
(1976) 11 PAT CK 0010
In the Patna High Court

Naresh Nonia and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 18-11-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 342, 379, 403, 428
Penal Code, 1860 (IPC) — Section 143, 144, 379

Citation : (1977) CriLJ 1181

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Judgement

Madan Mohan Prasad, J.—This application in revision is directed against the conviction of all the petitioners u/s 379 of the I. P. C. and the sentence of thirteen months" rigorous imprisonment passed thereunder as also against the orders of conviction of petitioners 1 and 2 u/s 144 and the sentence of seven months" rigorous imprisonment passed thereunder and that of petitioners 3 and 4 u/s 143 and the sentence of three months" rigorous imprisonment thereunder, the sentences having been directed to run concurrently.

2. The prosecution case is that one Ganesh Prasad Rai (P. W. 7) has got 60 bighas of culturable land in village Chaktola and he had grown wheat over an area of 4 bighas out of the same. He is not a resident of this village and, therefore, has got a . chhawani for the purpose of agricultural operations and his brother Brijbihari Rai (P. W. 3) looked after the cultivation. On the 25th of March, 1965 at about 6/7 a. m. Brijbihari was making a round of his field and when he arrived at the place where wheat crops had been grown, he found the four petitioners along with one Fakira Nonia (who died during the pendency of the case) harvesting the wheat crop with the help of labourers. Petitioner Ghura Nonia alias Ghuchu Nonia was armed with an unlicensed gun and petitioner Naresh Nonia was armed with a bhala while others were armed with lathis. It was further said that the prosecution party did not protest because in the previous year a clash had taken place with these very petitioners which resulted in the murder of two persons. Brijbihari, therefore, rushed to the police station

and lodged a first information report at 10.30 a. m. the same day.

3. On the basis of the first information, the police submitted charge sheet. The petitioners were charged with offences Under Sections 144 and 379, I. P. C. The learned Magistrate, however, convicted the petitioners as stated above. The petitioners went up in appeal though unsuccessfully. Hence this application.

4. The defence suggestion to the prosecution witnesses appears to be that the informant's brother was not in possession of the land in question and that the prosecution story in respect of the occurrence is absolutely false.

5. Both the courts below concurrently found that the field in question was in possession of Ganesh Prasad Rai and that he had grown the wheat crop in question. Further they found that the petitioners had forcibly and dishonestly harvested the wheat crop and, thus, were liable for the offences u/s 379. They also found that the petitioners along with others had formed an unlawful assembly and thus were guilty of the offences Under Sections 143 and 144.

6. Counsel for the petitioners has raised only one point before me, namely that the prosecution was barred by principle of issue estoppel. It is said that the land in question had, in an earlier criminal proceeding, been found not to be in the possession of Ganesh Prasad Rai and that it was also decided in a civil suit that the vendor of Ganesh Prasad Rai did not derive any title by an auction purchase and thus it has been urged that the land in question could not be in possession of Ganesh for his vendor could not have transferred possession to him. In this connection, plain copies of two judgments have been filed along with the petition in revision as annexures. It has been urged that these documents were not filed before the Magistrate since they had been filed in another case though in their statements u/s 342 of the Cr. P. C. (hereinafter to be referred to as the Code) the petitioners had said that they would file the documents. The question is whether these two documents can be looked into for the purposes of deciding the present case. In this connection. I may repeat that plain copies of the two judgments have been annexed to the main petition ; they are not certified copies. Secondly, there is no explanation whatsoever as to why these documents were not produced before the appellate court. Thirdly, the explanation is vague even with respect to their non-production before the trial court inasmuch as no dates have been given as to when these documents were filed in another case nor when they were taken back. There is no reason why the petitioners could not call for those documents from the record of the other case. There is no reason why the petitioners could not produce certified copies of the documents in question in the trial court. Apart from these considerations, there is no application in this Court to accept these documents as additional evidence nor was any such prayer made before the lower appellate court. For these reasons, these two judgments cannot be looked into at all for the purpose of deciding the present case.

7. Assuming, however, that they can be looked into, I find after looking into them that they are of no avail. The first judgment is that of a second appeal decided

by this Court (Annex. 1). From this judgment it would not appear as to what are the lands to which it relates ; all that appears from this judgment is that one Hari Prasad and others were appellants before this Court as against the concurrent decisions of the two courts below decreeing the suit of the mortgagees of some land and that the suit was for possession on the ground that the defendant there had obtained a decree which was a money decree and got the holding sold by in execution and dispossessed the usufructuary mortgagees by virtue of delivery of possession through court. Again assuming that this judgment relates to the land in respect of which the crops are alleged to have been taken away by the petitioners, it does not appear from the aforesaid judgment that the petitioners were parties to it or that they were in possession. In any case, assuming again that the delivery of possession to Hari Prasad in respect of the lands involved in the present case had been held to be illegal and a decree was passed in favour of the usufructuary mortgagees, there is nothing to show that this decree of the civil court was executed and that possession of the lands from which the usufructuary mortgagees admittedly had been dispossessed was transferred again to them on account of the execution of the decree in that suit. What is important is that it does not support the statement made before me that the petitioners claimed possession of these lands.

