

(1968) 12 PAT CK 0013

In the Patna High Court

Case No : Criminal Revision No. 590 of 1968

Ramkawal Upadhaya and Another

APPELLANT

Vs

Dudhanath Pandey and Others

RESPONDENT

Date of Decision : 20-12-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 367, 439
Evidence Act, 1872 — Section 13, 43

Citation : AIR 1969 Patna 317 : (1969) CriLJ 1197

Hon'ble Judges : B.D. Singh, J

Bench : Single Bench

Advocate : Ray Paras Nath and Rajeshwar Dayal, for the Appellant; Indu Shekhar Prasad Sinha, Fanish Singh and Sureshwar Prasad Singh, for the Respondent

Judgement

B.D. Singh, J.—This application in revision has been preferred by the two petitioners, who are sons of Yamuna Upadhaya, against the final order passed by the Magistrate u/s 145 of the Criminal Procedure Code (hereinafter referred to as "the Code). The petitioners were the first party, whereas the opposite party were the second party, in the said proceeding, which was initially started u/s 144 of the Code on 15-7-66 on the basis of a Police report dated 10-7-66, Later on, it was converted into a proceeding u/s 145 of the Code by order dated 9-8-66. The Magistrate also attached the disputed property u/s 145(4) of the Code.

2. The area under dispute in the said proceeding was 35.23 acres land in various plots situated in four villages, namely, Kurhnu, Kilni, Harkatha and Chakira, within police station Chand in the district of Shahabad details of which are given in the order of the Magistrate. It may be noted that in village Kilni the total land in dispute is 13.22 acres.

3. The facts which have given rise to this application may be briefly stated: The case of the petitioners was that the land in dispute belonged to Mossomat Bhago Kuer and Mossomat Dhanesra Kuer, the two widows of Kirtarath Pandey of village

Kurhnu, Police Station Chand, The disputed land included those inherited by the two widows from Kirtarath as also some lands which they acquired themselves. The aforesaid Kirtarath Pandey was a grandson of Gopal Pandey. It will be convenient here to give the genealogical table which is as follows:--

GOPAL PANDEY | _____
 _____ | | Udit Pandey Jhingan Pandey | | |
 _____ Jagropan Pandey | | | | Hardwar
 Dwarika Hazad Kritarath | | Dudhnath Pandey (Petitioners 1 & 2 1. Bhago
 (Opp. Party No. 1) are brothers of 2. Dhanesra | Mt. Dhanesra) (widows)
 _____ | | Parduman Prabhans Pandey Pandey
 (O.P.2) (O.P.8)

4. The further case of the petitioners was that the three sons of Udit Pandey, namely, Hardwar, Dwarika, and Hazari, died issueless and as such the entire property of the branch of Udit Pandey devolved on Kritarath, who also died issueless. Therefore, the properties ultimately devolved on the two widows aforesaid, Dudhnath, opposite party No. 1, is the grandson of Jhingan Pandey whereas the opposite party Nos. 2 and 3 are the sons of Dudhnath Pandey. Mossomat Bhago and Mossomat Dhanesra were not parties to the proceeding. The petitioners are the full brothers of Mossomat Dhanesra Kuer, the younger widow of Kritarath. The further case of the petitioners was that Kritarath Pandey died long ago and since after his death the petitioners were looking after the cultivation of both widows. On 1-11-1965 both the widows made a gift of the properties in dispute to the petitioners through two registered deeds of gift and thus the petitioners acquired title and possession over the disputed land and their names also were mutated in the revenue records. The petitioners were in sole possession over the disputed lands and the house in plot No. 148 in village Kurhnu in which the petitioners were residing with the two widows. The petitioners were also looking after the welfare of these two widows. The petitioners alleged that the opposite party, out of greed and lust, started making false claim over the said property.

5. On the other hand, the case of the opposite party was that they were in possession over the disputed land as Shikmidar, because Mossomat Bhago Kuer, acting as Karta of the family consisting of herself and Dhanesra, settled the disputed lands of village Kurhnu to opposite party No. 1 on batai basis through unregistered Hukumnama dated 5-5-1943. The further case of the opposite party was that Mossomat Bhago Kuer settled the disputed lands also of the other three villages namely, Eilni, Chakia and Harkatha, orally to opposite party No. 1 in 1945 on Shikmi batai basis with the conditions laid down in the unregistered Hukumnama of 1943. Their further case was that thus they were in possession of the disputed land till the date of attachment u/s 145(4) of the Code. They alleged that the petitioners did not acquire possession over the disputed land after the execution of the aforesaid two sale deeds which were ineffective. The Magistrate, however, considering the affidavits as well as other materials on the record, came to the conclusion that on the date of the commencement of the

proceedings members of the second party were in possession over the disputed land. Accordingly, he declared the possession in favour of the members of the second party. Hence this revision.

