

(2000) 04 OHC CK 0047

In the Orissa High Court

Case No : Criminal Revision No. 345 of 1997

Nabaghana Mohanty and Others

APPELLANT

Vs

Dwarikanath Tripathy and Another

RESPONDENT

Date of Decision : 17-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Criminal Procedure Code, 1973 (CrPC) — Section 143, 144, 145

Citation : (2000) 18 OCR 748

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : M.K. Muduli and B. Behera, for the Appellant; Pitambar Acharya, A.C. Samantray and A. Pattnaik for O.P. No. I, for the Respondent

Final Decision : Allowed

Judgement

P.K. Tripathy, J.—Learned Counsel for the Petitioners is present.

2. Heard.

3. Order dated 23.6.97 in Criminal Misc. Case No. 545 of 1997 of the Court of Executive Magistrate is under challenge in this revision. Initially, that proceeding was initiated u/s 144, Code of Criminal Procedure at the instance of the 1st party members who are the Petitioners in this revision. The opposite party members are the 2nd party members in that proceeding. After a long drawn discussion, on 23.6.1997, learned Executive Magistrate passed order converting the proceeding to one u/s 143, Code of Criminal Procedure on the ground of existence of apprehension of breach of peace concerning possession of the case land. In the said order learned Magistrate directed the opposite party No. 1 to harvest the standing crop in presence of the Revenue Inspector and to furnish accounts. He passed that order on the basis of finding recorded that prima facie, he found the opposite party No. 1 to have grown the crop.

4. Learned Counsel for the Petitioners does not dispute that there exists

apprehension of breach of peace concerning the possession of the land. He, however, argues that learned Magistrate while converting the proceeding to one u/s 145, Code of Criminal Procedure has committed gross illegality by recording a finding on possession and yet converting the proceeding to one u/s 145, Code of Criminal Procedure. He argues that when the parties have adduced their evidence, learned Magistrate should have decided the case on merit after making such a detailed discussion and should not have converted the case to one u/s 145, Code of Criminal Procedure. He further argues that the finding recorded by the learned Magistrate relating to growing of the crop by the 2nd party No. 1 is on the basis of wrong appreciation of the evidence and therefore such finding should be set aside. Learned Counsel for the Petitioners further argues that in a civil suit brought by the 2nd party No. 1 Plaintiff's prayer for interim injunction under Order 39 Rule 1, CPC was rejected on merit by the Subordinate Judge, 2nd Court, Cuttack, vide his order dated 20.4.98 in Misc. Case No. 139 of 1988 and in view of that learned Magistrate should not have proceeded with the proceeding u/s 144, Code of Criminal Procedure at all and should not have converted the proceeding to one u/s 145, Code of Criminal Procedure. Each of the aforesaid contentions need careful consideration.

5. The aforesaid argument of the Petitioners who are the members of the 1st party that in view of the decision of the Civil Court under order 39 Rules 1 and 2, Code of Civil Procedure, learned Executive Magistrate should not have initiated the proceeding u/s 144, Code of Criminal Procedure and thereafter should not have converted it to a proceeding u/s 145, Code of Criminal Procedure is a selfcondemning argument because they themselves approached the Magistrate for an order u/s 144, Code of Criminal Procedure. If the said order of the Civil Court relating to the prayer for interim injunction passed in the year 1990, would have been respected and accepted by the 1st party, they should not have approached the Executive Magistrate in 1997 for protection. When the civil suit is pending they should have approached the Civil Court, being co-defendants in that case, for appropriate interim protection. After invoking the jurisdiction of the Magistrate under the preventive provision, it does not lie on the mouth of the 1st party members to challenge the jurisdiction of the Executive Magistrate because the proceeding was not decided in the manner they wanted. Therefore, the relevant contention of the Petitioners about lack of jurisdiction of the Magistrate is not found sustainable. Apart from that, mere pendency of a civil proceeding does not oust jurisdiction of the Executive Magistrate to take action with a view to prevent apprehension of breach of peace concerning the dispute over land, water or boundaries thereof. However, a Magistrate shall not pass an order either u/s 144 or 145, Code of Criminal Procedure relating to land or water or boundaries thereof if the Civil Court has passed order relating to possession or protection of the subject matter of dispute.

6. of course such is not the situation so far as the present case is concerned. Mere dismissal of an injunction petition does not amount to making an interim arrangement. At the stage of consideration of an application under order 39, Rule

I or 2, CPC the Civil Court takes into consideration the factum of existence of a prima facie case, balance of convenience and if refusal to grant interim/temporary injunction will occasion in irreparable loss or injury. Under the given facts and circumstances and as per the aforesaid discussion, this Court does not find that jurisdiction of the learned Executive Magistrate was ousted because of pendency of the civil suit.

7. On 23. 6. 1997 learned Magistrate passed the order converting the proceeding to one u/s 145, Code of Criminal Procedure because he found that there exists breach of peace concerning possession of the subject matter of dispute. However, the observation made in the order stating that prima facie the second party was found to be in possession and hence he was to harvest the crop appears to be unjust, improper and uncalled for when I enquiry in the proceeding in accordance with the provision in Sub-section I (4) of Section 145, Code of Criminal Procedure is yet to commence. Thus, that observation/I finding be treated as non est. In other words, that finding recorded by the Executive Magistrate is set aside. Learned Executive Magistrate soon after receipt of a copy of this judgment shall direct the opposite party No. 1 to deposit the sale proceeds of the harvested crop in the Court of the Magistrate I and at the conclusion of the proceeding learned Executive Magistrate may I pass appropriate order for disbursement of the said amount.

8. In view of the aforesaid discussion and findings, this Court does not find any illegality in the order passed relating to converting the proceeding to one u/s 145, Code of Criminal Procedure. However, order passed by the learned Magistrate observing that the second party No. 1 was prima facie found to be in possession is set aside and learned Executive Magistrate is directed to issue direction to the second party No. 1 to deposit the sale proceeds in that Court and to see to its proper compliance. Accordingly, the Criminal Revision is allowed in part.