

(1984) 11 OHC CK 0002
In the Orissa High Court
Case No : Criminal Appeal No. 57 of 1981

Raghunath Padhi

APPELLANT

Vs

Ratnakar Pati and Others

RESPONDENT

Date of Decision : 15-11-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378, 378(4), 456(1), 456(2)

Citation : (1984) 58 CLT 606 : (1984) 2 OLR 1093

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : P. Kar and M.N. Das, for the Appellant; P.K. Dhal and D. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Mohapatra, J.—The appellant filed a complaint petition in the Court of the Judicial Magistrate, Bhadrak, against the respondents and alleged therein that his father had enclosed a piece of Bari land measuring Ac. 0.06 decimals in plot No. 219 appertaining to Khata No. 29 of mouja Agiria by a green fence and was in possession thereof by raising crops and vegetables since a long time, On 19. 11. 1978, the respondents out of previous enmity cut down and destroyed the green fence of the Bari land on the eastern side upto the length of 50 cubits and installed a new fence five cubits away from the original fence encroaching upon a large chunk out of the Bari land. They also committed theft of about 7 Kgs. of brinjals and two bunches of bananas from the encroached land. It was stated, that the respondents were trespassers having no manner of right on the encroached Bari land and so they committed offences under Sections 447 and 379 of the Indian Penal Code (referred to as "I. P. C).

2. The learned Judicial Magistrate framed charges against the respondents u/s 379/34 and 447/34, I. P. C. The respondents pleaded innocence, but after trial the learned Judicial Magistrate found respondents Nos. 3 and 4 guilty under Sections 447 and 379 and further found respondents Nos. 1 and 2 guilty u/s

447/34, I. P. C. He acquitted respondents Nos. 1 and 2 of the charge u/s 379/34, I. P. C. He, however, did not pass any order of sentence, but released the respondents u/s 3 of the Probation of Offenders Act after due admonition.

3. The appellant felt aggrieved, because, respondents Nos. 1 and 2 were acquitted of the charge u/s 379/34, I. P. C, all the respondents were released u/s 3 of the Probation of Offenders Act instead of being sentenced and the learned Judicial Magistrate did not pass an order u/s 456 of the Code of Criminal Procedure (referred to as the "Code") by delivering possession of the Bari land trespassed upon by the respondents to him.

4. The learned Advocate appearing for the appellant did not seriously press the appeal so far as it relates to the acquittal of respondents Nos. 1. and 2 of the charge u/s 379/34, I. P. C, in view of the statement made by the appellant (P W. 1) in cross-examination to the effect that respondent No. 3 committed theft of brinjals and respondent No. 4 committed theft of two bunches of bananas. He did not specifically implicate respondents Nos. 1 and 2 with the commission of theft. Therefore, the trial Court took the correct view in holding that the charge of theft was not brought home to respondents Nos. 1 and 2. This apart, by a series of decisions law has been well settled that a judgment of acquittal should not be interfered with unless the assessment of evidence and the conclusion drawn by the trial Court are unreasonable, erroneous and perverse. Reversal of a judgment of acquittal will not be justified merely on the ground that the appellate Court's view on the evidence on record is different from that of the trial Court or on the same set of evidence two views are reasonably possible [See 54 (1982) C. L. T. 83State of Orissa v. Trinath Das and Ors.1933 CLR 9Charupraya Dei v. Durjyodhan Mohanty and Ors. 55 (1983) CLT . 553State of Orissa v. Arjuna Das and Smt. Dhara Dei Vs. Prafulla Swain and Others, . In the present case, as already referred to above, the views expressed by the learned Judicial Magistrate in acquitting respondents Nos. 1 and 2 of the charge u/s 379/34, I. P. C, was not unreasonable, unjustified or perverse in the context of the evidence of the appellant (P. W. 1) himself and so it would be impermissible and improper according to law to interfere with such order of acquittal.

5. The learned Judicial Magistrate assigned reasons in the last paragraph of his judgment as to why, instead of sentencing the respondents, he applied the provisions of Section 3 of the Probation of Offenders Act. According to him, boundary disputes such as in this case are regular features in rural areas. In order to bring amity between the parties, he thought it proper not to impose any sentence because, had he done so the feelings between the parties, instead of being softened, would have run high and bitter. The reasons assigned seem to be proper in view of the petty nature of the case and the spirit underlying the provisions of the Probation of Offenders Act. Since the learned Magistrate exercised his discretion in an appropriate manner, interference in this respect in any manner is unwarranted.

