
(1975) 05 OHC CK 0012
In the Orissa High Court
Case No : First Appeal No. 63 of 1968

Paramananda Mohanty and Others	Vs	APPELLANT
Bira Behera		RESPONDENT

Date of Decision : 05-05-1975

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146

Citation : AIR 1976 Ori 47

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : R.C. Patnaik, for the Appellant; S. Mohanty and K.N. Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.K. Ray, J.—The defendants who are residents of village Chhelia under Mudhupur Grama Panchayat were sued in their representative capacity for recovery of damages amounting to Rupees 7,000/-. The suit was decreed in part for recovery of Rs. 4,500/-, with proportionate costs. The defendants in their representative capacity, except the plaintiff, were made jointly and severally liable for the said amount. The present appeal is from that decision by the aforesaid defendants.

2. There is a tank on plot No. 96 of village Chhelia under the management and control of Madhupur Grama Panchayat. The fishery right in the said tank is leased out for a period of three years at a time by auction held by the Grama Panchayat, Defendant No. 1 was a lessee till 31-3-1962 and on expiry of his lease, a fresh lease was granted to the plaintiff for three years in an auction held on 5-4-1962 in which he was the highest bidder. The plaintiff's lease was to expire on 31-3-1965. The plaintiff de-posed the first year's premium and was granted a patta. But on an application of the out-going lessee, defendant No. 1, the Sarpanch of the Grama Panchayat allowed him time till 20-4-1962 to catch and carry away fish reared by him during the period of his lease. The plaintiffs

case is that he executed his kabuliyat on 14-4-1962 and released fish fries in the tank for the first time on 21-4-1962 and thereby acquired possession of it. Subsequent thereto the S. D. O., Sadar directed the Sarpanch of Madhupur Grama Panchayat to hold a fresh auction in respect of this fishery as the bid amount was low, but on objection from the plaintiff, the S. D. O. withdrew his order on 24-8-1962. On 8-6-1963, the defendants with a malicious intention of putting the plaintiff to loss filed an application before the S. D. O. alleging that the fishery right in the tank had been granted to the villagers of Chhelia in the name of the plaintiff who was in the position of a benamidar and the plaintiff was about to catch fish forcibly and appropriate the same to himself. This application was sent to the police officer of Barsahi for enquiry and report and, ultimately on 29-11-1963, a preliminary order u/s 145 Criminal Procedure Code was passed and the tank was attached. The final order in the proceeding u/s 145 Criminal P. C. was passed on 30-3-1965 declaring the possession of the plaintiff as lessee on the date of the preliminary order, It will be seen that on the day following this final order the plaintiff's lease expired by efflux of time. The villagers, including defendants 1 to 11 thereafter on 9-5-1965 forcibly caught and removed the fish from the disputed tank which would be 60 maunds in weight valued at Rs. 6,000/-. The plaintiff further alleges that there was still 10 maunds of fish left in the tank of which he has been illegally deprived. He has, therefore, filed the present suit for recovery of damages to the tune of Rs. 7,000/- the loss to which he has been put on account of the illegal action of the villagers in getting the tank attached and thereby depriving him of the fruits of his leasehold interest in the tank. This, in substance, is the plaintiff's case.

3. The case of the defendants is that, in the past, the villagers of Chhelia used to take lease of this tank in the name of one of the villagers and the income from this tank was being utilised for the benefit of the village school. The lease immediately previous to the plaintiff's lease in question had, according to the said practice, been taken in the name of defendant No. 1 and during the period of that lease the villagers had, in fact, reared fish in the tank. When the lease was granted to the plaintiff, the villagers had still some fish left in the tank which they had not caught. The lease which plaintiff obtained in his own name was for the benefit of the entire body of villagers. In fact, the school managing committee had approved his name to be the ostensible lessee. The bid amount in fact was deposited by defendant No. 1 from the village fund, though plaintiff was recorded as the highest bidder. On the instigation of Dullav Chandra Patra, the then Sarpanch of the Grama Panchayat, the plaintiff claimed the fishery lease as his own. After expiry of the period of lease of the plaintiff the villagers applied to the Grama Panchayat and, with its permission, caught fish amounting to about 3 maunds and they paid Rupees 62/- to the Grama Panchayat. Since the fish was caught in pursuance to the order of the Grama Panchayat, the suit was not maintainable u/s 139 of the Orissa Grama Panchayat Act. They have adopted a technical plea that due to non-service of notice u/s 139 of the Grama Panchayat Act on defendants 7 and 9, the plaintiff is bound to be non-suited.

