

(1958) 09 OHC CK 0008

In the Orissa High Court

Case No : Criminal Revision No. 276 of 1957

Parmananda Mohanty and Others

APPELLANT

Vs

Baidyanath Naik and Others

RESPONDENT

Date of Decision : 08-09-1958

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 146(1), 146B(1)

Citation : (1958) 24 CLT 468

Hon'ble Judges : Narasimham, C.J

Bench : Single Bench

Advocate : S.K. Ray, for the Appellant; S.K. Ghose, D.C. Sahu and C.V. Murty, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, C.J.—This is a petition, in revision, passed an order dated the 21st August, 1957, passed by Sri A.S. Khan, First Class Magistrate, Cuttack, dropping a proceeding u/s 145 Code of Criminal Procedure.

2. On the 4th October 1956 the Sub-Divisional Magistrate Sadar drew up a proceeding u/s 145 Code of Criminal Procedure in respect of a tank in mouza Terjung, P.S. Balipatna, as there was apprehension of breach of peace. The first party who are the Petitioners in this revision petition claimed to be in exclusive possession of the tank by clearing weeds, rearing fish and catching the same, The second party claimed the tank on behalf of the general public and urged that the public were in possession of the tank for several years in the past. The acts of possession of the general public, according to the second party, consisted in annually repairing the same, clearing weeds, and keeping the water of the tank fit for public use throughout the year. They also alleged that the public used to enjoy fishery rights in the tank. It was further stated that when the residents of the village and of the neighbouring 20 or 30 villages there was no other common water reservoir and that the water in the tank Was being used by, the general public for various useful purposes. When the parties entered appearance and pot

forward their respective cases the learned Magistrate found himself unable to decide as to which party was in possession of the tank and he therefore drew up a statement of the Case and forwarded it to the First Munsif of Cuttack under the provisions of Sub-section (1) of Section 146 Code of Criminal Procedure as recently amended. The learned Munsif, after hearing the parties and perusing the documents produced by them gave the finding in the following terms:

Considering the evidence both oral and documentary led by both the parties, I am of opinion that the evidence of possession is evenly balanced on both sides and it is difficult to prefer one from the other. There is evidence worthy of name on behalf of the first party that they possess the tank and perform fishing operations therein. The evidence led by the second party is trustworthy so far as the question of possession by the members of the village public is concerned. In the circumstances, I hold that both the first party and the second party are in joint possession of the disputed tank. The reference by the learned Magistrate is, therefore, answered accordingly. Transmit the aforesaid finding with the record to the Magistrate, who made the reference.

On receipt of this report the learned Magistrate thought was in the same predicament as he was when he referred the Case to the Munsif. He then passed the following strange order on 21st August 1957:

Seen the orders of the Munsif on my reference dated the 12th February 1957. In view of the fact that the Munsif held joint possession, the proceeding is dropped. The attachment is released from today.

The order of the Magistrate dated the 21st August 1957 cannot be supported. Sub-section (1) B of Section 146 Code of Criminal Procedure says that on receipt of the Munsif's finding the Magistrate shall "proceed to dispose of the proceeding u/s 145 In conformity with the decision of the Civil Court". Dropping the proceeding would not be a proper order in conformity with the decision of the learned Munsif in this case.

3. Doubtless, I fully appreciate the difficulty of the learned magistrate. The munsif's finding, though clear on the question of joint possession of the tank by both parties is not clear on the question as to whether that possession would include fishery rights also. While referring to the possession of the first party he clearly says that there is evidence worth the name on behalf of that party that they possess the disputed tank and perform fishing operations therein. Here he distinctly refers to the performance of fishing operations in addition to possession of the tank. But so far as the second party's evidence of possession is concerned his finding is that it is trustworthy so far as possession by the members of the public generally is concerned. He does not expressly state whether he believed or disbelieved the evidence of the second party, as regards their performing fishing operations in the tank.

4. It is true that a person in possession of a tank may ordinarily be expected to be in possession of the fishery rights in the tank, also. But such a conclusion

does not necessarily follow. A tank may be in the possession of the general public for the purpose of bathing, taking drinking water, or using the water for various other purposes of the villagers; and yet, the fishery rights in it may be in the possession of some other person. The two are distinct. The first party had all along urged that they were in possession of the tank mainly for the purpose of rearing fish and catching the same. The second party also urged that the general public used to catch fish from the tank. But they further alleged, in paragraph 4 of their written statement that the tank is the only common reservoir for the residents of nearly 20 or 30 villages close-by and that the water of the tank is being used by the general public for various useful purposes. Thus the dispute between the parties on the question of possession was of two types namely;

(i) the right to the fishery in the tank and

(ii) the right to use the water for various other useful purposes, by the general public.

In this background of the dispute when the learned Munsif says expressly that the first party were in possession so far as fishery right were concerned and deliberately omits to mention about the fishery rights when giving a finding about the possession of the second party, it may be reasonably inferred that so far as fishery rights were concerned, his finding was that the first party was in exclusive possession. Doubtless, so far as other acts of possession over the tank are concerned his finding is that both parties were in joint possession. It is true that the witnesses of the second party had also led evidence to show that the villagers exercised fishery rights over the tank but the learned Munsif does not appear to have believed this part of the evidence.

5. The final order of the Magistrate should be in conformity with the finding of the learned Munsif. I would, therefore, while setting aside the order of the Magistrate dated the 21st August 1957, accept the finding of the Munsif as construed above and declare the first party to be in exclusive possession, of the fishery rights over the said tank and forbid disturbance of such possession by the second party or any other person until eviction in due course of law. I would further declare that in respect of the use of the water of the tank for other purposes both parties are in joint possession.

The revision is allowed.

Revision allowed.