

(1978) 08 PAT CK 0008
In the Patna High Court
Case No : Criminal Rev. No. 996 of 1976

Radha Sahani and Others	Vs	APPELLANT
Ramakant Jha and Others		RESPONDENT

Date of Decision : 04-08-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145, 2, 484

Citation : (1978) 26 BLJR 764

Hon'ble Judges : P.S. Sahay, J; Hari Lal Agrawal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hari Lal Agrawal, J.—This application in revision by the members of the first party arises out of a final order passed by a First Class Magistrate, Samastipur, in a proceeding u/s 145 of the Code of Criminal Procedure, declaring the possession of the members of the second party (opposite party) over the disputed land.

2. A proceeding u/s 144 of the Code of Criminal Procedure was started on 22-3-1974 by the Sub-Divisional Magistrate, Samastipur, on the basis of a police report on account of apprehension of breach of peace between the parties with regard to possession over certain land. In pursuance of the notice issued in the proceeding, both the parties appeared and filed their written statements. The learned Magistrate by his order dated 21st May, 1974, converted the proceeding into one u/s 145 of the Code on hearing both the parties which, as already stated above, has been decided against the petitioners by the impugned order,

3. From the facts stated above, it would appear that on 22-3-1974 when the proceeding u/s 144 of the Code of Criminal Procedure was started between the parties, the old Code of Criminal Procedure was in force. On 21st May, 1974, however, when the proceeding in question was ordered to be converted into a proceeding u/s 145 of the Code the new Code of Criminal Procedure had already come into force with effect from the 1st April, 1974 but the proceeding was

concluded under the old procedure. On the basis of this fact, Learned Counsel appearing for the petitioners raised the following points for our consideration:

(i) On account of the repeal of the old Code of Criminal Procedure by the new Code, the proceeding in question had automatically lapsed on 31st March, 1974 and, therefore, there was nothing in existence which could be converted on 21-5-1974.

(ii) Alternatively, it was argued that in case it is held that the old proceeding survived and might be deemed to be pending after the coming into force of the new Code of Criminal Procedure, then the order dated 21-5-1974, purporting to convert the said proceeding into a proceeding u/s 145 of the Code would amount, in the eye of law, of initiation of a fresh proceeding u/s 145, which should have been disposed of according to the procedure prescribed under the new Code, and inasmuch as it has been decided according to the procedure under the old Code, the order was vitiated and must be set aside.

4. The first point urged by the Learned Counsel appearing for the petitioners that on repeal of the old Code, the proceeding automatically came to an end, has got no merit and must fail. In spite of the repeal of the Code of Criminal Procedure, 1898, by Section 484 of the new Code, "any appeal, application, trial, inquiry or investigation pending immediately before the date of the coming into force of the new Code, are all saved and are to be disposed of, continued, held or made, as the case may be", in accordance with the provisions of the old Code as in force immediately before such commencement of the new Code as if this Code had not come into force. Learned Counsel however contended that the expression "inquiry" which is purported to be saved by the savings provisions contained in Section 484 of the new Code, could not embrace in its fold the proceeding u/s 145 of the Code, and for this purpose he invited our attention to the definition of the word "inquiry" u/s 2(g) of the new Code. The expression "Inquiry" has been defined under this section as meaning "every inquiry other than a trial, conducted under the Code by a Magistrate or Court. It is difficult to appreciate as to how this definition would at all support the contention of the learned Counsel. The marginal note to Sub-section (4) of Section 145 of the old Code is "Inquiry as to Possession" and the sub-section also reads that "The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry..."

5. From the above discussion, it is obvious that the nature of the proceeding u/s 145 of the old Code of Criminal Procedure was nothing else than an "inquiry". In support of this proposition, reference can also be made to a Full Bench decision of this Court in the case of Smt. Radha Devi v. Mani Pd. Singh and Anr. Criminal Revision No. 194 of 1976, decided on 10th April, 1978, to which I was one of the members and had the privilege of delivering the leading judgment. It was specifically observed in the said case that once a Magistrate makes an order as contemplated u/s 145(1) requiring the parties to put in their written statements