6. Learned Counsel appearing on behalf of the petitioners has raised the following points for consideration by this Court:--

(i) Although in the show cause itself the opposite party said that plot No. 361 of Khata No. 70 was not settled with the opposite party under the Sada Hukumnama and that is not the subject matter of dispute, still the court has made the order absolute with regard to that plot also.

(ii) Although regarding plot No. 148, Khata No. 71 in village Kurhnu where there is a residential house in which both the widows are living with the petitioners; and regarding plot No. 166 in the said village, the opposite party laid no claim in the show cause in the proceeding u/s 144 of the Code; yet the Magistrate has made the rule absolute in favour of the opposite party even with regard to the house in plot no, 148 and the land in plot No. 166, It is true that in the affidavits the opposite party later claimed plot No. 166, but they had not made claim regarding plot No. 148 at all.

(iii) The learned Magistrate failed to consider the prior deposition of Dudhnath. Opposite party No. 1, and that of his father Jagropan, recorded on 20-2-64 and 21-1-64 respectively, in which they stated that the widows had their separate cultivation through their own ploughmen.

(iv) The Magistrate also erred in not considering the mutation order regarding the disputed land, passed by the Anchal Adhikari under the Land Reforms Act in favour of the petitioners.

(v) The Magistrate has erred in relying on an unreported judgment of the High Court in Criminal Appeal No. 351 of 1964 in which the petitioners were not party, although the disputed lands are mentioned therein,

(vi) The settlement by Mossomat Bhago Kuer was in her individual capacity and could not have been in the capacity of Karta of the family.

7. It will be convenient to take up first point No. (vi) for consideration. Learned counsel appearing on behalf of the petitioners has contended that the Magistrate has erred in holding that Mossomat Bhago Kuer being the elder widow-could have settled the properties in the capacity of Karta of the family for herself as well as for the other widow Dhanesra Kuer. According to him, there is no such provision in law for the senior widow to act as a Karta of the family.

On the other hand, learned counsel appearing on behalf of the opposite party has contended that Mossamat Bhago Kuer being the senior widow, rent receipts and choukidari receipts had been issued in her name, and she was all along treated as head of the family. A woman can very well act as the manager of the family. According to him the position of the female manager is the same as that of a

male manager of the family. Of course, there are some limitations in the case of the female manager, e. g. in case of legal necessity, the action of Mossomat Bhago Kuer will bind the other members of the family including the co-widow Mossomat Dhaneshra Kuer, and in this connection he has referred to paragraph 198 of the Hindu Law by Mulla, 13th edition, which reads:--

"Widow's power of management and investment --

A widow or other limited heir is entitled to manage the estate inherited by her. Her power to manage the estate is similar to that of a manager of an infant estate as defined by the Privy Council in *Hannoman Persaud v. Mussamat Babooee* (1856) LR 6 IndAp 393. "A widow like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers, provided. . . she acts fairly to the expectant heirs". The Court will not interfere with her management, unless there is danger to the estate from the manner in which she is dealing with it" Learned counsel has contended that the manager of the family is called Karta and for that he has referred to paragraph 236 of the Hindu Law by Mullah, same edition, at page 269, where it is mentioned that the manager of a joint family is called Karta. He has also drawn my attention to a Bench decision of Orissa High Court in *Budhi Jena Vs. Dhobai Naik and Another*, where their Lordships in paragraph 8 at page 10, have observed that there is no inherent incompetency in an adult female member to be the karta of the joint Hindu family under particular circumstances.

Besides, in paragraph 5 of the show cause of the petitioners filed during the proceeding u/s 144 of the Code, it is stated that both widows got their names mutated in place of Kritarath and the ex-landlords used to issue rent receipts to them. In Paragraphs 5 and 8 of the show cause of the opposite party also in the said 144 proceeding, Bhago Kuer was described as the manager and it is also mentioned therein that she settled the land with the consent of Mosmt. Dhanesra. In the written statement of the Opposite party in 145 proceeding also, in paragraph 5, Bhago Kuer was described as manager of the joint family consisting of herself and Mossomat Dhane-sara. Besides, petitioner No. 1 in his affidavit in paragraphs 6 and 12, has used the terms "Manager" and "Karta" in respect of Bhago Kuer.

