
(1973) 01 OHC CK 0019
In the Orissa High Court

Madhusudan Misra and Others		APPELLANT
	Vs	
Baidyanath Mohanty and Others		RESPONDENT

Date of Decision : 25-01-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1973) 39 CLT 253 : (1973) CriLJ 1439

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Judgement

R.N. Misra, J.—Members of the first party in a proceeding u/s 145 of the Code of Criminal Procedure assail the final order in the proceeding against them in this revision application.

2. On 23-3-1968, the proceeding was initiated by drawing up the preliminary order. Notices were served at the spot under directions of the learned Magistrate as required under Sub-section (3) of Section 145 of the Code. Originally there were two parties. On 11-6-1968, one Narayan Mohanty appeared and wanted time to file his written statement. The learned Magistrate did not recognise him as a party to the proceeding and called upon him to establish his interest-edness in the dispute of possession of the disputed property. On 25-10-1968, one Biswanath Barik applied to be impleaded as a party. The learned Magistrate also directed him to establish his interestedness. On 9-12-1968, the learned Magistrate impleaded Narayan and Biswanath as members of the third party. On 1-3-1969, one Krushna Chandra Pratihari claimed possession of part of the property, but took no further steps in the case,

3. The preliminary order of the learned magistrate showed only two parties. Narayan and Biswanath, who were subsequently added and treated as members of the third party were not shown in the preliminary order by its amendment. The dispute related to several plots under different khatas. The first party claimed the entire disputed property while the second party No. 8 laid claim to Ac. 1.861/2 out of plot No. 10 in khata No. 393. Narayan, the third party

member claimed 80.1/2 decimals in all under the same khata No. 393. Biswanath whom the learned magistrate in the final order treated as the 4th party laid claim to 82.1/2 decimals in khata No. 395.

4. The first party contended that the disputed property was of the village Koth and the management had devolved upon one Madhusudan Misra. The second party No. 8 who alone contested in the proceeding confined his claim to Ac. 1.86.1/2 as stated above. According to him, he had purchased this property from several marfatdars under a sale deed dated 2-1-1967 and he had been in possession from that time. The third party claimed that he was an auction purchaser in Court auction and had obtained delivery of possession through Court in regard to the 80.1/2 decimals claimed by him. The 4th party claimed that his father was one of the recorded tenants in respect of khata No. 395 and on his death he was in possession on payment of rent of the area claimed by him.

5. Parties filed several documents to support their claim of possession. The first party filed four affidavits. The other parties also filed affidavits in support of their claim of possession. The learned magistrate drew adverse inference against the claim of the first party because, Madhusudan Misra, who was said to be in possession, had not supported his claim of possession by filing any affidavit. He further came to find that the witnesses who filed affidavits in support of the claim of possession of the first party did not lay claim over the property claimed by the second party No. 8 and the third and 4th parties. Ultimately he accepted the claim raised by the contesting parties and in regard to the remaining property he found possession in favour of the members of the first party. It is this order which is assailed in this revision application.

6. Mr. Rath for the petitioners raises the following contentions:-

(1) Impleading of 3rd and 4th parties in the proceeding subsequent to the preliminary order is without jurisdiction. There is no indication of satisfaction of the magistrate that those parties who were subsequently added were raising a dispute of possession over the disputed property. There was also no amendment of the preliminary order. He seeks to place reliance on a decision of this Court in the case of Muralidhar Naik v. Chatrubhuja Padhan (1968) 34 C LT 655, for this contention of his.

(2) There were several independent disputes which have been clubbed together and, therefore, the order is vitiated.

(3) No adverse inference should have been drawn against the first party for non-filing the affidavit by Madhusudan Misra. Enough material had been placed before the Court. Madhusudan Misra had filed his claim in the shape of written statement and had produced affidavit and documentary evidence to support such claim. Merely because the party had not filed the affidavit, his case could not become weak.

(4) The affidavits which are substitute of oral evidence were required to be dealt

with in the same manner as oral evidence was being dealt with in a proceeding u/s 145 of the Code of Criminal Procedure prior to the amendment of the Code in 1950. According to Mr. Rath, the learned magistrate has not discussed the evidence as required in several decisions of this Court. He relies upon a decision of this Court in the case of Murali Patel v. Purusottam Bhati (1965) 31 CLT 251 : (1965 (2) Cri LJ 788), for this contention.

7. On the other hand, Mr. R. C. Pat-naik for the second party No. 8 and Mr. R. K. Mohapatra for the third party dispute these contentions of Mr. Rath, both in law and on fact.

