
(1966) 07 PAT CK 0001
In the Patna High Court
Case No : Criminal Rev. No. 278 of 1964

Rajendra Prasad Singh

APPELLANT

Vs

Dr. A.K. Ghosh and Another

RESPONDENT

Date of Decision : 01-07-1966

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145

Citation : (1966) 07 PAT CK 0001

Hon'ble Judges : S.P. Singh, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : Lal Narain Sinha and L.M. Sharma, for the Appellant; Nageshwar Prasad, Sailesh Chandra Sinha and S.S. Verma, for the Respondent

Final Decision : Dismissed

Judgement

N.L. Untwalia, J.—In Mohalla Amgola in the town of Muzaffarpur, there is a piece of land comprised in plot no. 3290; the total area of which is a little over 16 kathas. There are pucca and kutcha houses situated over this plot as also a well near the pucca house. The property in dispute in this proceeding u/s 145 of the Code of Criminal Procedure, hereinafter called "the Code", is a portion of this plot measuring about 5 kathas over a portion of which stands a pucca house and the well. On the 3rd of June, 1962, there was a report by the police to the Sub-divisional Magistrate about an apprehension of breach of peace concerning the disputed property. On this report a proceeding u/s 144 of the Code was started by the Sub-divisional Magistrate against Dr. A.K. Ghosh and Rajendra Prasad Singh. During the pendency of this proceeding, there was a supplementary report by the police alleging that Rajendra Prasad Singh had taken forcible possession of the disputed property on the 14th June, 1962. Eventually, the proceeding was converted on the 30th July, 1962, into one u/s 145 of the Code. The learned Magistrate, who decided the proceeding in the first instance on the 29th of November, 1962 declared Dr. A.K. Ghosh to be in possession of the disputed property and rejected the claim of Rajendra Prasad Singh as being the

party in possession. I ought to have stated that Dr. A.K. Ghosh was the first party in the proceeding and Rajendra Prasad Singh was the second party. The learned Additional Sessions Judge of Muzaffarpur in Criminal Reference No. 9 of 1963 recommended to this Court to set aside the order of the learned Magistrate dated the 29th November, 1962, on several grounds. The said Criminal Reference was decided and disposed of by S.N.P. Singh, J. on the 10th of September, 1963. It is not necessary for me to give the entire history of the dispute between the parties or every detail of their respective claims. Suffice it to say that according to the case of Dr. Ghosh 11/12 share in plot no. 3290 and the house standing thereon have been purchased by his wife, Shrimati Renu Ghosh, and she had come in possession of those properties since her purchase. So far as the property in dispute in this proceeding is concerned, the claim was that she had come in possession of the entire property. The case of Shri Rajendra Prasad Singh has been that he had purchased 1/3rd share in plot no. 3290 from its last owner and had come in possession over his purchased share which includes, according to him, the whole of the disputed property.

2. The Hon"ble Mr. Justice S.N.P. Singh, while disposing of the criminal reference, did not express his view on most of the grounds stated by the learned Additional Sessions Judge in his letter of reference for setting aside the order of the Magistrate. His Lordship rested his order of remand chiefly and mainly on the ground, to quote his words;

I accept the reference on the preliminary ground, namely, that the proceeding has been decided in absence of the necessary party, namely, Shrimati Renu Ghosh. I may state that, in the written statement which was filed by the first party, it was specifically prayed that the possession may be declared in favour of his wife, Shrimati Renu Ghosh. In spite of that, the learned Magistrate has declared the possession of the first party over the disputed land. In my opinion, it will be proper if the proceeding be reheard after making Shrimati Renu Ghosh a party to the proceeding. There is vagueness in the proceeding also. I, therefore, direct that the Magistrate who will hear this proceeding after remand will not leave any ambiguity with regard to the subject matter of the dispute.

The reference was, accordingly, accepted, the order of the learned Magistrate was set aside and the case was remanded for a fresh decision of the proceedings after making Shrimati Renu Ghosh a party to it and the parties were given opportunities to file fresh written statements and affidavits and other documents.

3. As directed by this Court, the proceeding has been decided afresh by another Magistrate on the 30th January, 1964 in presence of not only the original two parties but also Shrimati Renu Ghosh. This time again, the possession of the first party which now consists of not only Dr. Ghosh but also his wife, Mrs. Ghosh, has been declared.

The second party failed this time before the learned Sessions Judge of Muzaffarpur to induce him to make a reference to this Court and, by filing this

criminal revision, obtained a rule against the opposite parties to show cause why the order of the learned Magistrate dated the 30th January, 1964 should not be set aside.

4. In support of the rule, the learned Advocate-General, appearing for the petitioner, has urged only two points; (1) that in view of the second proviso to Sub-section (4) of Section 145, on the facts of this case, the learned Magistrate had no jurisdiction to declare the possession of the first party, as in effect and substance he has declared the possession of Shrimati Ghosh; and (2) that he has committed a vital error in as much as he has not considered four affidavits filed after remand on behalf of the petitioner and certain other documents as mentioned in his petition in the criminal revision.

