Sections 188 and 379, I. P. C, and the other respondents being their associates in the crime were guilty of the offence u/s 379, I. P. C., According to him, the learned Judicial Magistrate failed to construe the provisions of Section 188, I. P. C., in a correct manner and so committed the error leading to the acquittal of the respondents. Learned counsel appearing for the respondents, on the other hand, supported the impugned order and contended that this Court should not interfere with the order of acquittal.

6. At the first instance it is necessary to examine if the findings of fact based on evidence recorded by the learned Judicial Magistrate are correct and should be upheld. P.W.1 stated in his evidence that he was present when the subject-matter of dispute was attached by beat of drums. He attested the service report prepared by the police officer, P. W.6. P.W.2 and P.W.4, Gramarakhi were also witnesses to the attachment. P.W.6, the Assistant Sub-Inspector of Police effected the attachment of the subject-matter of dispute and furnished his report (Ext. 2/2) to the Court. According to his report (Ext. 2/2) and evidence, respondents 18 and 21 did not receive copies of the order though they were duly informed in respect thereof. The Court accepted the service report of attachment (Ext. 2/2) and proceeded to dispose of the proceeding u/s 145 of the Code by order, Ext. 10. A complaint was also filed against the respondents for violation of Court's order acting on the service report of attachment. There is no other material to disbelieve the aforesaid evidence. Merely because there was party faction in the village, the evidence adduced by the prosecution witnesses cannot be disbelieved. On the basis of the aforesaid evidence, the learned Judicial Magistrate was right in holding that the subject-matter of dispute was attached

in pursuance of the preliminary order (Ext. 2) in the proceeding u/s 145 of the Code and respondents 18 and 21 were fully aware of the same.

P.Ws. 1, 2, 3 and 4 have stated about raising of paddy crops by Bhagirathi Srichandin on the subject-matter of dispute which stood on the land at the time of attachment. According to the report and evidence of P.W.6, there were standing paddy crops thereon. The evidence of P.Ws. 1, 2, 3 and 4 shows that the respondents in a body, despite protests, forcibly removed the standing paddy crops on the date of occurrence. Although some of the witnesses admitted that there was party faction in the village and some of them had earlier deposed against some of the respondents in criminal cases, yet their evidence cannot be entirely rejected. On the other hand, their evidence has to be closely and cautiously scrutinised. The learned judicial Magistrate after close and cautious scrutiny of their evidence correctly came to hold that the respondents reaped and removed the standing paddy crops from the subject-matter of dispute.

7. The aforesaid findings of fact recorded by the learned Judicial Magistrate which must have to be upheld lead me to consider the offences committed by the respondents and proved against them, if any. The ingredients of the offence u/s 188, I. P. C, are the following :

- 1) There was promulgation of an order by a public servant lawfully empowered to promulgate such order.
- 2) Such order directed the accused to abstain from a certain act, or to take certain order with certain property in his possession or under his management.
- 3) The accused was aware of such order.
- 4) He disobeyed such order.
- 5) Such disobedience caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, or
- 6) Such disobedience caused or tended to cause a riot or affray,

The expression "promulgation" is not defined in the Code. Its ordinary meaning is "to make known by public declaration, to publish or to proclaim". Promulgation of an order connotes publication of an order publicly and openly and it does not take in private information. No particular mode is prescribed for the promulgation of the order contemplated in Section 188, I. P. C. It may be by beat of drums or notification in the gazette or by openly reading out of an order in public. See Kothakota Papayya and Others Vs. State, The evidence in this case was that the preliminary order u/s 145 of the Code was promulgated by P. W. 6 in the presence of other witnesses and the subject-matter of dispute was attached. The promulgation was made and published by beat of drums prohibiting both parties to the proceedings to enter up to the subject-matter of dispute. Respondents 18 and 21 who were members of the second party in the proceeding were also

