
(2013) 09 OHC CK 0025
In the Orissa High Court
Case No : CRLMC No. 1584 of 2011

Biswanath Mohanty and Another

APPELLANT

Vs

Kailash Ch. Mohanty and Others

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Citation : (2014) 1 ILR (Ori) 951 : (2014) 1 OLR 57

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Advocate : Prabodh Ku. Pattnaik, M.K. Mishra, A.K. Mohanty, S.K. Pattnaik and A. Panda, for the Appellant; Suryakanta Dash and Hara Krushna Moharana for Opp. Parties 1 to 5, for the Respondent

Judgement

Dr. B.R. Sarangi, J.—The petitioners, who are the first party members, in a proceeding u/s 147, Cr.P.C., have filed this application assailing the order dated 6.1.2011 passed by the learned Ad hoc Addl. District & Sessions Judge, Jajpur in Criminal Revision No. 57 of 2009 setting aside the order dated 16.10.2009 passed by the Executive Magistrate, Jajpur in Crl. Misc. Case No. 272 of 2008. The fact of the case is that the first party members, petitioners herein, are using the disputed land as passage "Gharoi Rasta" and the same is being used since their forefathers because they belong to one family. The details of the case land is as follows:

District: Jajpur, P.S. Jajpur, P.S. No. 189, Tahasil, Jajpur, Tahasil No. 189, Mouza - Trilochanpur,

(i) M.S. Khata No. 60, M.S. Plot No. 192, Area Ac. 0.010 dec. corresponding to Sabik Khata No. 23, and Plot No. 157(P);

(ii) M.S. Khata No. 120, M.S. Plot No. 192, area Ac. 0.020 dec. corresponding to Sabik Khata No. 14 and Plot No. 158(P).

The petitioners are using the said case land as only approach road/passage to

their residential house and except the said land, the petitioners have no other approach road/passage to their residential house. The 2nd party members-opposite parties threatened the petitioners not to use the said land as road and tried to obstruct the road by constructing a cowshed and created disturbances with the first party members, as a result there is obstruction in the ingress and egress to the residential house of the first party members though they are entitled to use the said land as their easement right and there is no "Gharoi Rasta" to the case land. The 2nd party members-opposite parties stated that the plot has been recorded wrongly in the kism as "rasta" and it is actually homestead in kism and there is existing residential pucca house of the 2nd party members. It is further stated that the 2nd party members have no knowledge of Tahasil report and the 1st party members by influencing the Tahasil Amin, could manage to prepare false report without going to the spot and issuing notice to them. It is further stated that the 2nd party members are the owners of the plot in question and are in possession over it although it is wrongly recorded as kism "rasta" in M.S.R.O.R.

2. To the above facts and circumstances, since the 2nd party members-opposite parties created disturbances to the ingress and egress of the petitioners and using the suit land as "Gharoi Rasta", apprehending breach of peace, the first party members, petitioners herein, filed an application before the Executive Magistrate, Jajpur, which was registered as Crl. Misc. Case No. 282 of 2008 u/s 147, Cr.P.C. on the basis of the report of the Tahasildar, the 2nd party members were directed not to obstruct the passage used as "rasta" by the first party members petitioners/until further orders. Learned Executive Magistrate after hearing both the parties by order dated 16.10.2009 directed the 2nd party members to remove the obstruction (cow shed) from the common passage used as "Gharoi Rasta" for better convenience of both the parties within seven days from the date of issue of order, failing which the Tahasildar, Jajpur will remove the obstruction from the common passage with help of local police and realized the cost of such removal from the opposite parties as arrear land revenue.