5. In my opinion, there is no substance in the first point. On the facts stated, the petitioner dispossessed the first on the 14th of June, 1962. By saying "first party" I would here mean only Shrimati Ghosh. The preliminary order which is the relevant order within the meaning of the second proviso to Sub-section (4) of Section 145 of the Code must be held to have been made on the 30th July, 1962, when the proceeding u/s 144 of the Code was converted into one u/s 145 of the Code. The argument on behalf of the petitioner is that this preliminary order should be deemed to have been made, so far Shrimati Ghosh is concerned, on the 13th November, 1963, when she was added as a party to the proceeding in pursuance of the order of the High Court made in the criminal reference. That being so, Counsel submitted that the dispossession having taken place on the 14th June, 1962, much beyond the period of two months, the learned Magistrate had no jurisdiction to declare the possession of Shrimati Ghosh. In my opinion, apart from the language of the order of the High Court to which I shall allude by way of additional support to my decision, the language of the relevant provisions contained in Section 145 of the Code does not warrant the view that whenever a new party is added to a proceeding under that Section it must be held as a matter of law that the proceeding starts or the preliminary order envisaged under Sub-section (1) is made so far that party is concerned on the day on which the party is added, in other words, it would be tantamount to saying that a fresh preliminary order u/s (1) has got to be made whenever a new party is added, Sub-section (1) provides:

Whenever aSub-divisional Magistrate.....is satisfied from a police report.....that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof.....he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader.....and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.....

The Sub-divisional Magistrate is commanded by Sub-section (1) of Section 145 of the Code to start the proceedings and get jurisdiction to do so when he is satisfied that there is an apprehension of breach of peace concerning any

property of the kind enumerated therein. The duty cast upon him thereafter is that he shall make an order in writing the ground of his being so satisfied; and the third thing then what he is to do is to require the parties concerned in such dispute to attend his Court to support their respective claims. If by mistake or due to any inadvertence there is a mistake in the description of the property or the necessary parties concerned are not noticed to come and put forward their claims in the Court of the Magistrate, he undoubtedly can amend the property or by requiring the left out party to come and put forward its claim. This power will be exercised again within the four corners of Sub-section (1) of Section 145 of the Code, as there is no other provision of the Code empowering the Magistrate to correct his errors by amending the proceeding. There is nothing like an inherent power in him. But the question is whether in all cases of amendment of a proceeding, as a matter of law, a fresh preliminary order has got to be made or, even if it be not expressly made, will be it deemed to have been made on the date when the proceeding was amended either by correctly describing the property or by correctly describing the parties or even by adding new parties. I do not feel persuaded to accept the affirmative answer to the questions just posed above suggested in the argument made on behalf of the petitioner. In my opinion, in all cases of amendment of a proceeding it will not follow as a matter of law that a fresh preliminary order has got to be and must be made or must be deemed to have been made although not expressly made on the date when the proceedings are amended by addition of parties or the like. It may well be that in certain circumstances a fresh order is to be made and specially when new properties are added. But I am not called upon to take into consideration hypothetical questions which do not arise in the instant case. So far as the facts of the instant case are concerned, it is clear that only a fresh entry in the category of the first party was to be made. The properties had been purchased in the name of Shrimati Ghosh, and she was therefore, in possession of the properties, as claimed by her. But the dispute, when it arose, was understood by the police to be between Shri Rajendra Prasad Singh, the petitioner, and Dr. A.K. Ghosh, opposite party no. 1. To all intents and purposes, as a matter of fact, generally the persons selected for proceeding in such dispute on behalf of the female members are the male members of the family, especially the husband of the female concerned if he be available. In that view of the matter, the proceeding was drawn up showing Dr. Ghosh as the first party, but later on a technical ground it was urged on behalf of the petitioner that the proceedings were not valid in absence of the original claimant claiming possession over the disputed property, namely, Shrimati Ghosh. That being so, adding her as a party later on was not making the proceeding a new proceeding on the date of her addition as a party. The proceedings had been initiated, because there was an apprehension of breach of peace existing from before the 30th July, 1962, concerning the disputed property. The preliminary order of the Sub-divisional Magistrate that he was satisfied that there was an apprehension of breach of peace had already been made. The only lacuna or omission in the proceeding was that Shrimati Ghosh was not required by the Sub-divisional Officer, as she

ought to have been required, to come and put forward her claim before him. She was later on required to do so, but she was required to do so in respect of the same very property concerning which the apprehension of breach of peace existed on or before the 30th July, 1952. No further order was, therefore, necessary to be made in his case u/s 145 of the Code. It follows, therefore, that in the eye of law or by legal fiction it cannot be held that a fresh preliminary order must be deemed to have been made on the 13th of November, 1963 when Shrimati Ghosh was added as a party to the proceeding in so far as the proceedings concerned here.

