
(1965) 04 GAU CK 0002
In the Gauhati High Court

Nadia Chand Das

APPELLANT

Vs

Baishnab Charan Das and Others

RESPONDENT

Date of Decision : 05-04-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145

Citation : AIR 1965 Guw 43 : (1965) CriLJ 811

Hon'ble Judges : Rajvi Roop Singh, J.C.

Bench : Single Bench

Judgement

Rajvi Roop Singh, J.C.

1. This is a Criminal Reference made by the learned. Sessions Judge, Tripura in Criminal Motion No. 196 of 1963, with a recommendation for setting aside the order dated 26-11-63 passed by the Magistrate First Class, Dharmanagar in Criminal, Misc. Case No. 22 of 1963.

2. The facts giving rise to this reference are as follows:

On 29-3- 63 the petitioner Nadia Chand Das as first party filed a petition u/s 144, Cr. P. C. alleging that he along with his brother Santipriya Das were in peaceful possession of 2 kanis of land appertaining to Khash jote No. 148 of Mouza Baghan, Pargana Dharmanagar under Kadamtala P. S. bounded on all sides by the first party's land on the basis of his purchase on 4-7-60 in the name of his brother Santipriya Das under a registered kabala from the previous owner Abdul Knaleque Choudhury, that Santipriya Das possessed the said land for 7 or 8 years prior to the purchase as bargadar under Abdul Khaleque Choudhury and that the second party members Baishuab Charan Das, Kalindra Das, Manindra Das and Nani Das were threatening to dispossess them forcibly from the said land. The petition was sent for Police enquiry and after the receipt of the Police report the learned Magistrate drew up a proceeding u/s 144, Cr. P. C. against the second party.

Thereafter the second party members having filed an objection claiming

possession of the land in question, the learned Magistrate altered the proceeding to one u/s 145, Cr. P. C., and directed by his order dated 9-4-63 both the parties to file written statements, affidavits and documents, if any, in support of their respective possession over the land in dispute. Both the parties filed written statements. The first party also filed 10 affidavits and a registered kabala dated 4-7-60. The second party filed 11 affidavits and 5 rent receipts as also a registered deed of gift dated 27-3-63.

3. The case of the first party as appearing in his written statement is to the effect that he purchased the 2 kanis of land in question from the owner Abdul Khaleque Choudhury in the name of his brother Santipriya Das who was in joint mess and property with him on 4-7-60, that himself and his brother are possessing the same ever since the said purchase and that prior to the said purchase the first party's brother Santipriya Das had possessed the said land which was the khash khamar land of Abdul Khaleque Choudhury for about 7/8 years as a Bargadar under Abdul Khaleque Choudhury. It has further been stated in the petition that the second party members had collected goondas and were trying to oust the first party and his brother from the said land forcibly and that there was a serious apprehension of the breach of peace.

4. The second party in their written statement denied that there was any apprehension of the breach of peace and claimed to be in possession of the land in question for the last 50 years. The second party members also denied that the land in question appertained to jote No. 148 of Mouza Baahan and mentioned the same as appertaining to Kayemi Taluk No. 148 standing in the name of Abdul Ali.

The case of the second party is that the proceeding land along with other lands totalling 11 kanis 5 gandas were taken jote settlement of by the second party members Baisnab Charan Das about 50 years back from the original owners Abdul Kader and Abdul Ali, that on the death of Abdul Ali his son Hafij Ajijur Rahaman Choudhury inherited the share of Abdul Ali in the said property, that after the death of the said Ajijur Rahaman Choudhury and Abdul Kader, Abdul Salam son of Ajijur Rahaman Choudhury and Abdul Khaleque son of Abdul Kader inherited their respective shares in the Kayemi Taluk, that Abdul Khaleque being a minor Abdul Salara looked after the property of Abdul Khaleque and Baisnab Charan Das paid rent : to Abdul Salam Choudhury in respect of his jote land up to 1355 T. E., that Abdul Khaleque having come of age there was amicable partition of the properties between himself and Abdul Salam Choudhury and they started looking after their respective portions of land separately and that the proceeding land having fallen to the share of Abdul Khaleque Choudhury, the second party paid rent to Abdul Khaleque Choudhury since 1356 T. E.

