
(1973) 08 OHC CK 0023
In the Orissa High Court

Sankali Dehuri and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-08-1973

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 107, 112, 117, 144, 145

Citation : (1973) 39 CLT 1096 : (1974) CriLJ 219

Hon'ble Judges : G.K. Misra, C.J

Bench : Single Bench

Judgement

G.K. Misra, C.J.—On 8th April, 1972 a proceeding u/s 107, Cr. P. C. was initiated by the Subdivisional Officer, Talcher, against 87 persons of village Olanda including the petitioners on a report submitted by the Officer-in-charge of Kanhia P. S. They were made second party in the report and four persons of village Denali were made the first party. The Officer-in-charge recommended that a proceeding u/s 107, Cr. P. C. is to be taken only against the villagers of Olanda as they threatened to harass the villagers of Denali if the latter entered Chingudinali jungle of Olanda village and a portion of Gudianali jungle which the villagers of Olanda claimed to be a part of Chingudinali jungle for grazing or cutting fuel. Notices were issued u/s 112, Cr. P. C. against the villagers of Olanda to show cause. The case of the villagers of Olanda is that they have exclusive right of user of Chingudinali jungle for grazing and other purposes and the villagers of Denali have no right to enter into their forest for grazing in course of which their cattle destroy the crops of the villagers of Olanda. The villagers of Olanda are exercising their lawful rights in preventing any trespass by the villagers of Denali into their forest. They took the stand that if the villagers of Denali claimed any right of user of the village forest of Olanda, the proper proceeding would be one u/s 147, Cr. P. C. They further contended that even if a proceeding u/s 107, Cr. P. C. was initiated it should have been initiated against the villagers of both the villages. The impugned proceeding only against the villagers of Olanda had the effect of allowing the villagers of Denali to freely enter into the village forest of Olanda with their cattle for grazing and also to cut

fuel therefrom causing loss to the villagers of Olanda.

The learned Magistrate passed an order on 5-10-1972 directing all the 76 members of the second party to execute an interim bond of Rs. 500/- with one local surety for the like amount each to keep peace u/s 117(3), Cr. P. C. till the conclusion of the enquiry u/s 107, Cr. P. C. It is against this order that the criminal revision has been filed.

2. Jaladhar Samal (P.W. 1) and Nityananda Pradhan (P.W. 2), both of village Denali, were examined and cross-examined on 7-6-1972 and 22-9-1972 respectively. Both of them clearly admitted that the villagers of Olanda never objected to the use of the jungle located in village Denali. They only objected to the villagers of Denali taking cattle and cutting fuel from the Chingudinali jungle situate within the boundry of village Olanda. It is not necessary to examine the other evidence. It is sufficient to say that the villagers of Olanda are claiming exclusive right of user of the jungle lying within the boundary of their village and they resist trespass by the villagers of Denali into their forest. The learned advocates in the lower court ought to have invited the attention of the learned Magistrate to Subal Sahu and Others Vs. State of Orissa, wherein the law applicable in analogous circumstances was clearly analysed. In that case the apprehension of breach of peace existed regarding fishery right and user of water in the tank. It was observed that the learned Magistrate should have more appropriately started a proceeding u/s 147, Cr. P. C. and should have proceeded to make an enquiry as prescribed therein. The same reasoning applied to this case. The learned Magistrate should have started a proceeding u/s 147, Cr. P. C,

3. It was also observed in that case that it was well settled that even though a proceeding u/s 147, Cr. P. C. would furnish a better remedy, a proceeding u/s 107 of the Code is not without jurisdiction. The exact passage may be extracted:

Sections 107, 144, 145 and 147 of the Code can be invoked by a Magistrate for maintenance of peace and order. Section 144 of the Code is applied to cases of urgency. u/s 107 of the Code the Magistrate has to take security from persons likely to cause disturbance of the peace. Where the apprehension of breach of peace relates to land, resort is taken to a proceeding u/s 145 of the Code. Where, however, it relates to right of user of land and water, a proceeding u/s 147 of the Code is initiated. The manner of enquiry under Sections 145 and 147 of the Code is almost identical.

Whether the Magistrate would take recourse to one or the other of the Sections would depend upon the facts and circumstances of each case. If, however, without resorting to Sections 145 to 147 regarding dispute in relation to land or water or the right of user of the same, the Magistrate adopts a proceeding u/s 107 or 144 of the Code, his action cannot be said to be without jurisdiction. That does not, however, mean that the Magistrate would be arbitrary in exercise of his powers and discretion. It has been repeatedly said that regarding dispute relating to land or the right of user, a Magistrate should start proceeding u/s 145

or 147 of the Code. It may be in some cases that due to urgency an order u/s 144 of the Code is imminent. It is, however, the paramount duty of the Magistrate to convert the 144 proceeding to one u/s 145 or 147 of the Code.

4. It was also pointed out in that case that even if a Magistrate starts a proceeding u/s 107 of the Code though more appropriately he should have started a proceeding u/s 147 of the Code, he should initiate the proceeding u/s 107 of the Code ordinarily against both and not against one of the parties. Otherwise the party against whom no proceeding is started would be in an unfair advantage over the other party. There is an exception to this rule that where the claim of one of the parties is a mere pretence, then a proceeding u/s 107 of the Code can be started only against that party.

5. Here in this case as the apprehension of breach of peace relates to the user of the forest the learned Magistrate should have started a proceeding u/s 147, Cr. P. C. The proceeding u/s 107, Cr. P. C. initiated by him is not, however, without jurisdiction. But he should have started the proceeding against both the parties as the claim of the right of user of the forest by the villagers of Olanda is not a mere pretence. By starting the proceeding u/s 107 only against the villagers of Olanda the learned Magistrate has put the villagers of Denali in a more advantageous position. In such a case the proceeding u/s 107 only against the petitioners is liable to be quashed.

6. It was also pointed out in the aforesaid case that quashing of an order u/s 107, Cr. P. C. initiated only against one of the parties does not debar the Magistrate from starting a fresh proceeding u/s 147, Cr. P. C. or u/s 107 of the Code , against both the parties if apprehension of breach of peace still exists.

7. In the result, the impugned order is set aside and the criminal revision is allowed.