
(2009) 09 PAT CK 0042
In the Patna High Court
Case No : Cr. Misc. No. 8748 of 1993

Mohinder Lal

APPELLANT

Vs

State of Bihar and Another

RESPONDENT

Date of Decision : 03-09-2009

Acts Referred:

Citation : (2009) 09 PAT CK 0042

Final Decision : Allowed

Judgement

Mihir Kumar Jha, J.—Heard counsel for the Petitioner. No one appears for the complainant, opposite party No. 2.

2. From the facts as stated in this application seeking the relief of quashing of an order taking cognizance for offence under Sections 379, 447, 451 and 452 of the Indian Penal Code it would transpire that prosecution of the Petitioner in a complaint case at the instance of opposite party No. 2 had emanated only when the Petitioner in capacity of Defence Estate Officer, Danapur belonging to Indian Estates Service had taken certain action as follow up measure for resumption of Government property.

3. It is not in dispute that such resumption, when effected in the year 1971, was sought to be challenged by one Phulwasi Devi before this Court in CWJC No. 461 of 1971 and the said resumption order was quashed by this Court by a judgment dated 22.11.1973 only on the ground that one month's clear notice had not been given before the said resumption.

4. It appears that thereafter one month notice was given on 30.4.1987 by publishing the same in daily newspaper "Indian Nation" and property was resumed in accordance with law which however was again challenged this time by opposite party No. 2 in CWJC No. 4403 of 1987 but the said writ application was dismissed by a Division Bench of this Court vide order dated 31.10.1987.

5. Not only this one Surendra Nath Das and others alleging to be tenant under the complainant/opposite party No. 2 had filed another writ application being

CWJC No. 4391 of 1987 against the resumption of property which was also dismissed by this Court by a Division Bench of this Court vide order dated 16.11.1987.

6. That in fact was not the end of the matter inasmuch as the complainant, opposite party No. 2 thereafter had sought to get proceeding u/s 144 Code of Criminal Procedure initiated as with regard to property in question, Case No. 770(M)/87 was also dropped on a show-cause filed by Defence Estate Officer, Danapur as is recorded in the order of SDO, Danapur dated 3.7.1987.

7. In fact after all these events had taken place, the Defence Estate. Officer had made a request to S.D.O., Danapur to depute a Magistrate for ensuring peaceful handing over possession of the said property and in course of this exercise when the Magistrate was deputed for resumption of the Government land one Surendra Nath Das having given a written undertaking to vacate the quarter and handover possession to MES Incharge, Danapur had moved this Court again for quashing of the resumption order and when the same was not entertained by this Court said Surendra Nath Das is said to have filed a title suit in the Court of Munsif, Danapur for declaration that Defence Officials had no right in law to oust and disturb the peaceful possession over the Bungalow as also for permanent injunction from interfering in peaceful possession of the said Bungalow.

8. To top it all, complainant, opposite party No. 2 had filed a partition suit in the Court of Sub-Judge, Danapur for partition of the property in question, Government land and building which had already been resumed by the Govt. of India and in this title (partition) suit of opposite party No. 2 numbered as T.S. No. 52 of 1988, Union of India, Defence Estate Officer, Danapur and Sri. Surendra Nath Das have also been impleaded as Defendants.

9. It was in this background when the Petitioner in the capacity of Defence Estate Officer in the year 1990 had started to take appropriate steps for taking over peaceful possession of property in question, the aforesaid Surendra Nath Das had moved Civil Court in his pending title suit No. 90 of 1987 for protecting her interest wherein an order was passed on 5.2.1990 that defence authorities will not cause any trouble to Surendra Nath Das till disposal of the suit. The mala fide on the part of Surendra Nath Das and opposite party No. 2 in fact gets exposed not only from the aforementioned vexatious litigations but also on account of the facts when a Sesum tree in the premises in question fallen in a storm being a Government property was auctioned by the Defence Estate Officer, the said Surendra Nath Das filed a Misc. Case No. 9 of 1992 for taking action against the Petitioner on the ground of violation of order of injunction allegedly passed in Title Suit No. 90 of. 1987 but the Munsif, Danapur had also dismissed such application of Surendra Nath Das.

10. After this when the Petitioner in capacity of Defence Estate Officer as with regard to said property, house and the Government land had only proceeded to settle certain Palm and Date Trees in accordance with Government instruction by

settling in favour of one Somaru Choudhary the complainant, opposite party No. 2 had filed a complaint case against the Petitioner, SDO, Danapur and two others alleging offence under Sections 447, 452, 451, 379 I.P.C. on the ground that the Petitioner and other persons named above had trespassed the Bunglow and removed palm trees, stored in container fixed in trees valuing Rs. 3,000/- and on protest made by Surendra Nath Das he was chased for being assaulted.

