
(1985) 04 GAU CK 0005
In the Gauhati High Court
Case No : Criminal Ref.No. 2 of 1965

Nadia Chand Das

APPELLANT

Vs

Baishnab Charan Das

RESPONDENT

Date of Decision : 05-04-1985

Acts Referred:

Criminal Procedure Code, 1898 — Section 143(4), 145(4)

Criminal Procedure Code, 1898 (CrPC) — Section 143(4), 145(4)

Citation : AIR 1965 Tripura 43

Hon'ble Judges : Rajvi Roop Singh, J

Bench : Single Bench

Advocate : H.Dutta, H.C.Nath, Advocates appearing for Parties

Judgement

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 261183 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 293 63 the petitioner Nadia Chand Das as first party filed a petition under 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 4760 in the name of his brother Santipriya Das under a registered kabala from the previous owner Abdul Khaleque 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 Baishnab 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 under 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 under S 145, Cr. P C., and directed by his order dated 9463 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 4760. The second party filed 11 affidavits and 5 rent receipts as also a registered deed of gift dated 27363.

(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 arid property with him on 4760, 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 Baghan and mentioned the same as appertaining to Kayemi Taluk No. 148 standing in the name of Abdul AH.

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 AH his son Hafij Ajijur Rahaman Choudhury inherited the share of Abdul AH 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 Salam looked after the property of Abdul Khaleque and t 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 Khalequa Choudhury, the second party paid rent to Abdul Khaleque Choudhury since 1358 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 grandsons second party No. 2 Kalindra Das, No. 3 Manindra Das, No. 4 Nani Das and Tanu Das by a registered

deed of gift dated 27363. 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 AH.

(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 9863 praying for crossexamination of the second party member Baisnab Charan Das and the witnesses who had sworn affidavits on their "half. It does not appear that any order was passed, the learned Magistrate on the said petition. Ultimately the learned Magistrate by his order dated ?31163 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 4760 t!< 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 261063 B. S., 151164 B.S., 201266 B.S. and "26569 B. S. 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 27363 and the case is filed on 29363. "" 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 261163.

(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 Chand 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 partymembers 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 subsection (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 withoutreference to the merits of the claim...etc." of the said subsection. 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 v. Mishri Dhobi, AIR 1959 Patna 430. In that case what happened was that the learned Magistrate found the opposite party in possession of the disputed land after disposing o? 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 subsection (4) of section 145 Cr. P. G, 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 pqrte 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 981963 praying for cross-examination of second party members Baisnab Charan Das and his witnesses.

It is true that under the proviso to subsection (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 the 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 261063 B. S., 151164 B. S., 201266 B. S. and 26569 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 Handwriting expert.

In this case having regard to the fact that the genuineness 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 9863 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.

Reference accepted,