In my opinion, the above submissions made on behalf of the opposite party are well founded. The order of the Magistrate is not bad because he observed that Bhago Kuer acted as Karta on behalf of herself and the other widow Dhanesra Kuer. Thus, the contention made by learned counsel on behalf of the petitioners under this point cannot be accepted,

8. Now I turn to consider the contention made under point No. (v). Learned counsel appearing on behalf of the petitioners has contended under this point that the Magistrate has erred in relying upon the judgment of this Court in Criminal Appeal 351 of 1964 (Pat) and he has submitted that it is not admissible u/s 43 of the Indian Evidence Act (hereinafter referred to as "the Act"). He has

drawn my attention to the portion of the order where the Magistrate has mentioned that while discussing the evidence his Lordship of this Court came to the finding that plot nos. 791, 794 and 890 of village Kilni were in khas possession of Jagropan Pandey (father of opposite party No. 1). He has further mentioned that in the present proceeding only two plots, namely, 791 and 794 are under dispute. It was also argued before me on behalf of the petitioners that the finding of the High Court in that Criminal case could not be used as evidence of possession. To that the Magistrate has observed that this contention may be true but this fact cannot be ignored that the finding is of the highest court of justice of the State and cannot be brushed aside altogether. Learned counsel for the petitioners has raised objection to this observation of the learned Magistrate; whereas learned counsel appearing on behalf of the opposite party has contended that the Magistrate has used the judgment of the High Court as a piece of evidence of possession as quantum valebat and in this connection has referred to a decision of this Court in Abdul Shakur Vs. Abu Sayeed @ Abdul Mian, where Jwala Prasad, J. (as he then was) observed at page 594:--

"... If the Deputy Magistrate thought that finding of the Magistrate in the theft case was a pertinent finding as to possession, the best course for him was to make the enquiry as to possession upon the proceedings started by the Sub-Divisional Magistrate and to treat that decision as a piece of evidence of possession quantum valebat in the case"

He further submitted that the judgment of the High Court is also relevant u/s 13 of the Act. In this connection he has referred to the expression "or is relevant under some other provisions of this Act" occurring in Section 43 of the Act. He has submitted that even if the judgment may not be relevant u/s 43 of the Act, it may be relevant u/s 13 of the Act in order to establish the existence of the right of the opposite party over the disputed land.

In my opinion, the contentions of learned counsel for the opposite party are well grounded. The Magistrate in this case has not solely relied upon the judgment of the High Court in order to find possession of the opposite party on the disputed land, but he has mainly relied upon the affidavits of the parties for coming to the conclusion regarding possession. He has used the judgment only for the purpose indicated in Abdul Shakur Vs. Abu Sayeed @ Abdul Mian, . Thus, the contention of learned counsel for the petitioners, under this point also, has no substance.

9. Now I take up for consideration the point No. (iii). Learned counsel on behalf of the petitioners has contended, under this point, that the Magistrate has failed to consider that in the deposition of Jagropan in Sessions Trial No. 149 of 1963, dated 21-1-64, who deposed regarding Kilni village that Mushan Upadhya, petitioner No. 2, did not look after the affairs of the widow whose cultivation is done through her ploughmen. His house and that of Kritarath are separate. Similarly, the Magistrate has not considered the deposition of Dudhnath, opposite party No. 1, which he gave on the 20th February, 1964 regarding the same village. He also had deposed to the same effect that the widows and he along

with his father took separate possession of their lands and have been paying rent separately. His father had given his share of salami money for settlement of the land to Shitab Chand. On behalf of the widows, Mushan Upadhaya, petitioner No. 2, gave the shares of the widows. According to learned counsel, these were the admissions made by them in favour of the petitioners which ought to have been taken into account by the Magistrate. In my opinion, this is purely a question of appreciation of evidence which cannot be investigated into in revision by this Court. Besides, the object of Section 145 of the Code is to prevent breach of peace and for that end to provide a speedy remedy by bringing the parties before the Court and ascertaining which of them was in actual possession and to maintain a status quo, until their rights are determined by a competent court. So, the Magistrate has to examine the affidavits filed on behalf of the parties and he has to come to the conclusion as to which of the party was in actual possession at the time when the proceeding was started. Hence, in my opinion, there is no merit in this contention of learned counsel for the petitioners.

10. Now I take up his contention under point No. (iv). Learned counsel for the petitioners has urged that the Magistrate has erred in not considering the mutation order regarding the disputed land, which was passed by the Anchal Adhikari under the Land Reforms Act, in favour of the petitioners.

On the other hand, learned counsel for the opposite party has contended that the Magistrate can go behind the order passed in favour of the petitioners under the Land Reforms Act and in order to support his contention he has relied on a Bench decision of the Calcutta High Court in Kanai Lal and Others Vs. Hyder Ali Khan Pani, . He further relied upon the order of the Settlement Officer u/s 103 of the Bihar Tenancy Act. After hearing the parties the Settlement Officer came to the conclusion that the second party was in actual possession of the disputed land and ordered possession of Dudhnath Pandey to be recorded as Shikmidar. According to the learned Magistrate this order holds good even to-day and that is the latest order so far revisional survey operation is concerned. No doubt, a claim was made on behalf of the petitioners that they have filed an appeal before the Commissioner against the said order of the Settlement Officer, but since no paper was filed before the Magistrate to show that such an appeal was filed, the learned Magistrate held that the revisional survey authority also recognised the possession of the second party on the disputed land as shikmidar.