4. The trial Court rendered the following findings: --

(a) The suit was not hit u/s 139 of the Grama Panchayat Act.

(b) The defendants were fully aware that the plaintiff had taken the lease in his personal capacity and, therefore, their action in making an application to the S. D. O. making false allegations that the lease was on behalf of the villagers and thereby causing a proceeding u/s 145 to be initiated and the tank attached in consequence whereof the plaintiff was deprived of the fruits of his leasehold interest, was malicious.

(c) The plaintiff had taken lease of the tank in his personal capacity, not as the representative of the villagers.

(d) Defendants 1, 7 and 9, the office bearers of the Grama Panchayat, were sued in their individual capacity and not as office bearers, and there was no necessity to serve any notice on defendants 7 and 9 u/s 139 Grama Panchayat Act,

(e) The villagers caught 60 maunds of fish and deducting 15 maunds towards expenses of catching, the damages were assessed at Rs. 4,500/- at the rate of Rs. 100/-per maund of fish.

(f) The defendants in their representative capacity, excepting the plaintiff, are jointly and severally liable for the damage.

5. The controversy which is raised here, centres round the question as to the basis on which the plaintiff's claim for damages is founded. Mr. Mohanty for the plaintiff asserts that the claim for damages is based on what is known as "conversion". In other words, the action is based on an allegation that the defendants wilfully interfered, without lawful justification with fish and tank in a manner inconsistent with the plaintiff's rights whereby the latter was deprived of the use and possession of it. Mr. Patnaik for the defendants, on the other hand, contends that the foundation of the claim is the malicious action of the defendants in instituting the proceeding u/s 145 Criminal P. C. getting the tank wrongfully attached and thereby depriving the plaintiff of his right of enjoyment as a lessee during the period of lease which expired on 31-3-1965.

The difference in these two basic contentions is quite clear and distinct. In an action for damages based on conversion the plaintiff must prove that at the time the action was brought he had a right to immediate possession of the goods and that the defendant has wrongfully and without justification interfered in such a manner as to deny the plaintiffs right to the use and possession of goods. In an action of the other type the plaintiff must prove that the action of the defendants was malicious not only in instituting a proceeding u/s 145 but also in getting the tank attached in consequence whereof the plaintiff was ousted of his lease-hold interest and thereby suffered injury by being unable to cultivate fish in the tank and sell the same and the quantum of damages claimed must also be shown to have reasonable relation with what the plaintiff could have earned during the three years of his leasehold period by pisciculture. In such an action evidence of

the quantum of fish netted and carried away by the defendants two months after the plaintiff's lease expired by efflux of time can have no relevance with the claim of quantum of damages.

6. It is, therefore, first of all necessary to see what exactly is the plaintiff's case and on what footing he fought the litigation.