11. It is in this complaint case after holding enquiry u/s 202 Code of Criminal Procedure that the learned Magistrate by the impugned order dated 28.5.1993 had taken cognizance for offence under Sections 379, 447, 451 and 452 I.P.C. and issued summons to the Petitioner.

12. The aforesaid facts have been narrated at length only to show as to how the present complaint petition is vexatious by way of malicious prosecution. There cannot be escape that property in question is Government property about which three writ petitions have already been filed and dismissed and a civil suit even thereafter, if at all maintainable has not given any reprieve or a right to the complainant, opposite party No. 2 because in his suit no such order of injunction has been passed. In fact an application for taking action against the Petitioner on the ground of violation of order of injunction by auctioning Sesum trees at the instance of Surendra Nath Das had also been dismissed.

13. Considering these admitted facts and as also from perusal of the allegation made in the complaint petition, it would appear that the same was brought only against the Petitioner, in capacity of Defence Estate Officer, to harass him or to create pressure on him for dissuading him from taking any action against the opposite party No. 2. as prescribed in law in respect of resumption of Government property.

14. Apart from the finding that the complaint case filed by opposite party No. 2 is by way of malicious prosecution even otherwise, the main offence of theft as alleged in the complaint petition cannot be said to have been made out inasmuch as the property in question is admittedly a Government property and the Petitioner in capacity of the Defence Estate Officer being its custodian was fully authorized in law to enter into the premises of such property for safeguarding its interest. As noted above three writ applications have already been dismissed by this Court challenging the resumption of the property and even in the title suit there was no order of injunction in favour of the complainant, opposite party No. 2. Thus the act of either settling the palm and date trees in the campus of the resumed Government premises to the highest bidder by the Petitioner in capacity of the custodian of the property cannot be held to be an act of trespass or theft.

15. It is well settled that even a semblance of bona fide claim over an immovable property would not make one liable for offence of theft. Reference in this connection may be made to the judgment of the Apex Court in the case of Chandi Kumar Das Karmarkar and Another Vs. Abanidhar Roy, wherein in a similar situation as with regard to right of catching fish under bona fide claim of

right was held to have not constituted the ingredients of offence of theft. The Apex Court in that regard in the case of Chandi Kumar Das Karmarkar (supra) had held as follows:

...9. That there was a dispute between the parties which had not till then been decided by the Civil Court goes without saying. The facts do show that the decree was obtained by unfair means and the possession was tainted by fraud. Of course by the setting aside of the ex parte decree possession would not revert without proceedings for restitution, but the circumstances undoubtedly were such that the Appellants might well have thought that their possession stood restored. This belief was not lessened by the grant of a temporary injunction and its withdrawal on the assurance of Sailesh Chandra Banerjee that during the pendency of the proceedings he would not exercise certain rights of ownership. Further, the transaction between Abanidhar Roy and Sailesh Chandra Banerjee during the pendency of the Civil Case was not binding on the Appellants. There was thus a real dispute and in a manner of speaking also a recognition that a rival claim in respect of the tank did exist. In these circumstances it was not improbable that the Appellants considered that after the setting aside of the ex parte decree and the giving of the undertaking by Sailesh Chandra Banerjee they were entitled as the recorded tenants, to catch fish for a ceremony in their house. That they did it only once does not prove lack of bona fides but rather the contrary. All the embellishments in the case about unlawful assembly, riot, force and threats have not been believed and the catching of the fish in this big tank with nets was done quite openly.

10. In our opinion there was an absence of the animus furandi and the circumstances bring this case within the rule that where the taking of moveable property is in the assertion of a bona fide claim of right, the act, though it may amount to a civil injury, does not fall within the offence of theft....

16. Once this Court would also come to a conclusion that the offence alleged as against the Petitioner in the complaint petition also did not constitute offence for which cognizance was taken, there would be no difficulty in holding that continuation of prosecution against the Petitioner will be a gross abuse of the process of the Court capable of being interfered u/s 482 Code of Criminal Procedure.

17. The Apex Court in the case of R.P. Kapur Vs. The State of Punjab, has laid down the following held three criteria for quashing of the prosecution namely;

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisites sanction may, for instance, furnish cases under this category.

(ii) Where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises: it is a matter merely of looking at the complaint or the First Information Report to

decide whether the offence alleged is disclosed or not.

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction u/s 561A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the Trial Magistrate and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would be sustained.

and in the opinion of this Court, this is a fit case where the prosecution needs to be quashed both on account of no offence being made out against the Petitioner and as also the complaint case being wholly a malicious prosecution.

18. In that view of the matter, even when the other accused named in the complaint petition are not accused, since this Court itself has found the entire case to be a gross abuse of the process of the Court, this Court while allowing this application would quash the entire prosecution including the order taking cognizance against the Petitioner as also other accused persons.