

(1989) 08 OHC CK 0051

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 64 of 1989

Sanapalla Kamayya and Others

APPELLANT

Vs

Hamidi Rajanna and Others

RESPONDENT

Date of Decision : 11-08-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145, 146

Citation : (1989) 68 CLT 840

Hon'ble Judges : J. Das, J

Bench : Single Bench

Advocate : G.H. Panda, for the Appellant; B.K. Panda, for the Respondent

Final Decision : Allowed

Judgement

J. Das, J.—In this Miscellaneous Case the Petitioners challenge the order dated 9-12-1988 passed by the Executive Magistrate, Parlakhemundi and the order dated 6.1-1989 passed by the Sessions Judge, Ganjam, Berhampur and submit that the orders are without jurisdiction and there is miscarriage of justice and hence those orders should be quashed.

2. On perusal of the order dated 9-12-1988 it appears that the said order is not at all tenable. It appears that the learned Executive Magistrate without taking any evidence in the case proceeded to the spot and visited the house in question and on the basis of the knowledge acquired by him on such visit, he proceeded to dispose of the proceeding u/s 145, Code of Criminal Procedure and ultimately passed the order that the subject matter of the dispute is attached u/s 146, Code of Criminal Procedure and the Revenue Inspector, Machtamara is appointed as the receiver and the parties are directed to approach the competent civil court for determination of their rights. The learned Executive Magistrate also gave further direction that the attachment is to continue till the rights of the parties are decided by the competent court.

3. The approach of the Executive Magistrate, is not at all legal and it is also

unwarranted.

Usually a local inspection is done after the evidence is closed and if the court feels that for the purpose of appreciation of the evidence and to know the exact topography etc., the local inspection may be necessary. In such a case the court after local inspection shall prepare a memorandum of local inspection and serve the copies to both the sides and afford them the opportunity to file their objections, if any, and the memorandum is to be finalised after hearing and consideration of the objections and then after the Magistrate may rely on such memorandum of local inspection for appreciation of the evidence already on record.

4. In this case there is no evidence and before recording of evidence, the Executive Magistrate proceeded to the house in question and held local inspection. After local inspection the Magistrate did not prepare any memorandum of inspection and did not serve any copy of such memorandum of inspection on the parties enabling them to file their objections. The learned Executive Magistrate, however, utilised his personal knowledge gathered by local inspection in disposing of the case, although such a procedure is quite illegal and unwarranted. It may be mentioned here that if the Magistrate acquired some knowledge personally in course of a proceeding, he cannot utilise his knowledge for disposal of the case but if he feels that such knowledge may be necessary for effective disposal of the case, he may transfer the case from his file to another Magistrate and testify to what he has acquired by local inspection and then that evidence of the Magistrate can be accepted as materials on record.

In this case, however, the learned Executive Magistrate has not proceeded with the case in accordance with the law and he has utilised his personal knowledge in the disposal of the case, although it is neither warranted in law nor legal nor within the jurisdiction of the learned Executive Magistrate. Hence the order dated 9-12-1988 is vitiated and must be set aside.

5. Against the order dated 9-12-1988, a revision petition was filed before the Sessions Judge, Ganjam. Berhampur and that revision was registered and numbered as Criminal Revision No. 172 of 1988.

The learned Sessions Judge vide Order No. 5 dated 6-1-1989 observed in paragraph-3 that:

According to Mr. Sabat for the Petitioners the learned magistrate having not given reasons for his finding as to imminent breach of peace, such conclusion of the magistrate is not sustainable. Even accepting such contention to be correct, the ultimate conclusion of the learned magistrate in attaching the subject of dispute is not liable to be disturbed because he has specifically recorded a finding about his inability to decide as to which of the parties was in possession and such finding can be formed the basis for the impugned order.

The above observation and finding of the learned Sessions Judge is not in

accordance with law and I apprehend that the learned Sessions Judge has failed to appreciate the real purport of Sections 145 and 146, Code of Criminal Procedure. The learned Sessions Judge has assumed the contention that the finding of apprehension of breach of peace is not tenable and in spite of that he has affirmed that the attachment of the disputed property is to continue as the learned Executive Magistrate has held that he is not in a position to decide the possession of either party. It is absolutely a wrong approach and an approach which is contrary to law. Once it is assumed that the contention that there is no apprehension of breach of peace is correct, any finding regarding the possession or expression of incapability of the Executive Magistrate that he is not in a position to decide the possession is illegal and without jurisdiction. In order to take resort to the provisions of Section 146 Code of Criminal Procedure the first requisite is that there must be apprehension of breach of peace and it must be a case of emergency. In such Circumstance, if the Magistrate is unable to decide as to which party is in possession of the disputed property, he may appoint receiver and keep the property in attachment till the rights of the parties are decided by the competent court. If there is no apprehension of breach of peace and if it is not a case of emergency, then the provisions of Section 146 Code of Criminal Procedure cannot come into force and mere expression of the Executive Magistrate that he is not in a position to decide as to which party is in possessing quite futile and it does not carry either party anywhere and on the basis of such an illegal finding, the disputed properties also cannot be attached and kept in the custody of the receiver as has been done in this case in accordance with the order of the learned Sessions Judge. Hence, the order of the learned Sessions Judge is also without jurisdiction and it has caused miscarriage of justice and hence is vitiated and the same must be set aside.

6. In the result the revision is allowed and the order dated 9-12-1988 passed by the learned Executive Magistrate, Padakhemundi in Misc. Case No. 214 of 1988 and the order dated 6-1-1989 passed, by the learned Sessions Judge, Berhampur in Criminal Revision No. 172 of 1988 are set aside and the case is remitted back to the court of the Executive Magistrate, Parlakbemundi who is directed to proceed with the case as it stood as on 7-12-1988 in accordance with law and in the light of the observations made above.

It is also further made clear that if the Executive Magistrate feels that it is a fit case in which the proceeding u/s 144 Code of Criminal Procedure may be converted to a proceeding u/s 145 Code of Criminal Procedure, he may do so after giving adequate reason and proceed with the case in accordance with law.

Revision allowed.