6. The next aspect of the case is whether in the absence of any finding by the

trial Court to the effect that the offence of trespass was attended by criminal force or show of criminal force or by criminal intimidation and by such force or show of force or intimidation the appellant was dispossessed, Section 456(1) of the Code would be applicable. A bare look of the section will make it clear that it contemplates three conditions which must be satisfied before a Magistrate can pass an order of restoration of possession under Sub-section (1) of Section 456 of the Code. These conditions are-(a) the accused person is convicted of an offence attended by criminal force or show of criminal force or by criminal intimidation, (b) it appears to the Court that by such force or show of force or intimidation any person has been dispossessed of any immovable property and (c) the order made by the Court within one month after the date of conviction. Unless these three conditions are satisfied, no order can be passed u/s 456(1) of the Code for restoration of possession of immovable property to a person who has been dispossessed. On consideration of the judgment passed by the trial Court it appears that there is absolutely no finding recorded by him that the offence was attended by criminal force or show of such force or by criminal intimidation. The evidence given by the prosecution witnesses also does not indicate that the offence was attended by criminal force or show of such force or by criminal intimidation. Thus it appears to be a simple case of trespass and theft. In the absence of any proof or finding that the offence was attended by criminal force or show of such force or by criminal intimidation the provisions of Section 456(1) of the Code are inapplicable. There is a large number of authorities taking a consistent view to the aforesaid effect, such as 1917 CriLJ. 898 (Kaon and Anr. v. Emperor). 1927 CriLJ 320 (Shera v. Emperor) 1927 CriLJ. 819 (Teja Singh v. Emperor) 1927 CriLJ 964 (Mangliram alias Manga v. Emperor) 1935 CriLJ 1161 (Suba v. Ali Gauhar), AIR 1940 Lah 84 (Bhani and Ors. v. Narain Singh) Jamuna Das Vs. Emperor, 4 Gordhan Das Vs. State and Others, and (XIX) 1978 G.L.R. 175 (Yashinkhan Ahmedkhan and Ors. v. Hushanbhai Rajabhai and Ors.).

7. The last aspect of the case is whether the High Court in exercise of powers u/s 378 in an appeal against acquittal is competent to restore possession under Sub-section (1) in exercise of powers under Sub-section (2) of Section 456 of the Code. Sub-section (2) of Section 456 reads as follows:

"(2) Where the Court trying the offence has not made an order under Sub-section (1), the Court of Appeal, confirmation or revision may, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be."

Mr. P. K. Dhal, learned counsel appearing for the respondents urged that reference to "the Court of Appeal" must necessarily mean the Court to which an appeal against conviction ordinarily lies. In this particular case if the respondents had preferred an appeal to the Court of Session against the order of conviction, the Court of Session, in exercise of its power of appeal, could restore possession to the appellant under Sub-section (1) of Section 456 of the Code upon proof of

the essential requirements. As no appeal was preferred by the respondents against the order of conviction, the High Court cannot assume jurisdiction under Sub-section(2) to order delivery of possession under Sub-section (1) of Section 456 of the Code. Mr. M. N. Das, learned counsel appearing for the appellant, on the other hand, urged that the High Court is the Court of Appeal for the purpose of Section 378 of the Code and in the facts and circumstances of the case is competent to order delivery of possession to the appellant. Before embarking upon a decision on this aspect, it is necessary to point out that Section 456 of the Code corresponds to Section 522 of the Code of Criminal Procedure, 1898 (old Code) with some changes. The changes were considered proper in view of the 41st report of the Law Commission in para. 43.24 to the following effect:

"43.24. Sub-Section (3) of Section 522 provides that an order under Sub section(1) may be made by any Court of Appeal, confirmation, reference or revision. This is to meet cases where the trial Court; has failed to make an order under Sub-section (1) and it appears to the Court of Appeal or Revision that such an order ought to be made in the interests of justice. There is a conflict of decisions as to whether the period of one month from the date of the conviction which is mentioned in Sub-section (1) also applies to the Court of Appeal or Revision. This conflict would be set at rest by a slight re-wording of Sub-section (3) indicating that the Court of Appeal, confirmation, reference or revision may make such an order while disposing of the appeal, reference or revision, as the case may be."

The report of the Law Commission shows that "the Court of Appeal was not necessarily meant to be the Court to which ordinarily appeals against conviction and sentence lay. A narrow meaning was neither meant nor given. It was intended that the expression "the Court of Appeal" should receive a natural interpretation. In the context of the report of the Law Commission "the Court of Appeal will mean the Court to which a party can approach according to the specific provisions contained in Chapter XXIX of the Code. Such Court will function as the Court of Appeal for the purpose of passing an order of delivery of possession under Sub-section (1) of Section 456 of the Code. In this connection, it is relevant to quote Sub-section (4) of Section 378 of the Code.

