

(1976) 08 OHC CK 0005
In the Orissa High Court
Case No : Crimnal Revision No. 94 of 1976

Mst. Balamati Sahu and Another	Vs	APPELLANT
Gouranga Sahu and Others		RESPONDENT

Date of Decision : 26-08-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 144, 145, 146, 146(1B)

Citation : (1976) 42 CLT 1123

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

Bench : Single Bench

Advocate : R.K. Rath and N.C. Panigrahi, for the Appellant; H.B. Swain and B.P. Tripathy, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Member of the second party in a proceeding u/s 145 of the Code of Criminal Procedure have moved this Court u/s 397 of the Code to quash the order of the learned Sessions Judge, Balangir by which he has vacated a final order in the proceeding and has remitted the matter for reconsideration.

2. On 21-10-1970, a proceeding u/s 144 of the Code was initiated on the application of one of the parties. By order dated 19-11-1970, the Magistrate converted the proceeding to one u/s 145 of the Code and proceeded to investigate the claim of possession. By final order dated 31-7-1974, the learned Magistrate upheld the possession of the second party. Against that order, a revision application was filed before the learned Sessions Judge by the first party. The learned Sessions Judge came to hold that the Magistrate did not refer to the affidavits of parties and without an appropriate assessment disposed of the proceeding by upholding possession of the second party. Accordingly he vacated the order of the learned Magistrate and remanded the proceeding for a fresh disposal. That order of remand is questioned in this revision application mostly on a plea of want of jurisdiction of the Sessions Judge.

3. Mr. Rath for the Petitioners contends that as the proceeding u/s 145 of the Code had been initiated as early as 1970 and was pending when the new Code of Criminal Procedure came into force with effect from 1-4-1974, the new Code had no application to the proceeding in view of the clear language of Section 484(2) of the new Code and the case had to be disposed of as if the new Code had not - been passed. In that view of the matter, the learned Sessions Judge had no power u/s 435 of the old Code of 1898 to pass a final order in a revision application directed against a final order in a proceeding u/s 145 of the Code. Reliance is placed on a Bench decision of this Court in the case of Damodar Panigrhai v. Banohhanidhi Panigrahi 42 (1976) C.L.T. 842, in support of such contention.

4. Section 484(2)(a) of the Code provides:

Notwithstanding such repeal,

(a) If, immediately before the date on which this Code comes into force, there is any appeal, application trial, inquiry or investigation pending, then, such appeal application, trial inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure. 1898 (5 of 1898), as in force immediately before such commencement, (hereinafter referred to as the Old Code) as if this Code had not come into force:

Provided...

In the case of Natabar Parida v. State of Orissa AIR 1975 S.C. 1965, the Court was examining the applicability of the new provision in Section 167 of the Code to a case where arrest had been effected prior to 1-4-1974. The Court was observed:

Immediately before the 1st day of April, 1974 the investigation of this case was pending. Saving Clause (a) therefore enjoins that the said investigation shall be continued or made in accordance with the provisions

of the old Code....

The question for examination in this case cannot be resolved with reference to the decision of the Supreme Court referred to above. On the other hand, there is a direct Bench decision of this Court in the case of Bhima Naik v. State 41 (1975) C.L.T. 674, where this question was examined at length. After referring to several authorities and making an analytical discussion of the statutory provisions, the relevant conclusion was summed up this at page 695 of the Reporter:

(i) The proceeding u/s 107, Code of Criminal Procedure which was initiated prior to the commencement of the new Code would be enquired into u/s 484(2)(a) as it was pending on 1-4-1974 when the new Code came into force.

(ii) A revision filed against the impugned order would be under the new Code as the right to file a revision is not a vested right. The revisional jurisdiction would

exercised with reverence to Sections 397 and 401 of the new Code.

In the case of *Kanika Bewa v. State* 41 (1975) C.L.T. 798 the question for examination was whether the right of appeal was one of mere procedure or a substantive one of the footing that the right of appeal was substantive and rights available to a litigant on the date of commencement of the list attached to it unless altered or modified by subsequent law. Relying on the dicta in the decision of the Supreme Court in the case of *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, , this Court held that the light exists from the date cognizance was taken and not on the date judgment was pronounced and, therefore, as the case was instituted before the new code had come into force, the right of appeal was determined with reference to the old Code.

The decision on which reliance has been placed by Petitioners counsel (*Damodar Panigrahi v. Banchhanidhi* 42 (1976) C.L.T. 842), apparently supports the Petitioners' stand. But then the decision is closely examined, the distinction is apparent. The main question of consideration before the Bench was whether in a proceeding u/s 145 of the Code where the preliminary order had been passed on 15-4-1972 and the Magistrate had taken steps to refer the dispute to a Civil Court u/s 146 of the old Code and had ultimately passed an order in terms of the Civil Court's finding, the final order was immune from challenge. The question for determination was as to whether finality attached u/s 146(1B) of the old Code to the order and bar against review or revision operated, or in terms of the new Code a revision lay. The Court took the view that the provision of finality was not a matter of procedure and, therefore, it operated. Counsel for opposite party No. 1 doubted the correctness of the decision. We are not concerned at present with the correctness of the decision and all that has now to be examined is whether the dicta laid down in the case supports the Petitioners' stand. On the analysis indicated, I would hold that no support is available for the Petitioners from this decision. On the other hand, the earlier Bench decision directly runs counter to the contention. The revision application was, therefore, maintainable before the learned Sessions Judge under the new Code and he was, therefore, entitled to pass a final order.

5. It was next contended that the learned Sessions Judge went wrong in holding that in an order of this Court dated 11-4-1975 passed in Criminal Reference No. 5 of 1975, it had been held that there is no need for the Magistrate to indicate that possession had been found in his final order with reference to the date of preliminary order. Nothing of that type was said by this Court. In that case, a learned Magistrate had found possession of one of the parties without indicating with reference to which date he found such possession. The Sessions Judge had made a reference to this Court under the old Code of Criminal Procedure holding that when the Magistrate had not clearly indicated that his finding of possession was with reference to the date of the preliminary order, the order was vitiated. This Court held:

.... There is no indication in the final order of the Magistrate from which one can

come to entertain the view that the finding of possession is with reference to a date other than the date of the preliminary order.

No law was attempted to be indicated and the observation was one relating to the facts of the case.

6. The revision application must accordingly fail and is dismissed.