Learned counsel for the petitioners has urged that in similar situation the Magistrate has adopted double standard in the appreciation of evidence so far the evidence on behalf of opposite party is concerned. But it seems that no question of double standard arises, because the opposite party had filed certified copy of the order sheet of the mutation appeal, whereas the petitioners did not produce anything to show that their appeal was pending. Besides, all these amount to appreciation of evidence, to which I am not inclined to interfere in ray revision jurisdiction. Therefore, this contention of learned counsel for the petitioners also fails,

11. Now I take up for consideration the contention of learned counsel for the petitioners under point No. (i). He has urged that the opposite party in the show cause has stated that plot No. 361 of khata No. 70 was not settled with the opposite party under the said sada hukumnama and that was not subject matter of dispute, still the court has made the order absolute with regard to that order also.

On the other hand, learned counsel for the opposite party has contended that plot No. 361 is still in dispute. He has drawn my attention to the Police report on the basis of which 144-proceeding was initially drawn, and in the said report itself the Police has mentioned among others the plot No. 361, bearing an area of 13 decimals as the subject matter of dispute for which he recommended the proceeding. He has also referred to the two notices, which were issued to the parties in the proceedings under Sections 144 and 145 of the Code. In both the notices it appears that plot No. 369 was previously written, which was scored through, and instead the plot No. 361 is clearly mentioned. The relevant portion of paragraph 5 of the show cause filed on behalf of the opposite party in the proceeding u/s 144 of the Code reads as follows:--

"That Mosmt. Bhago Kuer with the consent of Mosint. Dhaneshra settled the disputed land of village Kurhnu along with other plot number 361 of khata No. 70 in village Kurhnu which is not in dispute on Batai basis with the second party Dudhnath Pandey. . . ."

Similarly, the relevant portion of paragraph 5 of the written statement filed by the opposite party in the proceeding u/s 145 of the Code, is to this effect:--

"That Mosmt. Bhago Kuer with the consent of Mosmt. Dhaneshara settled the disputed land of village Kurhnu along with other plot number 361 of Khata No. 70 in village Kurhnu which is not in dispute on Batai basis with the second party Dudhnath Pandey".

With reference to these paragraphs learned counsel for the opposite party contend ed that only by clerical mistake it was written that plot No. 361 is not in dispute. Besides, even under these paragraphs it is clearly mentioned that the disputed land of village Kurhnu along with other plot No. 361 of Khata No. 70 was settled with the second party on batai basis, Hence it was clear case of the opposite party that this plot No. 361 was also settled with the opposite party, and they were in possession; whereas the petitioners being the first party, were contending that they are in possession of the various plots including plot No. 361. Therefore, this plot No. 361 also is clearly under dispute. Further, he submitted that none of the affidavits filed on behalf of the opposite party indicated that plot No. 361 was not in dispute. In my opinion, the contention of learned counsel for the opposite party is well founded. From the records of the case it appears that the plot No. 361 was also in dispute in the two proceedings.

12. Now remains to be considered the last contention of learned counsel for the petitioners, namely, plot No. (ii). He has drawn my attention to paragraph 6 of

the affidavit filed by Muneshwar Dubey who has clearly stated in his affidavit in the said paragraph that all the disputed lands in village Kurhnu, except plot No. 148, the house in which Mossomat Bhago Kuer is residing, are in peaceful possession of the second party. As regards plot No. 166, in the same paragraph he has stated that it is in possession of the second party in which they tie their cattle. So far plot No. 148 is concerned, learned counsel appearing on behalf of the opposite party has fairly conceded that it was not the subject of dispute in the two proceedings. Learned counsel for the petitioners has, therefore, contended that since concession has been made on behalf of the opposite party regarding plot No. 148, the entire proceeding should be quashed. On the other hand, learned counsel for the opposite party has urged that the entire proceeding need not be quashed for a single error on the part of the Magistrate for holding that plot No. 148 is also under dispute. No doubt, it is an error of record but it is a minor one and for that the entire order in the proceeding need not be quashed. Besides, this plot is situated far off from the other plots and it is separable from the other plots under dispute. Further, it is clearly distinguishable from, the other plots, because, in plot No. 148 a house is constructed.

In my view, it will not be necessary to quash the entire proceeding on that ground. I modify the order of the Magistrate by holding that the lands including the house in plot No. 148 were not the subject matter of dispute in the two proceedings. Let the possession of the members of the second party be declared over the lands mentioned in the various plots in the order itself, excepting the plot No. 148.

13. In the result, the application is dismissed with the above modification in the order of the learned Magistrate.