3. Being aggrieved by the said order of the Executive Magistrate dated 16.10.2009 under Annexure-1, the 2nd party members-opposite parties preferred Crl. Revision No. 57 of 2009 before the learned Ad hoc Addl. District & Sessions Judge, Jajpur under Sections 399 and 400, Cr.P.C. The learned Ad hoc Addl. District and Sessions Judge, Jajpur after hearing the parties by order dated 6.1.2011 set aside the order passed by the Executive Magistrate on the ground that the Executive Magistrate has illegally passed order dated without supporting evidence for situation likely to cause breach of peace and also non-compliance of the provisions of Section 147, Cr.P.C. The first party members have assailed the said revisional order passed by the learned Ad hoc Addl. District & Sessions Judge, Jajpur in the present application on the ground that no detail reasons have been assigned, particularly when the learned Executive Magistrate has passed the order under Annexure-1 after examining the necessary documents. Therefore, it is submitted by the petitioners that the impugned order passed by

the revisional authority is bad in law. In support of his contention, learned counsel for the petitioners has relied upon the judgment of this Court in *Kolha Jena Vs. Pravakar Patra and Another*, and *Jani Dondosena and Others Vs. Signo Bodamundi and Others*,

4. Mr. Dash, learned counsel appearing for the 2nd party members-opposite parties submitted that on examining of the report of the Tahasildar, Jajpur and local police and after going through the records, the Executive Magistrate passed the order dated 16.10.2009, with which the learned Ad hoc Addl. District and Sessions Judge has interfered with and passed the impugned order with due application of mind. In support of his submission, he has relied upon the judgment of this Court in *Siba Prasad Moharana Vs. Dhadi Nayak and Others*,

5. In order to properly appreciate the contentions raised, a reference has to be made to the provision of Section 147, Cr.P.C., which is quoted hereunder:

147. Dispute concerning right of use of land or water - (1) Whenever an Executive Magistrate is satisfied, from the report of a police officer or upon other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water within his local jurisdiction, whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a specified date and time and to put in written statement of their respective claims.

Explanation - The expression "land or water" has been meaning given to it in Sub-section (2) of Section 14.

(2) The Magistrate shall then peruse the statements so put in, hear the parties, receive all such evidence, as may be produced by them respectively, consider the effect of such evidence, take such further evidence, if any, as he thinks necessary and, if possible decide whether such right exists and the provisions of Section 145 shall, as far as may be, apply in the case of such inquiry.

(3) If it appears to such Magistrate that such rights 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.

(4) When in any proceeding commenced under Sub-section (1) of Section 145

the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under Sub-section (1);

And when in any proceedings commenced under Sub-section (1) the Magistrate finds that the dispute should be dealt with u/s 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under Sub-section (1) of Section 145.

Section 147 of the Code deals with apprehension of breach of peace when dispute is raised concerning rights of use of land or water. If the Executive Magistrate is satisfied from the report of a police officer or upon other information that a dispute likely to cause a breach of peace exists regarding any alleged right of user of any land or water, he shall make an order in writing stating the grounds of his satisfaction and shall direct the parties concerned in such dispute to attend his Court and put in written statements by the parties and the Executive Magistrate shall peruse the same, receive all such evidence as may be produced and then decide whether such right exists. In making such enquiry, the provisions of Section 145 of the Code as far as possible may be applied. If he would find that any such right exists, 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.

Section 147 Cr.P.C. has the same object as that of Section 145 Cr.P.C. A proceeding can be initiated u/s 145 Cr.P.C. when a dispute concerning any land exists and that is likely to cause breach of peace. Proceeding u/s 147, Cr.P.C. can be initiated when a dispute exists with regard to any alleged right of user of any land or water which is likely to cause breach of peace. The power conferred on a Magistrate under this section is intended to preserve public peace and not to determine the right of parties like a Civil Court.

"Right of user" as contemplated in the section means any dispute relating to a recurring right in the use of the land or water whether the right is claimed by a person in possession or not and such right is not limited to right of easement proper. Thus, the section also applies to a right of way whether claimed by the public or by a section of public. But the mandatory requirement for an order under Sub-section (1) of Section 147 Cr.P.C. is that the Magistrate must be satisfied from the report of a police officer or upon other information that a dispute exists with regard to the alleged right of user of a land which is likely to cause a breach of peace. The Magistrate also is required to record in writing the grounds of his being so satisfied and then may require such parties in the dispute calling upon them to put in their respective claims in form of a written statement. Under Sub-section (3) thereof the Magistrate is authorized to make an order prohibiting any interference with exercise of such right or in an appropriate case order for removal of any obstruction in the exercise of such right, only when he is satisfied that such an alleged right exists, but that is only an opinion of the Magistrate and there can be no determination of any such right which is within

the domain of a Civil Court.

