
(1933) 11 PAT CK 0035
In the Patna High Court

Ramroop Mahton and Others

APPELLANT

Vs

Mano Mian and Others

RESPONDENT

Date of Decision : 10-11-1933

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145, 147

Citation : AIR 1934 Patna 86

Hon'ble Judges : Courtney-Terrell, C.J.;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—This is an application in revision by the first party in a proceeding u/s 147, Criminal P.C., in the Court of a Deputy Magistrate of the First Class at Monghyr. The first party are admittedly the owners of two revenue paying villages, Bishanpur Santokh and Amba Icharua. The second party claimed a jalkar right in certain sheets of water in those two villages. The case of the second party is that there is a fishery known as Jalkar Maniar which extends over a large number of villages including the two villages of the first party, that they have a right of fishing in these waters and they have been exercising such right and that the first party were now disputing the right of the second party to fish in those waters.

2. The Magistrate at first drew up a proceeding u/s 144, Criminal P.C., but subsequently that proceeding was converted into a proceeding u/s 147. This proceeding was drawn up on 31st January 1933, and the next day, the 1st February, the first party filed an application before the Magistrate objecting to the proceeding being drawn up u/s 147, their case being that the proceeding ought to have been u/s 145. They further referred in that application to certain entries in the finally published record of rights. The learned Magistrate held that the proper proceeding was one u/s 147 and he, refused to consider the record of rights on the ground that it was published more than 30 years ago.

3. After the proceedings were served upon the parties and they had filed their written statements and evidence had been gone into and after the close of the

arguments the learned Magistrate took in evidence three documents which were marked by him as Exs. M-6, M-7 and M-8, the final order made by him was in favour of the second party prohibiting the first party from interfering with the exercise of the right by the second party.

Against the order of the Magistrate the first party came up in revision to this Court and the revision case was heard in the first instance by Macpherson, J., who has referred it to a Division Bench in order that there may be an authoritative decision whether the proceeding should have been u/s 147 or u/s 145.

4. The first question therefore for consideration is which is the proper section under which the proceeding ought to have been drawn up. The next point for consideration is whether there has been any illegality in admitting the three documents Exs. M-6 to M-8 after the close of the case. The last point is whether the Magistrate was right in entirely excluding from consideration the finally published record of rights. As regards the first question the difference between a proceeding u/s 145 and one u/s 147 appears to be clear enough. Section 145 deals with disputes concerning any land or water or the boundaries thereof, and land or water have been defined in sub-s (2), Section 145, as including amongst other things fisheries. Section 147 also deals with disputes regarding land or water but limits the dispute to a right or alleged right of user of any land or water.

5. In a proceeding u/s 145 the Magistrate has without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute to decide whether any and which of the parties was at the date of the order initiating the proceeding in possession of the said subject. In a proceeding u/s 147 the Magistrate has to come to a finding whether the right claimed by the parties of user of any land or water does or does not exist, and after coming to a finding that such a right does exist, he has to find further whether any of the parties had been exercising that right within three months of the date of the proceeding, or where the right was exercisable only at particular seasons or on particular occasions, whether such right had been exercised during the last of such seasons or the last of such occasions before the institution of the proceedings.

6. It is clear therefore that the subject matter of a proceeding u/s 147 may also be fisheries to which one of the parties may have a right apart from any right to the land upon which the fishery stands. The subject matter of the proceeding u/s 145, if it relates to fisheries must relate to the particular local area where the fishery extends. The difference therefore is that in, the one case, that is in the case of Section 147, the right may be a prescriptive right or right of easement to use water or land not belonging to the parties but belonging to somebody else which has to be considered.

7. In the present case the right claimed by the second party is the right to catch fish in waters upon the land of the first party. It is therefore in the nature of an

easement or profits a prendre and therefore the proceeding clearly came within the ambit of Section 147, Criminal P.C. In *Kali Kissen v. Anund Chunder Roy* (1896) 23 Cal 557, it was held that jalkar rights were included within the words "right to do anything in or upon tangible Immovable property" which occurred in the old Section 147. The present section makes the matter clearer when it uses the words "right of user of any land or water whether such right be claimed as an easement or otherwise." The case of *Andrew Yule & Co. v. A.H. Skone* AIR 1919 Pat 210 was a case relating to mining rights.

8. There are no doubt some observations occurring in that case as regards jalkar rights also, but the distinction between jalkar rights as contemplated by Section 145 and that contemplated by Section 147 was not considered and dealt with. I am therefore clearly of opinion that the proceeding u/s 147 was correctly initiated and there is no defect in that respect.

As regards the other two points I am of opinion that the petitioners ought to succeed. The three documents admitted by the learned Magistrate after the close of the hearing of the case have been referred to in the judgment and mainly relied on as a substantial piece of evidence for a finding as regards the existence of the right in favour of the second party.

9. The first party complain that they had not an opportunity to meet these documents and to adduce rebutting evidence in respect thereof. In fact they produced before us certain documents which they say would have completely rebutted the evidence afforded by these three documents, namely, Exs. M-6 to M-8. There is no doubt that the first party has a genuine grievance in this respect and the action of the Magistrate in admitting documents after the close of the case without notice to the first party and without giving them an opportunity to adduce rebutting evidence was illegal.

10. There is also the question as regards the evidentiary value to be attached to the Record of Rights. It is contended on behalf of the first party, that the finally published Record of Rights shows the possession of the first party in respect of the jalkar. Mr. S.P. Varma on behalf of the second party contends that the Record of Rights does not show the possession of the first party in respect of the jalkars. But whether the Record of Rights does or does not support the first party is a question which has to be considered by the Court below.

11. That Court has discarded this document simply on the ground that it was an old document prepared more than thirty years ago, but the fact that it was prepared more than thirty years ago does not in any way affect the presumption attaching to it in law. The presumption is no doubt a rebuttable one and it was open to the Magistrate to find upon the evidence adduced by the second party that the presumption raised by the document had been rebutted. But the learned Magistrate was not justified in wholly excluding that document from consideration.

For these reasons I am of opinion that the order of the learned Magistrate cannot

stand and must be set aside and the case sent back to him for re consideration if he is still of opinion that there is. a likelihood of a breach of the peace.

Courtney-Terrell, C.J.

12. I agree.