specifically offered copies of the preliminary order, but they refused to accept the same. Therefore, promulgation of the preliminary order u/s 145 of the Code was known to respondents 13 and 21. Despite such knowledge they reaped and removed the standing paddy crops from the subject-matter of dispute on the date of occurrence. Such action on their part was clear disobedience of the preliminary order u/s 145 of the Code lawfully passed by a Court of competent jurisdiction and tended to cause a riot or affray. Fortunately, the members of the first party did not appear at the time of the occurrence for a trial of strength. Had they done so, a riot or affray could have been caused. At least there was possibility of a riot or affray being caused for the act of disobedience in 22 (1957) C. L. T. 176 *Fakir Charan Das v. The State*, it was held that, mere disobedience of an order u/s 144 of the Code would not render a person liable to punishment under that section. It must be further shown that such disobedience had either of the two tendencies described in the second and third paragraphs of that section, i.e., it must tend to cause obstruction, annoyance or injury to any person lawfully employed or it must tend to cause danger to human life, health or safety or to cause riot or affray. It is true that a riot or affray need not actually follow such disturbance so as to make a person liable under that section, but there must be a tendency. Doubtless this tendency has to be inferred from the proved facts and circumstances of each case as it is not capable of direct proof. Reiterating the same view it was held in 25 (1959) C. L. T. 264 *Bhagaban Misra v. The State*, that there can be no conviction u/s 188, I. P. C., unless the likely consequences of the breach of the order are proved affirmatively. The gap cannot be filled up by resort to judicial notice. It is a fact to be proved in *Ram Samujh and Others Vs. State*, after the Court passed a preliminary order u/s 145 of the Code and the subject-matter of dispute, a house was attached and locked, the accused broke open the lock and took forcible possession of the house. Promulgation of the order was known to the accused. It was held that the accused had committed an offence under Sections 188 and 454, I. P. C., in *A. I. R. 1964 Pat. 526, Khoshi Mahton and Ors. v. The State*, both the parties to a proceeding u/s 144 of the Code were restrained from going over a particular piece of land over which paddy crops were standing. Notices were duly served on the parties. One of the parties cut and removed the standing paddy crops there from. The question for consideration was whether the party who cut and removed the standing paddy crops had committed an offence u/s 188, I. P. C. It was contended that a mere act of cutting and removing of the crops did not justify the inference that disobedience was likely to cause a riot or affray. It was held by a Division Bench that the aggrieved party tolerated the act of the party, who, by disobedience of the order, cut and removed the standing paddy crops instead of resisting. Otherwise, the action of the aggressor party was likely to result in a riot or affray. Therefore, inference could justifiably be drawn from circumstances of the case.

The facts of the case are identical to the facts of *Khoshi Mahton's* case (supra). Respondents 18 and 21 not only disobeyed the preliminary order u/s 145 by

entering upon the subject-matter of dispute although they were prohibited from doing so, they also reaped and removed "the standing paddy crops. Such action on their part tended to cause a riot or affray. The offence was, therefore, squarely within Section 188, I. P. C.

8. Despite the aforesaid finding, there is yet another clog of bar of limitation provided in Section 468, read with Section 469 of the Code. Before entering upon a discussion on this point, it is necessary to state a few facts. On the basis of the charge-sheet, cognisance of offences under Sections 143 and 379, I. P. C., was taken on 26.7.1974. On that day, cognisance of the offence u/s 188, I. P. C., was not taken, because a complaint u/s 195(1)(a)(i) of the Code was not filed by a Public Officer. The complaint was filed on 24.5.1975 and cognisance of the offence u/s 188, I. P. C., was taken on 5. 6. 1975 although the offence had been committed on 24.12.1973. The aforesaid facts go to show that cognisance of the offence was taken on 5.6.1975 after expiry of one year.