"(4) If such an order of acquittal is passed In any case Instituted upon complaint and the High Court, art an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court."

Thus if there is an acquittal and the complainant after obtaining leave prefers an appeal to the High Court under Sub-section (4) of Section 378 of the Code, the High Court becomes "the Court of Appeal" within the meaning of Sub-section (2) of Section 456 of the Code. It is, therefore, amply clear, that according to plain and natural construction the expression "the Court of Appeal" occurring in Sub-section (2) of Section 456 will mean the Court to which an appeal will ordinarily lie against an order of conviction and sentence and an order of acquittal

according to provisions of Chapter XXIX of the Code. Unless such an interpretation is made by giving a natural meaning to the expression "the Court of Appeal" used in Sub-section (2) of Section 456 of the Code injustice is" bound to follow. To illustrate, if an offence u/s 447, I. P. C., attended by criminal force or show of force or by criminal intimidation is committed and the Judicial Magistrate illegally acquits the accused, the complainant will get no relief according to Sub-section (1) of Section 456 although in an appeal against the order of acquittal under Sub-section (4) of Section 378, the High Court convicts the accused, unless it acts as "the Court of Appeal" for the purpose of Sub-section (2) of Section 456 of the Code to order delivery of possession to the complainant. In other words, unless the High Court acts as "the Court of Appeal" against an order of acquittal so as to order delivery of possession under Sub-section (1) of Section 456 in appropriate cases, injustice is bound to occur. Such a situation can never be contemplated in criminal jurisprudence. My attention was drawn to a decision reported in *Abdul Mannan and Others Vs. Taiyab Ali*, , in which it was held by a learned single Judge that the occasion for the exercise of the power conferred upon the Court of Appeal, confirmation, reference or revision by Section 522(3) arises only when an appeal or reference or revision against the order of conviction is pending before that Court. In another decision reported in *A. I. R. 1950 Mad 655Snbramania Chetty and Anr. v. Ganesan Pilai*, it was held by a Division Bench that the expression "Court of Appeal, Revision etc." in Section 522 mean the Court before which an appeal or revision etc., from the conviction is actually pending and does not mean a Court to which an appeal or revision lies. The order u/s 522(3) can, therefore, be made only when the main conviction is taken before the Court of Appeal and not otherwise. In neither of these two decisions there was any discussion regarding the power of the High Court acting as the Court of Appeal u/s 378 of the Code. The decisions of the Calcutta and the Madras High Courts, (supra) can, therefore, be distinguished. On the other hand, there is a recent decision of the Supreme Court reported in 1979 S. C. C. 530H. *P. Gupta v. Manohar Lai and Ors.*, in which Their Lordships of the Supreme Court did not make any distinction while making reference to the Court of Appeal under Sic. 453(2) and held that the appellate or revisional Court acting under Sec 456(2) will have jurisdiction or power to pass an orier for restoration of possession at any time. There is no limitation of the power to the effect that such an order must be incorporated in the body of the judgment disposing of the appeal, reference or revision; but it has to be exercised with discretion within reasonable time of disposal of the appeal, reference or revision. Thus the power of the appellate Court was given a wide amplitude. Therefore, leading Sub-section (2) of Section 456 together with the provisions of Section 378 of the Code in the light of the Supreme Court decision {supra) and giving a plain constitution to the expression "the Court of Appeal", I am inclined to agree with the view expressed by Mr. M. N. Das that a narrow interpretation of the expression "the Court of Appeal" should be avoided so as to eschew injustice and serve the cause of justice and bring the High Court within the sweep of Sub-section (2) of Section 456 to act as a Court of Appeal against an order of

acquittal in order to clothe it with jurisdiction to direct delivery of possession in just and suitable cases. The above finding, however, is academic because, so far as this case is concerned, the trial Court in the absence of proof has not recorded a finding to the effect that the offence was attended by criminal force or show of force or by criminal intimidation. Further, the appeal is not against an order of acquittal of an offence u/s 447, but against an order of acquittal u/s 379/34, I. P. C., which offence does not contemplate dispossession from immovable property. The order, acquittal is also not proposed to be interfered with as found earlier. Therefore, no order for delivery of possession under Sub-section (1) of Section 456 can be passed by this Court exercising powers under Sub-section (4) of Section 378 of the Code.

8. For the foregoing reasons it is not possible to give any relief to the appellant and accordingly the appeal is dismissed.