

(1990) 09 PAT CK 0025

In the Patna High Court

Case No : Criminal Miscellaneous No. 9391 of 1985

Kailash Nonia

APPELLANT

Vs

Shibu Nonia and Others

RESPONDENT

Date of Decision : 13-09-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145

Citation : (1991) 1 BLJR 555 : (1991) 1 PLJR 60

Hon'ble Judges : B.N. Agrawal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Agrawal, J.—This application has been filed by the second party against the impugned order by which the learned Magistrate has converted the proceeding u/s 144 of the Code of Criminal Procedure (hereinafter referred to as "the Code") into a proceeding u/s 145 of the Code. It appears that in the proceeding u/s 144 of the Code, both the parties appeared and filed their respective show cause. Case of the petitioner was that both the parties were in joint possession of the subject of dispute. So far the opposite party No, 1 meaning thereby the first party is concerned, his case is that the parties belong to a Mitakshara coparcenary and the property in question belongs to the joint family of the parties. According to him, although there was no partition, but for the sake of convenience the parties were separately cultivating the joint family properties and the subject of dispute was being cultivated separately for the sake of convenience by the first party and the second party had no right to create any disturbance in peaceful possession of the first party.

2. The learned Magistrate after taking into consideration cases of both the parties has recorded a finding which is in consonance with their respective cases that the property in question belongs to the joint family of the parties and for the sake of convenience they were separately cultivating the same. He has further recorded finding that there was dispute between the parties over possession of the

disputed land which can be settled only by partitioning the same. In spite of the aforesaid findings, the learned Magistrate initiated the proceeding u/s 145 of the Code. Hence this application.

3. Mr. Braj Kishore Prasad No. II, learned Counsel appearing on behalf of the petitioner contended that it is well settled that in cases where according to both the parties they are in joint possession of subject of dispute, proceeding u/s 145 of the Code cannot be initiated, and the same can be initiated only in those cases where one party claims joint possession and the other exclusive possession. Learned Counsel appearing on behalf of the opposite party No. 1 could not dispute this proposition. He, however, submitted that from his aforementioned case, it cannot be said that the parties were in joint possession of the subject of dispute. In my view, from these averments in the show cause filed by opposite party No. 1 it cannot be inferred that he claimed exclusive possession over the subject of dispute. Merely because one co-sharer is cultivating for the sake of convenience some of the lands belonging to the joint family, the same cannot show that he is in exclusive possession thereof. Neither case of partition nor separation has been disclosed by opposite party No. 1. He has not come with any plea of ouster. Therefore, it is not possible to hold that according to the case of the opposite party No. 1, he is in exclusive possession of the subject of dispute.

4. The matter may be examined from another angle. If on such a pleading the first party files a civil suit for granting perpetual injunction against the second party restraining him from interfering with separate cultivation of the subject of dispute which is admittedly joint, family property by the first party which he was cultivating for the sake of convenience, can a civil court grant a decree? My answer to the question posed is emphatically in the negative. It is well settled that possession of one co-sharer of joint family property is possession of the other co-sharer. Unless there is partition by metes and bounds or there is case of ouster, every co-sharer in law is deemed to be in possession of every little fraction of joint family property irrespective of the fact that for the sake of convenience the parties were cultivating separately different portions of lands belonging to their joint family. Since law recognises all the co-sharers to be in possession of a joint family property, one co-sharer cannot be restrained from going over the same merely because for the sake of convenience another co-sharer has cultivated the same. This being the position, a civil court cannot grant perpetual injunction in such a suit which in my view is bound to fail. If civil court cannot grant relief to the first party in such a suit, it goes without saying that a Magistrate dealing with a summary proceeding like 145 of the Code cannot grant any relief to the first party by passing a prohibitory order against the second party.

In view of the foregoing discussions, I am clearly of the view that the learned Magistrate was not justified in initiating the proceeding u/s 145 of the Code as the parties were in joint possession of the subject of dispute.

5. In the result, this application is allowed and the proceeding u/s 145 of the

Code is hereby quashed.