An offence u/s 188, I. P. C. is punishable with imprisonment for a term not exceeding one year. Therefore, according to Section 416(2)(A) of the Code the learned Sub Divisional Judicial Magistrate, Puri, was debarred from taking cognisance of the aforesaid offence after expiry of the period of limitation of one, year. There is nothing in the complaint petition (Ext.4) to indicate that the public officer making the complaint had no knowledge of commission of the offence prior to 24.5.1975. On the other hand, the date of occurrence is stated to be 24.11.1973 in Ext. 4. Ext. 3 is the certified copy of a petition dated "23.4." filed before the S. D. M., Puri, in which intimation was supplied that an offence u/s 188, I. P. C., was committed. Neither the date of commission of the offence was stated, nor the year in which the petition was filed before the S.D. M., Puri. Therefore, so far as limitation is concerned, the case will not come under the exception of Section 479(1)(b) of the Code. While taking cognisance of the offence u/s 188, I. P. C., on 5.6.1975, it was not explained by a reasoned order that on the facts and in the circumstances of the case delay in taking cognisance was condoned within the meaning of Section 473 of the Code. The complaint u/s 188, I. P. C., (Ext. 4), was filed on 24.5.1975 and cognisance was taken on 5.6.1975. So far as this offence is concerned, the procedure laid down in new Code will be applicable. So on application of the provisions of Section 468(2)(b) of the Code, taking cognisance of the offence u/s 188, I. P. C., after expiry of the limitation of one year was impermissible. This being the position, neither respondents 18 and 21 nor the other respondents can be convicted for the offence u/s 188, I. P. C.

9. Now the offences under Sections 143 and 379 I. P. C. In the preliminary order (Ext.2), both the parties to the proceeding u/s 145 of the Code were prohibited from entering upon the subject-matter of dispute till disposal of the proceeding. After promulgation of the order on 28-10-1973 neither party was in possession of the subject-matter of dispute. On the other hand, the subject-matter of dispute with standing paddy crops was kept under attachment. When the subject-

matter of dispute was not in possession of the first party or of the second party to the proceeding u/s 145 of the Code and the same was attached by promulgation of the order dated 28-10-1973, then the question that arises for consideration is who was in possession of the subject-matter of dispute during the period the property remained under attachment.

In Mahendra Prasad Singh and Others Vs. State of Bihar and Another, , a question was raised to the effect that when property is attached u/s 145 of the Code then the property comes to the custody of the Court. This question was not answered. But as it was a case u/s 144 of the Code, a prohibitory order had been promulgated and there was no attachment of the subject matter of dispute, it was held that a case of theft of paddy crops could not be made out. This decision is not a precedent for the case before us. Immovable property with valuable standing crops cannot remain without being in possession of some one to be appropriated by any person. Once such property is attached by a Court of competent jurisdiction the custody thereof shall be deemed to be with the Court. It has therefore been rightly pointed out in Deokuer and Another Vs. Sheoprasad Singh and Others, .

"...There is no doubt that property under attachment u/s 145 of the Code is in custodial legis"

So, here Is a case In which respondents 18 and 21 were prohibited from entering upon the subject-matter of dispute with standing paddy crops which was custodia legis. Respondents 18 and 21 in flagrant violation and disobedience of the prohibitory order reaped and removed the standing paddy crops. Their action tantamounts to an offence u/s 379, I. P. C.

10. The case of the other respondents stood at a different footing. They were not parties to the proceeding u/s 145 of the Code. They did not raise any claim of their own in respect of the subject-matter of dispute. It is possible to take a reasonable view that they were engaged by respondents 18 and 21 for reaping of the paddy crops and they had no criminal intention of committing theft. So, the order of their acquittal under Sections 143 and 379, I. P. C. cannot be disturbed.

11. In the ultimate analysis, acquittal of all the respondents for offences under Sections 143 and 188, I. P. C, and those of the respondents except respondents 18 and 21 for the offence u/s 379, I. P. C, cannot be disturbed. Acquittal of respondents 18 and 21 for the offence u/s 379, I. P. C, was wholly unreasonable and improper.

12. In the result, respondent No. 18, Damodar Baral and respondent No. 21, Upendra Routray are found guilty u/s 379, I. P. C, and are convicted thereunder. They are sentenced to pay a fine of Rs. 250/-each, in default, to undergo rigorous imprisonment of one month each. The Criminal Revision and the Government Appeal, are accordingly allowed in part.