

(2009) 02 BOM CK 0114

In the Bombay High Court

Case No : Criminal Writ Petition No. 1 of 2009

Mr. Ratnakar R. Sawant

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 125, 142, 145, 146, 147

Citation : (2009) 02 BOM CK 0114

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : A.D. Bhobe, for the Appellant; S. Samant, for the Respondent

Judgement

N.A. Britto, J.—Challenge in this petition is to the interim order dated 12/01/2009 of the learned SDM passed in proceedings initiated at the behest of the Police u/s 147 of the Code of Criminal Procedure, 1973. There is no dispute that the petitioner (party no.1) and respondents no. 3 to 9 (party no.2) claim to be mundkars of a property surveyed under no. 111/1 in Village Jua, Santo Estevam in Tiswadi Taluka. A survey plan of the said property has been produced by the petitioner and unfortunately for the petitioner as well as the said respondents none of their houses can be seen on the said survey plan. From that one certainly could infer, prima facie, that none of the said houses were existing at the time when the survey plan was prepared. Counsel on behalf of the said respondents submits that the structure identified by letters "W", "E" and "O" on the said plan belonged to the ancestors of the said respondents but, I must hasten to add that none of the residents from the said houses have claimed any right or way from the said houses to come to the well in question and further on to the public road, particularly, to make use of water of the said well, which can be seen adjoining the structure identified as 3 on the said survey plan.

2. The petitioner, who claims to be the mundkar also claims to have purchased an area admeasuring about 157 sq. mts. as per sale deed dated 3/07/2006 from his Bhatkar. According to the petitioner, the well does not fall within the area

purchased by him, but, is beyond the said area, towards the road and according to the petitioner, the petitioner will have no objection in case the said respondents or any other persons come to the said well by the road and fetch water therefrom.

3. The respondents no. 3 to 9 approached the Police with their grievance that they were being prevented from going to the said well to take water therefrom on account of the petitioner having erected a fence. A show cause notice came to be issued to the said respondents on or about 10/12/2008, as a result of which, the said respondents appeared before the SDM and filed their written statement, inter alia, stating that the landlord of the said property had maintained a specific access to come to the said well and there was no access from the property purchased by the petitioner. It was also stated by the petitioner that the said well was presently not in use by any of the villagers except on the occasion of marriage to perform certain religious ceremonies as per hindu religion. As regards funeral procession, the petitioner stated that in the entire ward there were open spaces. The petitioner also stated that there was another well in between the houses identified by letter "M" and "Q" in the said survey plan and, moreover, there was a facility of tap water to the houses of the respondents and, therefore, the question of depriving them from the well water did not arise.

4. There is no dispute that thereafter on or about 10/12/2008, on behalf of the said respondents, an application came to be filed for interim relief supported by several affidavits including one of Jamuwant Sawant. The said application was replied to by the petitioner reiterating the pleas taken by him in the written statement earlier filed and supporting the same by an affidavit.

5. The learned SDM by the impugned order dated 12/01/2009, relying on two decisions namely of Orissa High Court in the case of Niranjana Behera and Another Vs. Laxmidhar Rana and Others, and that of Rajasthan High Court in the case of Sawa & Ors. V/s. State of Rajasthan & Ors. reported in (1997 (1) Crimes 294), came to the conclusion that he had jurisdiction to pass interlocutory orders. The learned SDM further took note of the contention of the petitioner (party no.1) that the owner had left access to proceed to the well, but, observed that the said access which the petitioner was trying to point out was that the parties had to proceed to the main road towards the eastern side and then come back to the well through the main road which was resulting in taking a round. In other words, the learned SDM accepted the position that the said respondents could take water from the said well but that was inconvenient because they had to take a round. The learned SDM took note of the photographs and therefrom observed that it appeared, prima facie, that there was an access and the said access was blocked by erecting a fencing and after the same was damaged, a loose late rite stone wall was erected, and, therefore proceeded to grant the interim relief and direct the removal of blockage erected by the petitioner, to the extent of 1 meter, in order to allow the said respondents (party no.2) to proceed to the said well to fetch water from the said well.