8. The other judgment (Annex. 2) is a decision given in a criminal appeal. It appears that it was a case of theft of khesari and dhanias crops in respect of some lands of Ganesh Prasad Rai against three of these petitioners and several others alleged to have been committed on the 26th of March, 1961 and in this case they were convicted by the trial court but acquitted by the appellate court in respect of the offences Under Sections 379 and 144. Firstly, it is well settled that the judgment of criminal case is admissible only to show the result. A reference may be made to a decision of a Division Bench in the case of Ramadhar Chaudhary and Others Vs. Janki Chaudhary, where it was held that--

... .. a judgment of a criminal court is admissible to prove only who the parties to the dispute were, and what order was passed. Facts therein stated, or statements of the- evidence of the witnesses examined in the case, or the findings given by the Court, are not admissible at all. Technically, such judgments are inadmissible as not being between the same parties, the parties in the prosecution being the State on the one hand and the prisoner on the other.

9. Counsel for the petitioners has placed reliance on the decision of the Supreme Court in the case of Lalta and Others Vs. State of Uttar Pradesh, and urged on its basis that in the aforesaid criminal case the appellate court having found that Ganesh Prasad Rai was not in possession of the land auction-purchased by his vendor and sold to him, the decision on this fact would act as an issue estoppel. True the Supreme Court did lay down that where an issue of fact has been tried by competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would, constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused,

for a different offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the term of Section 403(2) of the Code. In that case the accused had been acquitted in respect of an offence of forgery. On the basis of a subsequent complaint he had been found guilty. In such circumstances it was urged that the prosecution case with regard to the act of forgery must fail and the argument was accepted by the learned Judges of the Supreme Court, and it was held that even though the prosecution of the appellants could be permitted under Sub-section (2) of Section 403, the question remained whether the earlier finding on the basis of the facts would constitute an estoppel to the reception of evidence to the contrary.

10. In my view, before the principle of issue estoppel can be applied, the question to be determined is whether in the subsequent case facts are alleged and sought to be proved by the prosecution which would be contrary to the finding given on the basis of those facts. It appears to me that it would be equally relevant to find out whether the point at issue between the parties, which was adjudicated upon was the same. If the claims made on the two occasions were different, the previous finding would not constitute a finding in respect of the new claims made out before the court trying the subsequent matter. Some of the ingredients of the principle of res judicata would be common to the principle of issue estoppel. Res judicata is itself estoppel by deed. The principle of issue estoppel is not very much different. As pointed out by the Supreme Court, issue estoppel relates to "the objection to the reception of evidence to prove an identical fact which has been the subjectmatter of an earlier finding between the same parties".

11. Keeping the principle aforesaid in mind, I turn to the judgment (Annex. 2). Firstly it must be noticed that the learned Assistant Sessions Judge, who decided the appeal, said that no plot number, khata number, etc. had been given in the petition of complaint and it was "difficult to ascertain as to exactly from what lands the accused persons are alleged to have harvested the crops". The learned Judge further observed that except for two witnesses none else had come to say that the crops alleged to have been harvested by the accused were grown on behalf of Ganefsh Rai. He, therefore, found as follows--

... .. In absence of any reliable evidence on the record, to prove that the crops were actually grown by the complainant on behalf of Ganesh Prasad Rai I think it will be highly improper to convict the accused persons for the offences for which they have been charged in this case.

Having given this finding, he turned to the documentary evidence adduced by the prosecution as also to the documents produced by the accused and ultimately held that in view of the documents "Hari Prasad did not come in possession of all the lands auction-purchased by him and could not have conveyed any title and possession to Ramchandra Rai and Ganesh Rai over all of them". This is a finding which, Counsel has urged, should operate as issue