6. On behalf of the petitioners it was argued on the basis of certain Calcutta decisions and an Assam decision, viz. the cases of (1) Brown V. Prithiraj Mandal (I.L.R. 25 Calcutta 425), (2) Dhondhai Singh Vs. Follet, and (3) Rup Chand Moran and Another Vs. Bhagalu Singh, , that a proceeding in absence of a necessarily concerned party is void and, therefore, the proceeding was void until the 13th of November, 1963 in absence of Shrimati Ghosh. It became valid only when she was added as a party. That being so, the submission was that a fresh preliminary order within the meaning of Sub-section (1) of Section 145 of the Code, it should be held, was made on that date in the eye of law. I do not intend to examine in detail the facts and the ratios of any of the three cases, referred to above, I shall assume in favour of the petitioner that in absence of Shrimati Ghosh, the proceeding was bad and also void, but the fact is as is admitted on behalf of the petitioner also, that proceeding did no longer remain bad or void on that ground when Shrimati Ghosh was added as a party to it on the 13th of November, 1963. The question is,--was the proceeding validated in the sense as suggested on behalf of the petitioner that it was starting of a fresh proceeding on that date, or, was it validated from the very beginning when the defect was cured and Shrimati Ghosh was added as a party to it? In my judgment, the defective proceeding or the bad or void proceeding when validated by the addition of Shrimati Ghosh on the 13th November, 1963 became valid on the theory of relation back from the very beginning and not from the date when she was added as a party.

7. Some help was endeavoured to be taken by some observations of K.C. Das Gupta, J. as he then was, in (4) Radhashyam Vs. Katyani Dasi and Others, in support of the argument put forward on behalf of the petitioner. There, the position was a converse one. The necessary party was there from before. A proforma party was added later. The argument put forward before the Calcutta High Court that the proceedings should be deemed to have been commenced by a fresh order when proforma party was added was rejected but his Lordship said during the course of the judgment referring to the proforma party whose name was Bansidhar.

If Bansidhar, who was added as party, was a party with an independent claim, if Bansidhar had himself claimed to be in possession, there might have been some force in Mr. Dutt's contention.

I do not think that a mere observation of the kind relied upon on behalf of the petitioner can be pressed into service to decide the point which has fallen for our decision in this case. As I have myself guardedly stated above, I do not propose to say that in all cases where a fresh and independent party is added, it is not necessary to draw up a fresh preliminary order, or by legal fiction it cannot be said that a fresh preliminary order should be deemed to have been drawn up on the date when a new and independent party is added to the proceeding; but on the facts of this case I have no doubt in my mind that no fresh order was necessary nor by legal fiction it can be said that a fresh order within the meaning of Sub-section (1) of Section 145 of the Code should be deemed to have been made when Shrimati Ghosh was added as a party.

8. I may with advantage take some help from the answer given by the Full Bench of the Calcutta High Court in (5) Krishna Kamini Vs. Abdul Jubbar to one of the questions posed before the Full Bench--a case cited on behalf of the opposite party. The answer to question no. 3 in the main judgment of Hill, J. is to be found at page 201 where it has been pointed out that even, if a fresh party is added after the commencement of the enquiry, it may be an irregularity, yet, in consequence, it would not be necessary to initiate a fresh proceeding. There is no question of any irregularity or illegality in this case by the addition of Shrimati Ghosh, because at the instance of the petitioner and under the direction of the High Court she was added as a party. That being so, I hold that it was not necessary in this case to initiate a fresh proceeding by making a fresh preliminary order under Sub-section (1) of Section 145 of the Code.

9. To lend additional support to my judgment, I am also inclined to accept the argument put forward on behalf of the opposite party that the High Court, while disposing of the criminal reference merely remanded the case and directed it to be freshly decided after adding Shrimati Ghosh as a party to it and after taking fresh affidavits and documents also. It did not say that a fresh proceeding was to be drawn up after adding Shrimati Ghosh as a party to it, or any fresh order within the meaning of Sub-section (1) of Section 145 of the Code had to be made. In that view of the matter also, I am not inclined to accept the argument put forward on behalf of the petitioner in this case in support of the first point.

10. The second contention of the petitioner seems to have some justification as it appears that some affidavits filed on behalf of the petitioner after the remand have not been specifically considered by the learned Magistrate and perhaps a few more documents also, as alleged by him, have also not been considered. But considering the judgment as a whole and the facts and circumstances of this case, I am not inclined to say that the order of the learned Magistrate is vitiated and to set it aside and to remand the case for the second time and for a third decision I think the petitioner, if so advised should go to the Civil Court now to establish his claim and so far as the criminal court is concerned, the proceedings should be allowed to have been finally disposed of. In the result, I dismiss the application.

S.P. Singh, J.

I agree.