6. Learned Counsel appearing on behalf of both parties have not been able to cite any decision of the Apex Court or for that matter of this Court in support of the proposition that in proceedings taken u/s 147 of the Code, the SDM or an Executive Magistrate has jurisdiction to pass interim orders. There appears to be a conflict of judicial opinion on that score and the Orissa High Court in the case of Niranjana Behera and Anr. V/s. Laxmidhar Rana & Ors. (supra) has proceeded on the assumption that an Executive Magistrate had an implied power out of necessity to pass such an interlocutory order. In coming to that conclusion, the Orissa High Court has also taken note of a decision of the Apex Court in Savitri Rawat Vs. Govind Singh Rawat, . Likewise, the Rajasthan High Court took note of the first decision in the case of Niranjana Behera and Anr. V/s. Laxmidhar Rana & Ors. (supra) as well as Smt. Savitri V/s. Govind Singh Rawa (supra) and has held that an Executive Magistrate has jurisdiction to pass an interlocutory order in the absence of express provision u/s 147 of the Code. The case of Smt. Savitri V/s. Govind Singh Rawa (supra) was in relation to Section 125 proceedings.

7. Be that as it may, Section 147 of the Code appears in Chapter X dealing with maintenance of public order and tranquility and particularly in the part dealing with disputes as to immovable property. In relation to public nuisances, the Code has provided, in terms of Section 142 thereof, for injunction orders to be made pending inquiry. In terms of Section 146, the Code has also provided for emergent matters to be dealt with while dealing with disputes as to immovable property. By virtue of explanation to Section 147 of the Code, the expression "land or water" has been given the same meaning as in sub-section (2) of section 145 of the Code. The procedure to dispose of the proceedings u/s 147 is similar to the procedure provided to dispose of the proceedings u/s 145 of the Code in relation to disputes as to immovable property. In fact, sub-section 2 of Section 147 provides that;

(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, so far as may be, apply in the case of such inquiry.

The Legislature in its wisdom has excluded making a provision like of Section 146 of the Code or for that matter Section 142 of the Code in Section 147 of the Code and in the light of that the power of an Executive Magistrate to make an interlocutory order would not be free from doubt. The fact that the Legislature did not incorporate in Section 147 of the Code, a provision similar to the one contained in Section 142 or for that matter Section 146 of the Code impliedly shows that the Legislature did not wish to confer such a power to make interlocutory orders in proceedings u/s 147 of the Code. This is another view of the matter. Nevertheless we could proceed on the assumption that such a power was available with the learned SDM, leaving this controversy to be decided in another matter.

8. Nevertheless, considering the facts of the case, in my view, this was not a fit case to exercise such a power to make an interim order. The said respondents had essentially claimed a right of user of water of the said well, which neither belonged to the petitioner nor to the said respondents but to their Bhatcar. The said respondents had not claimed that they had any right of way which could lawfully be used by the members of the public. However, there was absolute silence on their part as to, since when they had acquired the said right, both in the police report as well as in the application dated 10/12/2008 except to say that it was their traditional access or their traditional right to fetch water from the said well. A person who claims to have acquired a right of user of water from the well was expected to state as to how many years it was exercised by them. There is total silence on this aspect. Only a long use for a prescribed period can crystallise into a right. Mere use does not. Further, the facts stated by the petitioner that there was another well from which they could take the water or they had tap water facilities, were facts which were not denied by them, by filing a rejoinder. Moreover, the learned SDM had also come to the prima facie conclusion that there was an alternate access, though inconvenient, by which the said respondents, could have fetched the water from the said well. Being so, the learned SDM was certainly not justified, assuming he had jurisdiction, to make any interim order in favour of the said respondents. Consequently, the petition deserves to succeed. The interim order dated 12/01/2009 is hereby set aside. Nevertheless, the learned SDM is hereby directed to complete the inquiry, as expeditiously as possible and in any event within a period of 6 months from the receipt of notice from the Court. Needless to observe, the matter will be decided by the SDM or for that matter by the Civil Court, in which the plaintiff, is stated to have filed the suit without being influenced by the observations made herein. Considering the facts, there shall be no order as to costs.