8. The correctness of the four contentions of Mr. Rath may now be examined-
Contention No. 1 - As already indicated, members of the third and fourth parties were added to the proceeding long after the preliminary order. They were added because after the copy of the order made under Sub-section (1) of the section which was published at the spot under Sub-section (3), they applied to the learned Magistrate to be so im-pleaded. The learned Magistrate did not straightway add them as parties, but required them to satisfy him that they were interested in the dispute and on being so satisfied he brought them on record. Undoubtedly, the preliminary order has not been corrected so as to include these two new parties. learned Counsel for the petitioners relies upon the observations made by my learned brother S. K. Ray, J., in the case of (1968) 34 C LT 655, in support of his contention that the addition of parties was without jurisdiction. At page 665 of the reporter, it has been stated-

... That portion of the order of the learned Magistrate which declares possession in favour of the third party must also equally be struck down not only as grossly erroneous but also as without jurisdiction. The third party members it is true, were not a party in the civil suit, but nevertheless so far as their subsequent implemen in this proceeding and intervening in its inquiry by setting up an independent claim on their behalf is concerned, it amounts to clubbing of two independent proceedings into one, for which there is no warranty in law. Further, mere existence of a dispute, assuming there is one, between the petitioners and the third party member, concerning the land claimed by the latter, without the likely consequence of breach of peace flowing therefrom of which there is no allegation and regarding which the Magistrate has not recorded his satisfaction as to such dispute likely to cause breach of peace, would not empower the Magistrate to launch an enquiry into such disputed possession. It may be still open for the Magistrate to start a fresh proceeding in regard to the land claimed by the third party members in pursuance of Section 145(1), Criminal Procedure Code, if he still feels that apprehension of breach of peace exists concerning the same due to any dispute between the petitioners and the third party members.

The aforesaid observations do support Mr. Rath's contention. There is, however, abundant authority that in a proceeding u/s 145 of the Code of Criminal Procedure, persons claiming possession of the property which is in dispute can be added after the proceeding is initiated.

In the case of *Leela Singh and Others Vs. B.P. Singh and Others*, , Varma, J., stated-

Now, the parties concerned "may be persons who are not mentioned in the original notice." As was pointed out by the Full Bench in 30 Cal. 155, the term "parties concerned" in this section should not be so narrowly construed as to mean only the persons actually disputing but should be extended to persons who are concerned in claiming to be in possession. In selecting the persons whom he will require to attend his Court for the purpose of laying their claims before him, the Magistrate acts only upon the basis of the information conveyed to him. But so as to attract all persons or parties concerned Sub-section (3) lays down that a copy of the order made under Sub-section (1) shall be served in manner provided by the Code upon the person or persons as the Magistrate may direct, "and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute". The purpose of the inquiry u/s 145 is to declare the possession of the party actually in possession; and as soon as a Magistrate decides to investigate under the section, Sub-section (3) requires that the order must be duly notified. The reason is obvious, because it is possible that if the order is not notified on the spot and in manner provided by the Code, persons may collude to have an order passed as to possession of a property in favour of one or the other so as to deprive the person actually in possession....

The reasoning given by Varma, J., was adopted in this Court by Narasimham, C. J., in the case of *Dass Mohanto v. Prahlad Mohanto* ILR 1959 Cut 1. At page 5 of the reporter, the learned Chief Justice stated-

... The provision for local service of notice was made in Section 145(3), Criminal Procedure Code, with a view to guard against collusive proceedings so that any other person, apart from the parties mentioned in the Police report or in the petition, if in possession of the land, may enter appearance and object....

The same view has been taken by Bhargava, J., as his Lordship then was, in the case of *Mt. Kulsumunnisa Vs. Rex and Another*, ; by the Mysore High Court in the case of *Javaregowda and Others Vs. Mullegowda*, ; by the Patna High Court in the case of *Rajendra Prasad Singh v. A. K. Ghosh*, 1968 Pat LJR 208; by the Punjab High Court in the case of *Chanan Singh Kishan Singh Vs. State of Punjab and Others*, and by the Calcutta High Court in the case of *Chandi Kumar Sarkar Vs. Probhat Kumar Biswas*, .

9. As early as 1929, in the case of *Jainath Pati Vs. Ramlakhan Prasad and Others*, , Wort, J., laid down:-

... the intention of the legislature is that the order made by the Magistrate should have reference rather to the subject-matter of the dispute than to the persons who are engaged therein, that is to say, that once the declaration has been made as regards possession of the land it is, without using the words in the strict technical sense, binding upon all persons interested therein

This view has been adopted in this Court in the case of Mst. Alarakshi Bibi and Others Vs. Mst. Ujala Bibi and Others, . A learned Single Judge of this Court after referring to various precedents summarised the legal position thus;-

The intention of the Legislature is that the order made by the Magistrate should have reference rather to the subject-matter of dispute than to the persons who were engaged therein. That is why such order is binding upon all persons interested in the possession of the disputed land subject to the rider that they had notice of the same. This conclusion has been drawn mainly on the basis of Section 145(3) which lays down that the copy of the order under Sub-section (1) must be affixed to some conspicuous place at or near the subject of dispute. This provision has been construed as indicating the intention of the Legislature that persons not parties to the proceedings would be bound by the order as they would have notice of such publication on the locality. This principle has also been extended to persons interested in the possession of the disputed land where they collude with persons who are parties to the proceedings u/s 145, Criminal Procedure Code....

If the final order binds the person who is really in possession even if he is not implead-ed in the proceeding, it is only fair that when he comes up to be added as a party he must be impleaded and be given a hearing before the conclusion over the dispute of possession is reached.