According to the plaint, the tank in question is under the management and control of Madhupur Grama Panchayat and is leased out periodically for pisciculture by public auction. The fishery lease was granted to the plaintiff on public auction for three years, i.e., for 1962-63, 1963-64 and 1964-65 on an annual fishery rent of Rs. 32/- and the said lease was to expire on 31-3-1965. The right conferred under the lease was to rear fish in the tank and catch fish therefrom with effect from 5th of April. 1962. The outgoing lessee had not carried away all his fish in the tank and had asked for extension of time from the Sarpanch for catching all existing fish before the plaintiff took possession of the tank and the Sarpanch granted time to the outgoing lessee to catch the remaining fish in the tank on or before 20-4-1962. The S. D. O. Sadar, first of all directed the Sarpanch on 16-6-1962 to hold a fresh auction of the fishery lease, but that order was subsequently cancelled on 24-8-1962 as the Sarpanch raised objection to a fresh auction. The plaintiff got possession of the tank on 21-4-1962 and remained in peaceful possession thereof up to Bhadrap 1962 and, during that period, he released a good number of fish fries of healthy type in the tank. Subsequent thereto, defendants 1 to 11 filed an application before the S. D. O. on 8-6-1963 making various allegations against the plaintiff stating that they apprehended breach of peace on account of the contemplated forcible action of the plaintiff. This petition was sent by the S. D. O., to the Officer-in-charge who submitted a report recommending initiation of a proceeding u/s 145, Criminal Procedure Code making the plaintiff as the second party and defendants 1 to 11 as the first party. The S. D. O., passed a preliminary order on 29-11-1963 and directed attachment of the tank until final termination of the proceeding u/s 145. The proceeding terminated on 30-3-1965 on which date the S. D. O., not only declared that the plaintiff was in possession of the tank on the date of the preliminary order but since the leasehold period was expiring on the day following the date of the order, he directed that the Grama Panchayat was at liberty to lease out the tank again with effect from 1-4-1965. The plaintiff then states in para 6 of the plaint that being emboldened by the said illegal order of the S. D. O. the villagers including defendants 1 to 11 started forcibly catching fish between 9-5-1965 and 23-5-1965 and caught 60 maunds of fish valued at Rs. 6,000/- and carried them away. In para. 7 he proceeds to state:--

"7. That apart from the fishes caught the plaintiff believes that he has still about 10 maunds of fish in the tank to which he is entitled. Thus it would appear that due to mischievous act of the villagers of Chhelia and the Sarpanch of Madhapur Grama Panchayat and also due to the illegal order of the S. D. O. Sadar the defendant No. 12 the plaintiff has been put to a serious loss of Rs. 7 000.00

being the value of the fish of the tank to which the plaintiff was alone entitled.

Thus the plaintiff has been forced to file this suit against the villagers of Chhelia making the Sarpanrh Madhanur Grama Panchavat and Sri Govinda Chan-dra Mallik. S. D O., Sadar as party for realisation of Rs. 7,000.00 either jointly or severally with cost of the suit."

It is clear from Para. 7 of the plaint that damage of Rs. 7,000/- claimed is nothing but the price of 70 maunds of fish out of which 60 maunds were caught and carried away by the villagers leaving 10 maunds in the tank. Though the quantum of damages has been claimed on the basis of the market value of 70 maunds of fish in the tank which the plaintiff claims to be his, nevertheless, the cause of action seems to be deprivation of his right as a lessee during the leasehold period on account of the malicious institution of Section 145 proceeding as a result of which he was deprived of enjoyment of the tank by order of attachment of the Magistrate. This is clear from absence of any allegation in the plaint that the plaintiff continued in possession of the tank even after expiry of the term of the lease. The counsel for the plaintiff in the trial Court fought the case on this footing as would be apparent from the observation of the trial court extracted hereinbelow:

"..... On the other hand Sri S. C. Das Patnaik, the learned Advocate for the plaintiff has urged that the plaintiff has brought the suit for recovery of damages to which he has been put by a malicious action of the defendants. Had the defendants not started this proceeding u/s 145. Criminal Procedure Code maliciously he would have caught fish during these three years and benefited himself to the extent of Rs. 7,000/-. It is only because the defendants applied to the S, D. O. on purely false allegations that the lease was taken in the name of the plaintiff on behalf of the villagers the proceeding u/s 145, Criminal procedure Code was initiated which deprived the plaintiff of his possession of the tank causing him the loss aforesaid."

The court has further observed in para. 10 as follows:--

"..... As I have already set out the case of the plaintiff the whole suit is based for the malicious act done by the villagers of Chhelia in filing an application intentionally making some false allegations resulting in the starting of the proceeding u/s 145. Criminal Procedure Code and not for catching the fish from the tank. The learned Advocate for the plaintiff has submitted that this catching of fish has been alleged only for assessment of the damage caused to the plaintiff and not for any other purpose."