It is further mentioned by the second party in their written statements that the second party members Baisnab Charan Das having become old, he transferred 9 kanis of land including the proceeding land to his grand-sons second party No. 2 Kalindra Das. No. 3 Manindra Das, No. 4 Nani Das and Tanu Das by a registered deed of gift dated 27-3-63. The second party asserted that they were in

continuous possession of the proceeding land for the last 50 years on the basis of settlement taken of by the second party No. 1 Baisnab Charan Das from the Talukdars Abdul Kader and Abdul Ali.

5. Among the affidavits filed by the two parties were the affidavits of Mirashdars Abdul Khaleque Choudhury and Abdul Salam Choudhury who respectively supported the case of the first party and the second party. After the filing of the affidavits by the second party the first party filed a petition dated 9-8-63 praying for cross-examination of the second party member Baisnab Charan Das and the witnesses who had sworn affidavits on their behalf. It does not appear that any order was passed by the learned Magistrate on the said petition. Ultimately the learned Magistrate by his order dated 26-11- 63 decided and declared that second party members are in possession of the land in dispute on the date of the order upon an observation to the following effect:

Now let me discuss about the documents filed by both the parties. On 4-7-60 the proceeding land was sold to the 1st party. But against this there are seven rent receipts. These rent receipts show that not only Abdul Salam Choudhury realised rent from the 2nd party but also Abdul Khaleque Choudhury.

After examination of rent receipt I find that Abdul Khaleque Choudhury issued rent receipts after realisation of rent on four occasions-dated 26-10-63 B. S., 15-11-64 B.S., 20-12-66 B. S. and 26-5-69 B. Section 1st party contended that these are not issued by Shri Abdul Khaleque Choudhury. But I have examined the signature of Abdul Khaleque Choudhury given in rent receipts and the document and the affidavit. All these tally. Hence I am of opinion that the affidavit filed by Abdul Khaleque Choudhury cannot be relied upon. So the whole case of 1st party falls flat to the ground. There may be a document. But I am concerned only with possession of the date of order. The deed of gift of 2nd party was made on 27-3-63 and the case is filed on 29-3-63. Moreover the details of the proceeding land are found in the W/S of 2nd party. But no details have been furnished by 1st party. The intention of the 1st party is to grab the land in dispute as they are owning all lands in and around the land in dispute. In view of above I do disbelieve the story of possession of the 1st party.

6. Being aggrieved by this order of the learned Magistrate the petitioner filed a revision petition to the Court of learned Sessions Judge, Tripura. The learned Sessions Judge has made this reference for setting aside the order of learned Magistrate dated 28-11-63.

7. Heard the learned lawyers appearing on both sides and perused the record of the case.

8. In this case the main point for determination is whether the order of learned Magistrate is erroneous or not.

From the perusal of the record, it would appear that besides the first party member Nadia Ghana Das, his brother Santipriya Das and Abdul Khaleque

Choudhury as many as 7 other persons namely Majibur Rahaman, Haji Habibur Rahaman, Haji Abdul Bari, Ayani Malakar, Jogendra Malakar, Ratanmani Nath and Samarendra Chandra Nath have filed affidavits in support of the claim of the first party. The affidavits of all these persons show that they had lands close to the proceeding land. They have all stated on solemn affirmation that they know the proceeding land as also both the parties, that the first party member Nadia Chand Das and his brother Santipriya Das are in possession for the last 10/12 years, that they never saw the second party members Baisnab Charan Das and others possess the proceeding land and that there was a serious apprehension of the breach of peace as the second party members were about to dispossess the first party forcibly.

