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(1989) 10 OHC CK 0021

In the Orissa High Court

Case No : Criminal Rev. No. 230 of 1985

Kali Charan Gouda and Others — APPELLANT

Vs

Tara Sankar Acharya and Others — RESPONDENT

Date of Decision : 20-10-1989

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) — Section 144, 145, 145(1), 145(5)

Citation : (1989) 2 OCR 570

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S.S. Ratho, Manoj Misra, R.P. Mohapatra and A.K. Satpathy, for the Appellant; S. Senapati and S.N. Mohapatra for Opp. Party No. 2, for the Respondent

Judgement

A. Pasayat, J.—Revisional order passed by learned Sessions Judge, Ganjam, Berhampur, reversing the order passed by Executive Magistrate, Bhanjanagar dropping a proceeding u/s 145 of the Code of Criminal Procedure, 1973 (for short ''the Code'') is under challenge in this revision application.

2. Opposite party No. 3 as the first party filed a petition for initiation of an appropriate proceeding alleging apprehension of breach of peace, Petitioners were second party member Nos. 2, 3, 5 and 6. The other two members of the second party are opposite parties 1 and 2 in the present case. Proceeding u/s 144 was initiated on 21.3.1984 which was later on converted to one u/s 145 on 21.5.1984. The case of the first party was that the disputed land originally belonged to one Dandapani Maharatha who had gifted the same to one Gallery High School about 30 years back and the first party was in possession of the said land as a tenant under the school on payment of Rajbhag. Second party members 2 to 6 contested the proceeding on the ground that the alleged gift deed was never given effect to and the possession was retained with the owner and there was never any delivery of possession to the school. Dandapani Maharatha was in peaceful possession of the disputed land till his death and after

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his death his adopted son Kumuda Chandra Maharatha (second party No. 4-opposite party No. 2) continued to be in peaceful possession of the disputed land. Further on account of his temporary absence, as he was in service, the lands were under management and possession of Petitioner Nos. 1 and 2. Final patta had been issued in favour of Kumuda Chandra Maharatha and rents were paid from the time of Dandapani Maharatha either by him or by his adopted son Kumuda Chandra Maharatha. During the pendency of the proceeding, the second party members 2 to 6 filed an application to drop the proceeding on the ground that the question regarding possession of the disputed land had been settled by both the authorities under the Orissa Land Reforms Act, 1960 (described in short as ''the O.L.R. Act'') and the settlement authorities and there was no scope for any further enquiry. Parties filed documents in support of their respective claims and after hearing the parties and on consideration of the documents, the learned Executive Magistrate held that the prayer of the second party members 2 to 6 was acceptable and there was no necessity for any further enquiry in view of the documentary evidence and the orders passed by the authorities under the O.L.R. Act and the settlement authorities, and also there was no apprehension of breach of peace over the subject-matter of dispute.

Opposite party No. 3 carried the matter in revision before the learned Sessions Judge, Ganjam-Berhampur, who allowed the revision observing that before cancellation of the preliminary order it was incumbent on the Magistrate to come to a finding that no such dispute existed when the preliminary order was passed. According to him, in the instant case no such finding was given and on the contrary the learned Executive Magistrate had merely mentioned in the order that there was no apprehension of breach of peace, and in the absence of any finding regarding non-existence of dispute when the preliminary order was passed, the order was illegal. He remanded the matter for fresh disposal. His order as aforesaid is being impugned here.

3. In this case in spite of notice there was no appearance on behalf of opposite party No. 3. None appeared for opp party No. 1 at the time of hearing, though he was represented by Advocates.

4. Having heard the learned Counsel for the parties, I find that the impugned order passed is not sustainable.

Section 145(5) deals with a situation when the apprehension of breach of peace has vanished Apprehension of breach of peace being a condition to give jurisdiction to the Magistrate u/s 145, as soon as he is satisfied that there is no such dispute he is bound to cancel his order made under Sub-section (1) and stay his hands. Once a Magistrate is satisfied that there is no apprehension of breach of peace he must cancel his initial order under Sub-section (1). He cannot thereafter go into the merits in order to give a finding as to title or possession. See Delhi Cloth and General Mills Ltd. Vs. Yograj Singh and Others, , Donepudi Narasayya and Another Vs. Chiguluri Venkiah and Others, , Murru Vs. The State, . The Supreme Court had also occasion to deal with the provisions of Sub-

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section (5) of Section 145 of the Code in a case reported in Rajpati Vs. Bachan and Another, wherein was observed:

...it is not necessary that the breach of peace should continue at every stage of the proceeding unless there is clear evidence to show that the dispute has ceased to exist so as to bring the case within the ambit of Sub-section (5) of Section 145 of the Code of Criminal Procedure....

This Court has held in the case of B. Simachalan v. Basanta reported in (1988) I OCR 409 : 66 (1988) CLT 38 that the Executive Magistrate is duty bound to take note of the orders passed under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (for short ''the Consolidation Act''). This Court in the case of Kirtan Jena v. Biswanath Swain and Anr. reported in 1984 (I) OLR 1039 held that it is the duty of the Criminal Court to respect contemporaneous decisions of the Civil Court or the Revenue Court whichever is the appropriate forum in the matter regarding possession. The Court also observed that there should be no fresh enquiry as to the assertion on possession by initiation of a proceeding u/s 145 of the Code after such declaration. Undisputedly, in the present case orders were passed by the authorities under the O.L.R. Act and settlement authorities which support the claim of the Petitioners. The sole objection of the revisional Court as regards the propriety of the Order dropping the proceeding appears to be absence of definite finding regarding non-existence of apprehension of breach of peace at time when the preliminary order was passed though he accepted that the order was one u/s 145(5). A reading of the order of the Executive Magistrate also shows that he had exercised power under Sub-section (5) of Section 145. A revisional Court is not supposed to interfere with and every order where there is some irregularity unless it causes miscarriage of justice. Revisional power is to be sparingly used and should not be normally exercised unless there is a glaring defect in the procedure, or, there has been a flagrant miscarriage of justice. See Amar Chand Agarwalla Vs. Shanti Bose and Another, etc., . Conversely in the absence of miscarriage of justice a mere defect or error in law or fact does not warrant interference in revision, however, glaring that defect or error might be. See Chaganti Kotaiah and Others Vs. Gogineni Venkateshwara Rao and Another, . A bare perusal of the order of the Executive Magistrate shows that he had considered the material aspects in their relevant particulars and his conclusions did not warrant any interference. Expressional inexactitude about the absence of apprehension of breach of peace when the preliminary order was passed did not warrant interference in revision. In any event, since the case came within the ambit of Sub-section (5) of Section 145, the recording of a finding regarding existence of dispute at the time of drawing up the preliminary order loses significance. See AIR 1954 Hyderabad 93: Rama Rao v. Shivram. The revisional authority, therefore, acted with material irregularity in reversing the order of the learned Magistrate. The order, therefore, is liable to be vacated and set aside.

5. In the result, the revision succeeds.

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