6. Applying the above provisions of law governing the field, in the present case it is to be examined whether the revisional Court has passed the order reversing the order passed by the Executive Magistrate dated 16.10.2009 under Annexure-1 applying its judicial mind. It reveals from, the order itself that the learned Ad hoc Addl. District and Sessions Judge has passed the order stating that the order of the Executive Magistrate is illegal being passed without supporting evidence for situation likely to cause breach of peace and also non-compliance of the provisions of Section 147, Cr.P.C. The reasons assigned by the revisional Court are not justified in view of the fact that on perusal of the order passed by the Executive Magistrate, it is found that the Executive Magistrate after considering the reports of the Tahasildar as well as local police and the apprehension of breach of peace, passed the order in the proceeding u/s 147, Cr.P.C. The further reasons assigned by the revisional Court that the parties have not adduced any oral or documentary evidence for use of the disputed land by them and the situation was not clearly reported, which would likely to cause breach of peace, have no basis in view of the fact that on enquiry, the Tahasildar has given a report vide his letter No. 3554 dated 25.10.2008 stating that the 2nd party members have constructed a cow shed by encroaching the "Gharoi Rasta", for which the first party members along with their family members are facing inconvenience for such obstruction. That apart, considering such report of the Tahasildar as well as the police report, the Executive Magistrate has passed the order directing the 2nd party members to remove the obstruction. Therefore, the impugned order passed by the revisional Court is based on surmises and conjectures and inasmuch as the judgments relied upon by the learned counsel for the petitioner referred to supra are applicable to the facts of the present.

7. So far as the judgment in Kolha Jena (supra) concerned, the said case arises out of a proceeding u/s 145 Cr.P.C. and this Court while dealing with Sub-section (9) of Section 145, Cr.P.C. has held that recording of evidence is not compulsory if none of the parties desired to produce such evidence and if the Magistrate does not feel the necessity for the same. The nature of the enquiry u/s 145, Cr.P.C. being a short and summary one, it is quite possible that the Magistrate in a particular case may feel that the case can be disposed of on perusal of the documents without examining any witness. In view of such position of law, the procedure envisaged u/s 145, Cr.P.C. is not applicable to the proceeding u/s 147, Cr.P.C. Therefore, the judgments cited by the learned counsel for the petitioners are not applicable so far as the 2nd party members are concerned. In view of such position, the findings arrived at by the learned Ad hoc Addl. District Judge cannot be sustainable. The judgment relied upon by the learned counsel for the opposite parties in Siba Prasad Moharana (supra) is squarely applicable to the present case since this Court has held that proceeding can be initiated when a dispute exists with regard to any alleged right of user of any land which is likely to cause breach of peace and powers conferred on a Magistrate is intended to preserve public peace and not to determine the rights of parties like a Civil Court.

8. It is stated by the learned counsel for the opposite parties that the parties have already approached the competent Civil Court to ventilate their grievances. In view of such position, law is well settled in Ram Sumer Puri Mahant Vs. State of U.P. and Others, , that when a civil litigation is pending for the property wherein the question of possession is involved and has been adjudicated, initiation of a parallel criminal proceeding u/s 145, Cr.P.C. would not be justified.

9. In view of the aforesaid facts and circumstances of the case and the law governing the field, this Court is of the opinion that the order dated 6.1.2011 passed by the learned Ad hoc Addl. District & Sessions Judge, Jajpur in Criminal Revision No. 57 of 2009 under Annexure-4 suffers from material irregularities and accordingly, the same is hereby set aside. In view of the fact that the parties have approached the Civil Court, as per law laid down by the apex Court, they are at liberty to establish their right in accordance with law and as such, the proceeding u/s 147, Cr.P.C. is not maintainable. With the aforesaid observation and direction, the CRLMC is disposed of.