10. The State of law in the Patna High Court as well as in this Court being as indicated above, the view taken in (1968) 34 Cut LT 655, must be taken not to be a general statement of the legal position and has to be confined to the facts of that case. What was stated in the said decision is more an obiter than the ratio decidendi of the case. On the state of authorities referred to above, I would therefore, conclude that in a proceeding u/s 145 of the Code of Criminal Procedure, it is open to a magistrate to add new parties and merely because the preliminary order is not modified so as to include the newly added parties, the proceeding is not vitiated and the final order is not open to question. The first contention of Mr. Rath must, therefore, fail.

11. Contention No. 2 It has already been noticed that the claim laid on behalf of the first party is to the entire property, while the three of the contesting opposite parties confined their claims to only portions. This is not a case to which the principle laid down in this Court in the case of Ratan Majhi v. Budu Rondhari, (1955) 21 Cut LJ 174 can be said to apply. There is no mutuality of dispute. On the side of the first party claim is laid to the entire property in dispute while the contending members have claims to portions thereof. I would rule out the second contention by quoting what I said in the case of Rabindra Mohapatra v. Bhagirathi Mo-hapatra, (1972) 38 Cut LT 59:-

The claim in this case on behalf of one party was to the entire property while the members of the other party laid claim to parcels of the disputed land. Thus it was not a case of mutual disputes in regard to parcels of the disputed property. The

competition of claim was on one side to the whole and on the other to portions. To such a case the principle indicated in *Ratan Majhi v. Badu Rondhari*, (1955) 21 Cut LT 174 would not apply. It is true in this Court on some occasions there have been decisions to show that even when there is a dispute in regard to the entire property on one side and disputes confined to different portions thereof on the other, different proceedings are warranted. On a proper analysis the real principle seems to be that only when there would be mutuality of disputes in regard to portions of the disputed property they would become separate disputes; otherwise there would be a lot of inconvenience particularly for that party who has a total claim to the entire property, "p fight many disputes in regard to the same property over which he has only a single claim....

12. Contention No. 3 - Admittedly Madhusudan Misra is the person who according to the first party was in management of the disputed property on behalf of the mar-fatdars of the village. Claim has been laid to possession of the entire property by Madhusudan by filing a written statement. Four affidavits were filed to support such claim and documents were also produced. Some of these affidavit witnesses stated that they were in possession of portions as tenants under the recorded tenant. In looking for an affidavit by Madhusudan, who as alleged, was in actual possession of the property, the learned Magistrate cannot be found fault with. No circumstances have been indicated as to why Madhusudan did not support the claim by filing an affidavit. If Madhusudan had filed such an affidavit, and if the contesting opposite parties wanted Madhusudan to be examined under the law, Madhusudan could have been cross-examined. In the circumstances, drawing an adverse inference against the first party cannot be said to be unjustified. This contention must also fail.

13. Contention No. 4 - This contention may be dealt with in two separate heads. According to Mr. Rath, the learned Magistrate misread the four affidavits filed in support of the claims of the first party. The affidavits clearly show that Madhusudan was in possession of the entire property. The learned Magistrate has stated in his order that no claim was laid in the affidavits in respect of the properties claimed by the contesting opposite parties. This seems to be certainly an error of the learned Magistrate. This has been used as a reason for negating the case of the first party, Mr. Rath is right in his contention that this error has been responsible to some extent for the ultimate conclusion.

The following is the entire discussion of the evidence of the other parties:

On the other hand, I do not find any material discrepancies in the affidavits filed on behalf of 2nd party No. 8 and 3rd party and also find no defect in the affidavit sworn by the 4th party himself to the effect that he is in possession of the land since his father was one of the recorded tenants and he has got the land settled in his name under Sections 6 and 7 of the Orissa Estates Abolition Act as per patta filed.

Mr. Rath's contention has been that while the affidavits on behalf of the first

party were thrown out on untenable grounds and various documents having bearing on the question of possession were not considered, the evidence on the side of the opposite parties in whose favour the final order has been passed, was not considered in the manner required by law. I find merit in this contention because, the learned Magistrate has not indicated what exactly were the affidavits of the contending- parties and has not kept in view relevant documents touching on the question of possession while dealing with the matter. Here, the claim laid by the second party No. 8 and the third and 4th parties was confined to portions of the disputed property. Merely by rejecting the affidavits on behalf of the first party, the learned magistrate could not come to the conclusion in favour of the other contending parties. In support of his order, the learned magistrate was obliged to record positive finding with reference to the evidence on record that each of the opposite parties was in possession of the specific properties claimed by him. That indeed is wanting in this case.

14. I would accordingly set aside the final order of the learned magistrate and remit the case for a fresh disposal in accordance with law. As there has been no dispute relating to possession of other portions of the property, the learned magistrate shall confine his re-examination in respect of those items of properties, which have been claimed by second party No. 8 and the third and 4th parties respectively. In regard to the other properties, he will maintain the previous order. On the material already on record the learned magistrate shall decide this proceeding after hearing parties.