It is therefore, clear from the plaint allegations and the submissions made by the learned counsel for the plaintiff in the trial court that the foundation of the plaintiff's case is based on initiation of the proceeding u/s 145. Criminal Procedure Code with malicious intent and not on the basis of conversion. There is no allegation in the plaint nor any proof that the plaintiff continued in possession of the tank after the expiry of the term of the lease. There is also no evidence led

by the plaintiff that at the time of the present action he had a right to immediate possession of the goods. Since he had never been in possession of the tank during the period of his lease, the tank having been taken into custody of the court by order of attachment, there can be no application of doctrine of holding over so as to vest in him the right to immediate possession of the tank and its incidental right to catch fish therefrom even after the expiry of the lease period. The facts proved show that the villagers caught fish after taking the permission of the Grama Panchayat the real owner, about more than two months after expiry of the plaintiffs lease and this act per se without anything more, of which there is no iota of evidence cannot be said to be wrongful and without justification. Even if the plaintiff had any right to catch and carry away fish after expiry of his lease he had obviously sufficient time to catch the same after 31-3-1965 and before 9-5-1965 by taking permission from the Grama Panchayat. But he remained completely inactive. It cannot be said that the plaintiff can continue to have any right to catch fish at any time after expiry of his lease thereby preventing fresh auction of the fishery right. Such a right even if claimed, does not appear to me to be legally tenable. Therefore, even if it is held that the plaintiff made out a case of damage based on conversion, the suit could not have been decreed on account of the lacuna in evidence establishing the necessary elements indicated above.

7. Since the trial court has disposed of the suit on the footing that the plaintiff based his case for damages on the alleged malicious action of the defendants in initiating Section 145, Criminal Procedure Code proceeding, the correctness of that decision from that standpoint has to be determined in this appeal.

The petition u/s 145, Criminal Procedure Code which triggered off an action u/s 145, Criminal Procedure Code has been exhibited as Ext. 9/A. It has been alleged therein that as the villagers had not been able to catch all the fish reared by them during the lease period immediately preceding the plaintiff's lease and the matter had not been finally decided and as the plaintiff was forcibly trying to catch fish before any final decision in the matter was reached, they apprehended likelihood of breach of peace. It has not been stated therein that the plaintiff's lease was taken on behalf of the villagers. The findings of the trial court reached in paragraphs 7 and 8 are vitiated on account of an error of record which has been committed by the trial court in supposing that the defendants averred falsely in Ext, 9/A that the plaintiff had taken lease on behalf of the villagers when, in fact, there is no such allegation. In para. 7 the trial court has stated;--

"It is only because the defendants applied to the S. D. O. on purely false allegations that the lease was taken in the name of the plaintiff on behalf of the villagers the proceeding u/s 145, Criminal Procedure Code was initiated, which deprived the plaintiff of his possession of the tank causing him the loss aforesaid."

In para 8 he has again said:--

"So if the defendants knowing well that the plaintiff had taken the lease in his personal capacity made an application to the S. D. O., falsely alleging that the lease was taken on behalf of the villagers in the name of the plaintiff which has resulted in initiation of a proceeding u/s 145. Criminal Procedure Code and restrained the plaintiff from catching fish from the tank in exercise of such right and depriving of his lawful gain the defendants are certainly liable."

Therefore, the very basis of the decision of the trial court being wrong cannot be upheld.

8. Deprivation of the plaintiff of his possession of the tank under the lease was due to the order of attachment passed by the Magistrate. The basis for initiating proceeding u/s 145. Criminal Procedure Code is the satisfaction of the Magistrate regarding existence of apprehension of breach of peace. He did not take action on the petition itself, but waited till the police submitted report after enquiry on the basis of the application. He gets jurisdiction to attach under that section only in case of emergency. Existence of emergency is a fact which the Magistrate must determine initially on the basis of materials produced before him. There is nothing in the petition to indicate any emergency. It is Magistrate's own satisfaction, apparently reached after receipt of police report, that an emergency existed before he issued an order of attachment. Order of attachment cannot be made referable to any act of the defendants, who merely set the law in motion. The court of justice cannot be regarded as agent or servant of the litigant who sets the law in motion so as to make the litigant responsible for any error of law or fact which the court commits. Every party setting the law in motion acts on the presumption that the court will be guided by the limits of its jurisdiction and decide correctly all facts and law arising in the case. The decision of the Magistrate to attach, in exercise of his jurisdiction u/s 145. Criminal Procedure Code, ostensibly intervened between the petition filed and the attachment which was subsequently made. The defendants, therefore, cannot be held liable for the consequent loss to the plaintiff on account of order of attachment passed by the Magistrate.