estoppel. The argument cannot prevail. It is obvious that the finding is not with respect to any particular plot of land. It is equally obvious that the finding is limited one inasmuch as it says that Hari Prasad did not come in possession of all the, lands auction-purchased. Thus it cannot be said that this finding should operate as estoppel to reception of evidence to show that the plots which have been specifically mentioned in the present criminal case as plot Nos. 4182, 4184, 4185 and 4187 where the crops had been grown which are alleged to have been harvested and taken away by the petitioners were also involved in that case. The finding, therefore, does not either show that these four plots had not been in possession of the complainant of the present case or that the entire land auction-purchased had not come into his possession. It seems to me that the learned Assistant Sessions Judge committed an error of record in reading the judgment of the title suit where the delivery of possession to Hari Prasad was found to be illegal and ineffective. This error is apparent from reading of the judgment of the High Court. The learned Assistant Sessions Judge says in Annex. 2 that the case of the usufructuary mortgagees was that they were "still in possession of the lands" and their suit was decreed and the judgment was upheld by the High Court. It, however, appears from the judgment of the High Court in appeal (Annex. 1) that the suit was for possession on the allegation that the rehandars themselves had been dispossessed as a result of the delivery of possession effected to Hari Prasad in the execution proceeding. When on their own case Hari Prasad had dispossessed them and they filed a suit for recovery of possession, the learned Assistant Sessions Judge was obviously in error in thinking that the suit was merely for declaration and confirmation of possession and that Hari Prasad never came in possession. In any case, the claim of accused in that case was that they (accused persons) had taken the land on sikmi from the mortgagees and were growing crops therein. There is no finding given by the learned Assistant Sessions Judge that the accused persons were held to be the sikmidars. The learned Assistant Sessions Judge ultimately held as follows :

Taking into consideration these documents and circumstances, along with the fact that the description of the lands has not been given in the complaint or by the complainant in the dock, and also the fact that there is no reliable evidence on the record to show that the crops which are alleged to have been harvested and taken away by the accused persons were actually grown by the complainant on behalf of Ganesh Rai, I think it is very doubtful whether the lands in question were in possession of Ganesh Rai on the date of the alleged occurrence, and whether the crops alleged to have been cut and taken away by the accused persons were grown on his behalf and it will be highly improper to convict the accused persons for the offences Under Sections 144 and 379, I. P. C. for which they have been charged and convicted.

It is thus apparent that there is no positive finding either that the accused persons were in possession or that the complainant of that case was not in possession of any portion of the land auction purchased by him. There is thus no question of application of the principle of issue estoppel.

12. Further, it is well settled that the plea of res judicata or estoppel has to be raised and pleaded. It was never pleaded in the instant case at any stage. There was no prayer at any stage before any of the courts for reception of additional evidence u/s 428, Cr. P. C. Further what is more important to note is that it is not the case of the defence in the present case, that they are in possession of the lands in question--whether as sikmidars or otherwise. The aforesaid case has not been pleaded even in the examination of the accused u/s 342 of the Code nor has it been suggested to the witnesses in their cross-examination. The specific case that the complainant was not in possession and that the usufructuary mortgagees were still in possession of the land on the date of the occurrence in the present case through the petitioners as his sikmidars has not been suggested to any of the witnesses nor stated in the statement u/s 342 of the Code. The submission made by the Counsel for the petitioners that in their statements u/s 342 of the Code the petitioners told the court that they would produce the documents to show their possession is also an incorrect statement of fact inasmuch as I find after going through statements of all the four petitioners that only one petitioner, namely, Naresh Nonia stated, in answer to the question as what he had to state in defence, had said that "in his defence he would produce paper". No specific paper was named. No paper was subsequently produced. None of the courts below was given any notice of the fact that there were papers to support the defence case. No witness was examined by the defence at all. In other words, none of the usufructuary mortgagee was examined to support the defence case that they were the sikmidars, a defence made "in the other case. It may be repeated that in the present case the petitioners never made out a case that they were the sikmidars either in their statement u/s 342 or in the suggestion made to the witnesses in their cross examination. Further I may mention that there is nothing "to show that any paper to indicate that the decree passed in the title suit and upheld by the High Court had been executed "was produced before the Assistant Sessions Judge in the other criminal case. Thus, there was merely a decree in favour of the mortgagees who admitted to have been dispossessed and nothing to show that possession had been redelivered to them, a point which I have noted earlier. It must also be mentioned that the last occurrence was in the year 1961 and the present occurrence relates to 1965. One does not know what changes took place, if any, during the period aforesaid in respect of possession over the lands. In a criminal case of theft of crops, it is well settled, the real question is as to who had grown the crops in question and the question as to who is entitled to possession is subsidiary. At best, it would appear from the documents, assuming all that has been said in favour of the petitioners to be true, that they were entitled to possession, but in the absence of anything to show that they had grown the crops and in view of the positive finding that the prosecution had grown the crops in question, the argument of issue estoppel is of no avail.

13. No other point has been raised and the one raised having failed, this application must be dismissed.

14. On the question of sentence, it appears that the sentences passed against some of these petitioners appear to be excessive. In respect of Section 379 all of them have been awarded thirteen months" rigorous imprisonment. I would reduce that to a period of six months" rigorous imprisonment. In regard to petitioners 1 and 2 u/s 144, I. P. C. the sentence of seven months" rigorous imprisonment is reduced to three months" rigorous imprisonment each. The sentence awarded to petitioners 3 and 4 u/s 143 remains undisturbed. All these sentences will run concurrently.

15. With the above modification in the sentence, this application is dismissed.