
(1983) 05 PAT CK 0004

In the Patna High Court

Case No : Criminal Revision No. 36 of 1983

Binoga Yadav and 3 Others

APPELLANT

Vs

The State of Bihar and 8 Others

RESPONDENT

Date of Decision : 05-05-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 147, 147(3)

Citation : (1984) PLJR 629

Hon'ble Judges : Anand Prasad Sinha, J

Bench : Single Bench

Advocate : Balbhadra Prasad Singh and Nand Kishore Prasad, for the Appellant;
R.K.P. Verma and Nand Kishore Pd . No. 1, for the Respondent

Judgement

Anand Prasad Sinha, J.—This application is directed against the order dated 6-1-1983 passed in Case No. 104(M) 1981/T.R. No. 14/81/T.R. No. 204/81 by Shri Chandranand Jha, Executive Magistrate, Dinapore, in a proceeding u/s 147 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) by which the petitioners have been directed to remove the obstructions caused in the drain through which the opposite parties are entitled to flow the water of their houses so that water may flow in a normal manner terminating in Kama canal. It appears that proceeding u/s 147 of the Code had been started on the basis of a police report on 8.6.1981. As a matter of fact earlier a petition had been filed by apposite party No. 2. According to his case, he has a pucca house on survey plot No. 483. Khata No. 377, situated at village Rampur Nagwan, P.S. Paligunj, District Patna. North to the house, there is a lane 5 fit. wide running east to west. Further, north of that lane is the house of the petitioners on plot No. 485, khata No. 377. The drain water of opposite party No. 2 used to flow through kacha drain towards north to the house and thereafter to the west terminating in the canal drain which runs from north to south and, thereafter, to the west side since before and in the month of July, 1980, when opposite part No. 2 was converting that kacha drain into a pucca one, to which the petitioners had obstructed. A Panchaiti was held and the punches, after making local

inspection, had authorised the opposite party No. 2 to make pucca drain and this decision of the Punch had been given on 16-7-1980. According to the case of opposite party No. 2, pucca drain had been constructed on 16-7-1980 without any objection and since then the drain water of the opposite party No. 2 has been flowing from the pucca drain.

2. According to the allegations, the petitioners had formed a group and on 2-2-1981 obstructed the flowing of the water by force and that caused accumulation of water and also started causing damage to the house wall of opposite party No. 2. Opposite party No. 2, accordingly filed an application before the Sarpanch of Gram Panchayat Rampur Nagwan, which he forwarded to the Sub-divisional Officer on 3-2-1981.

3. It appears that the petition of the opposite party No. 2 had been sent to the Circle Officer, Paliganj for inquiry and report. But that had been recalled and a Pleader Commissioner was appointed. The objection was filed by the petitioners and the inquiry from the Pleader Commissioner had also been recalled and the enquiry was given to one Shri A. Toppo, Executive Magistrate. Also a report had been called for from the Officer incharge of the concerned police station. When the report from the Officer Incharge had been received, the proceeding had been drawn as stated above.

4. The case of the petitioners appears to be that the allegations put forward both regarding the existence of the Nali as claimed by opposite party No. 2 and the obstruction caused by the petitioners are not correct. According to the case of the petitioners, contiguous north to the lane is the house and Sahan of Basawan Yadav having plot No. 485, Khata No. 377. According to the case of the petitioners, no clear Khesra regarding the involved plots had been mentioned. Further, the outlet of water was not north to west but north to east. The flow of water towards west has been denied. Also it has been denied that after flowing towards west, the water falls in Karha canal. It has also been denied that the petitioners have closed the drain.

5. Further, it appears that the petitioners have challenged the report of the pleader commissioner, which appeared to be in favour of opposite party No. 2. It also appears that the police report was also in favour of opposite party No. 2.

6. Learned counsel appearing on behalf of the petitioners has submitted that the impugned order suffers from infirmity in the manner that the order is not in accordance with the mandatory provisions as laid down under the proviso to section 147(3) of the Code. Subsection (3) and the proviso to section 147 of the Code reads as follows:--

(3) If it appears to such Magistrate that such right exist, he may make an order prohibiting any interference with the exercise of such right, including, in a proper case, an order for the removal of any obstruction in the exercise of any such right:

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry, or where the right is exercisable only at particular seasons or on Particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

7. Therefore, from the proviso it is apparent that a finding is required where the right is exercisable at all times of the year unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the enquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such receipt.

8. I find sufficient force in this contention. The dispute with reference to plot number is of no importance in a proceeding u/s 147 of the Code because the scope of a proceeding u/s 147 of the Code is distinguishable from that u/s 145 of the Code. In the later case, it is the actual possession "which is for adjudication". In the case of former one the question for consideration and decision will be the right of user, which may be over any plot of land belonging to some one else and thus that plot not being directly involved for adjudication with reference to ownership or possession. The dispute involved in a proceeding u/s 147 of the Code, as stated above, is the right of user either by easement or otherwise.

9. When the right in itself, either in exercise of such right or its denial, gives rise to a dispute making out an apprehension of the breach of the peace, a proceeding u/s 147 of the Code is warranted and thus it may also be termed to be a preventive measure for avoiding any occasion of apprehension of the breach of the peace.

10. In the instant case also it will appear that a right of user in the shape of flow of water through drain, as claimed the drain being towards north of the house and then going towards west and after falling in Karha canal further goes to west is involved and that is for adjudication and decision.

11. It will appear from the proviso of sub-section (3) of section 147 of the Code that there is a condition precedent for passing an order u/s 147(3) of the Code and that is that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the receipt under sub-section (1) of the report of a police officer or other information leading to the institution of the inquiry.....

12. It appears that opposite party No. 2 has not stated in his application, which he had filed before the learned Sub-divisional Magistrate and which became the basis for initiating a proceeding u/s 147 of the Code, that the right has been exercised within three months next before as contemplated under the proviso to

sub-section (3) of section 147 of the Code. It will also appear that this aspect has not been dealt by the learned court below at all. It has been argued on behalf of the opposite parties that, as a matter of fact, there is statement of witnesses regarding the point of time when the right had been exercised, but that will not be enough because that evidence needs consideration and discussion at the time of passing of the final order and that is extremely important, in the facts and circumstances of the case, because it will appear from the petition of opposite party No. 2 that there has been definite obstruction by the petitioners in the exercise of the right and the first obstruction had been put at the time when opposite party No. 2 wanted to convert the kacha drain into a pucca one and even thereafter, when in accordance with the decision of the Panches, pucca drain had been made, there has been obstruction in the manner that according to opposite party No. 2 the drain had been filled up.

13. It will appear that the exact point of time has not been mentioned regarding the overt act having been committed by the petitioners and that being so, there is no scope for drawing any inference on the basis of any material whatsoever on the record in compliance of the proviso to sub-section (3) of section 147 of the Code.

14. The proviso to sub-section (3) of section 147 of the Code is of mandatory nature and in absence of any finding whatsoever, that will strike at the root of the jurisdiction for passing a valid and legal order u/s 147 of the Code. Simply a finding that opposite party No. 2 had a right of user is not sufficient in itself from the legal validity point of view unless there is a finding regarding the period of user as contemplated under the proviso to sub-section (3) of section 117 of the Code. In the result, the application is allowed. The impugned order is hereby set aside and the case is remanded back for fresh decision according to law and in the light of the observations made above and the decision will be made on the materials so far available on the record and no party shall be authorised to adduce any further evidence in the case.