and documents, etc. and the copy of that order is served, the stage of inquiry begins and the matter pending before the Magistrate is the matter regarding inquiry as to possession. A proceeding u/s 145 of the old Code pending on the day when the new Code of Criminal Procedure came into force therefore must be deemed to be saved under the savings provision (section 484) of the new Code. Taking any other view would lead to absurd situation, and if it is held that all such proceedings would stand abated, then the proceedings which might have been pending for years and likely to be disposed on the very next day the new Code came into force, would lapse, leaving the parties in a predicament and the authorities responsible for maintaining the peace to start fresh proceedings for the same matter. Such a construction, apart from the fact that it is manifestly contrary to the savings provisions, would also be contrary to all canons of a harmonious and reasonable construction. I would, accordingly, reject the first contention and hold that on coming into force of the new Code, the enquiry pending did not lapse and survived under the savings provisions contained in Section 484 of the new Code.

6. The second contention raised on behalf of the petitioners, however, has got merit and must succeed. We have already seen that a proceeding u/s 144 of the Code of Criminal Procedure between the parties had been started on 22-3-1974 by the Sub-Divisional Magistrate on the basis of a Police report, and when both the parties appeared and had filed their show cause, on hearing them, the said proceeding was converted into a proceeding u/s 145 of the Code by order dated 21st May, 1974, passed by the learned Magistrate. This order will certainly be deemed to be an order starting a fresh proceeding u/s 145 of the Code, and inasmuch as on that day (21-5-1974), the old Code had already been repealed and the new Code had come into force, the proceeding in question was obviously a proceeding started under the provisions of the new Code. There is no specific provision either in the present Code of Criminal Procedure, nor was there any such in the old Code for converting a proceeding u/s 144 into one u/s 145 of the Code, and for all practical purposes, the purported conversion of the proceeding amounts to drawing up a fresh proceeding. This view is directly supported by a recent Bench decision of this Court in the case of *Mossomat Simla Devi and Anr. v. Sobhnath Mahnarik an Ors.* 1975 Bihar Bar Council Journal 246, as well as another Bench decision of this Court in the case of *Lakshmi Narain Singh and Ors. v. Jugeshwar Jha and Ors* AIR 1954 Pat. 169, where it was observed that the period of two months must be calculated from the date of the order passed u/s 145(1) of the Code, and not from any other date. The argument that two months should be counted when the order u/s 144 of the Code had been passed, because that order was a fore-runner of the proceeding u/s 145 of the Code, was rejected.

7 We have seen that a Magistrate was to conclude the inquiry under the old Code on the basis of affidavits and documents put in by the respective parties, but under the new Code, the Magistrate besides perusing the statement so put in is also to "receive all such evidence as may be produced by them". Under the new

provision, there is no requirement for filing documents or affidavits. It requires the receiving of evidence at the hearing, the evidence being such as may be produced. In other words, by the amending provision, the earlier provision of law contained in law contained in Sub-section (4) of Section 145 prior to the 1955 amendment, has been restored, and provision has been made to hear the parties and receive All such evidence as may be produced by them. It cannot be disputed that the amendment brought in by the 1955 amendment did not work well and, therefore, the Law Commission recommended for restoration of the old procedure which was accepted under the new Code. It cannot be gainsaid that the procedure Which has to be followed now is more exhaustive and definite. Simply because the parties participated in the proceeding and did not object to the following of the new procedure, in my view, would not stand in their way to challenge the decision,

8. Reference in support of the above view can be made also to two decisions of a learned single Judge of this Court in the cases of Manik Chand v. Bhupneshwar Pd. 1961 B.L.J.R. 217 and Sharda Pd. Singh and Anr. v. Satya Narain Singh and Ors 1961 B.L.J.R. 297. Both these cases were u/s 147 of the old Code, and as in the case before us, the parties had been directed to file affidavits and documents, but had not examined any witness which they were required to do, namely, "to receive all such evidence as may be produced by the parties, similarly as the position now stands u/s 145(4) of the new Code. In both the above cases, the parties had not taken any objection to the procedure adopted by the learned Magistrate, who were misled by the order of the Magistrate. It was held that on the failure to follow the prescribed procedure, the Magistrate shut out the evidence which the parties were otherwise entitled to produce, and in this view of the matter, the judgment of the Magistrate was set aside.

9. I would, accordingly, allow this application, set aside the order in question and remand the case back to the learned Magistrate or his successor-in-office, as the case may be, for a fresh decision in accordance with law.