The learned Magistrate nowhere in his judgment has given any reason for disbelieving the affidavits of all these persons whose statements show that they are competent to speak about the possession of the proceeding land. In fact, there is nothing in his order to show that he has considered the affidavits of any of the aforesaid persons except that of Abdul Khaleque Choudhury, Under Sub-section (4) of Section 145 Cr. P. C., it is the mandatory duty of the Magistrate to peruse the affidavits before deciding the question whether any and which of the parties at the date of the order was in possession of the proceeding land as is evident from : the opening words "The Magistrate shall then with out reference to the merits of the claim...etc." of the said sub-section. The failure to consider the affidavits filed on behalf of the first party, is an illegality which has vitiated the order of the learned Magistrate. This view finds support from the decision of the Patna High Court in the case of Brahmdeo Narain Singh and Others Vs. Mishri Dhobi, In that case what happened was that the learned Magistrate found the opposite party in possession of the disputed land after disposing of the affidavits filed on behalf of the contesting petitioners upon an observation to the effect:

It may be mentioned here that the affidavits filed on their behalf have no evidentiary value as they are ex parte matters done in mechanical way and hence I do not feel inclined to attach any importance to such documents.

On being moved in revision against the said order his Lordship N. Imam J. set aside the order of the learned Magistrate and sent the case back for disposal by some other Magistrate with competent jurisdiction by making an observation to the following effect after quoting the provisions of Sub-section (4) of Section 145 Cr. P. C., as amended by Act 26 of 1955:

It is clear from the above that the statement on affidavit must be taken into consideration. It will not do for the learned Magistrate to brush aside statement on affidavit by saying that it has no evidentiary value as they are ex parte matters. These matters have been deliberately made ex parte by the Act itself. To brush aside statement on affidavit on this ground is unjustifiable. If, however, the learned Magistrate found that statement on affidavit were such that he was not able to get much assistance in order to determine who is in possession then it was open to him to summon and examine any person whose affidavit was put

in as to the facts contained therein.

It will be noticed that the ruling laid down in the above case applies with greater force to the present case as here the order of the learned Magistrate does not show that he had any pretext for not feeling inclined to attach any importance to the affidavits of the first party. The impugned order of the learned Magistrate has also occasioned a failure of justice as he had not passed any order on the petition of the first party dated 9-8-1963 praying for cross-examination of second party members Baisnab Charan Das and his witnesses.

It is true that under the proviso to Sub-section (4) of Section 145 Cr. P. C., as amended in 1955 the Magistrate has a discretion to summon and examine any person whose affidavit has been put in as to the facts contained therein and no party can claim to examine or cross-examine any such person as a matter of right. There is, however, one aspect of the matter which cannot be overlooked in the present case. The learned Magistrate has refused to rely on the affidavit filed by Abdul Khaleque Choudhury on the ground that the second party has filed 4 rent receipts purporting to be dated 26-10-63 B. S., 15-11-64 B. S., 20-12-66 B. S. and 26-5-69 B. S., and said to have been issued by Abdul Khaleque Choudhury. His order shows that he has come to the conclusion that the whole case of the first party fell flat to the ground as the signature of Abdul Khaleque Choudhury given in rent receipts, documents and the affidavits were found on examination by him to tally. It would appear that under the whole basis of his order are the rent receipts. A perusal of these rent receipts shows that they do not mention either the jote number or area of the land. These rent receipts are written in slips of plain paper and there is also nothing in any of them to show either the rate of rent or the identity of the land covered by the same. Moreover, in accepting the signatures appearing in these rent receipts as those of Abdul Khaleque Choudhury by himself comparing the signatures of that person in the affidavit and document, the learned Magistrate has assumed the role of a Hand-writing expert.

In this case having regard to the fact that the tenuousness of the rent receipts was challenged by the 1st party, the learned Magistrate ought not to have decided the question merely by personal examination and comparison. In any view, before relying on the said rent receipts, the learned Magistrate should have considered the petition of the first party dated 9-8-63 praying for being allowed to cross-examine the second party member Baisnab Charan Das and his witnesses, particularly because in the said petition the first party made a clear allegation to the effect that the written statement and affidavits filed by the second party were false.

9. From all this, it is clear that the Magistrate has committed illegality, therefore, I have no other alternative but to accept the reference. I, therefore, accept the reference and set aside the order of learned Magistrate and send the case back for deciding it according to law.