In the case of *Durvijay Singh and Others Vs. Munni Narain and Others*, , the defendant reported that there was a danger of breach of peace and the Magistrate acting u/s 145 attached the lands in cultivating possession of the plaintiff. The result was that the plaintiff could not cultivate the land owing to the order of attachment. The proceedings u/s 145 ultimately terminated in favour of the plaintiff who brought a suit for damages for the loss sustained by him. In negating the plaintiff's claim for damages the court held:--

"The attachment therefore, was made after the Magistrate was satisfied that a dispute likely to cause a breach of the peace existed, and that he considered it to be a case of emergency in which it was proper for him to attach the plots in dispute. After the defendants had lodged a report alleging that there was a danger of a breach of the peace, it was open to the Magistrate to be satisfied or not to be satisfied as provided in Section 145. Criminal Procedure Code.

He had the jurisdiction to decide as to whether he would take action under that provision of law. His decision, therefore, intervened or came in as it were between the report made by the defendants and the attachment which was subsequently made and due to which the plaintiffs were unable to cultivate the plots."

In the case of Rani Mina Kumari Bebi v. Surendra Narain. (1910) 14 Cal WN 96, a proceeding u/s 145 was initiated and subsequently an order was passed u/s 146, Criminal Procedure Code in consequence whereof the plaintiff remained out of possession of the agricultural land and was unable to cultivate it during the period during which the dispute was pending. The plaintiff, then brought a suit for damages basing his cause of action on his ouster on account of the order passed u/s 146. In dismissing the suit, the court said:--

"..... It is well settled that no action will lie against any person for procuring an erroneous decision of a court of justice. This is even though the court has no jurisdiction in the matter and although its judgment or order is for that or any other reason invalid. A court of justice is not the agent or servant of the litigant who sets it in motion so as to make that litigant responsible for the errors of law or fact which the court commits. Every party is entitled to rely absolutely on the presumption that the court will observe the limits of its own jurisdiction and decide correctly on the facts and law. The substance of the matter is that the opinion and judgment of a judicial officer interpose between the complaint and the prohibitory order."

The Court, therefore, held that a suit to recover damages suffered by the plaintiff by reason of his land having been kept for a year under attachment under an erroneous order u/s 146 of the Criminal Procedure Code would not lie against the defendant upon whose complaint the enquiry leading up to the order was initiated.

In the case of Ammani Ammal v. Sellayi Ammal. ILR (1883) 6 Mad 426 a dispute having arisen regarding possession of certain land, an order was passed by a Magistrate prohibiting both the plaintiff and the defendants from interfering with the land until either party established his title in a civil Court. Consequently, the land remained uncultivated in the following year. The plaintiff sued for damages for the loss of profits resulting from non-cultivation of the land. There it was held that the damages were not the probable result of the defendants' act but were consequence of a judicial act of the Magistrate.

Applying the aforesaid principles to the present case where Section 145 proceeding was initiated on police report, though the law was set in motion by the defendants-villagers, the plaintiff's loss of possession of the tank must be attributed to the judicial act of the Magistrate acting within limits of his jurisdiction, and, as such, the defendants cannot be held liable for damages.

9. The case of Narayana Mudali and Another Vs. Peria Kalathi Mudali and Another, . relied upon by Mr. Mohanty cannot be of any assistance to him. That

was a case where a proceeding u/s 144, Criminal Procedure Code was initiated and the person affected by that order sued for malicious prosecution. The question there was whether initiation of a proceeding u/s 144 amounted to prosecution and whether that prosecution was malicious. That case, therefore, is not one which can be said to be an authority for the proposition that the party who being prohibited u/s 144 loses possession is entitled to sue the person who initiated Section 144 proceeding for damages based on account of such loss of possession.

10. In the result, therefore, for the foregoing reasons. I am of opinion that the plaintiff is not entitled to any damages having regard to the nature of his suit. The decision of the court below is, therefore, reversed and the suit is dismissed; but in the peculiar circumstances of the case the parties will bear their costs throughout.

Appeal allowed with costs.