
(1976) 05 GAU CK 0002
In the Gauhati High Court

Sankha Ram Sahu and Others

APPELLANT

Vs

Bura Takbi and Others

RESPONDENT

Date of Decision : 24-05-1976

Acts Referred:

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 145, 401, 439

Citation : (1976) CriLJ 1952

Hon'ble Judges : K. Lahiri, J

Bench : Single Bench

Judgement

K. Lahiri, J.—This is a criminal revision u/s 439 of the Criminal P.C., 1898, read with Article 227 of the Constitution, directed against the orders dated 16-9-1975 and 14-10-1975 passed by Shri A. Ahmad, Magistrate 1st Class at Diphu in M. R. Case No. 104 of 1971.

2. This proceeding has a chequered career. Admittedly the land is situated in Mikir Hills, which is governed by the Rules for Administration of Justice and Police. At all relevant period, it was in table A of the sixth schedule of the Constitution of India. The proceeding u/s 145, Criminal P. C. was initiated on 29-12-1971 on the strength of a police report. The Magistrate was satisfied that there was likelihood of breach of peace between the parties in respect of the possession of the land in question. The petitioners were the 1st parties and at their instance, the present proceeding was started. Thereafter, in due course, namely, on 27-7-1972, the learned Magistrate disposed of the proceeding, declaring possession of the land in favour of the petitioners. Against this order an appeal was taken to the appellate Court constituted under the Rules for Administration of Justice and Police in Sibsagar and Nowgong Mikir Hills Tracts, 1937. On appeal, the order declaring possession in favour of the petitioners was set aside by the Appellate Court, namely, the Additional Deputy Commissioner by his order dated 12-12-1974. While setting aside the order, the appellate authority remanded the case to the learned Magistrate to decide it in accordance with law and in the light of the observations made in the said order of the

appellate court. Against the said order of the Appellate Court dated 12-12-1974 in Criminal Appeal No. 19 of 1972, the petitioners came up before this Court in Criminal Revision No. 50 of 1974. The matter was heard by my Lord the Hon'ble Chief Justice, who, by an order dated 2-6-1975 rejected the petition. It was, inter alia, held in the said criminal revision that the petition preferred by the petitioner was incompetent u/s 439 of the Criminal P. C., 1898.

3. Thereafter, as it appears, the matter went down to the trial court and on receipt of the record, the learned Magistrate took it up on 12-3-1974. On 12-3-1974, the Magistrate on perusal of the order of the Additional Deputy Commissioner, i.e. the appellate court, proceeded further and examined few more witnesses. It transpires from the record of the case that the proceedings continued until 19-4-1974, on which date, the learned Magistrate stayed further proceedings of the case in view of the presentation of the present application u/s 439, Criminal P. C. read with Article 227 of the Constitution before this High Court. The said criminal revision is the present revision and it is directed against (1) an order dated 16-9-1975 and (2) another order dated 14-10-1975.

4. By the order dated 16-9-1975, the court directed the Officer-in-charge, Howraghat Police Station to attach the disputed land immediately inasmuch as there was already an order of attachment made by him on 4-8-1972; but according to the learned Magistrate as the case was pending before the High Court, the order could not be conveyed to the Officer-in-charge for the execution thereof. The learned Magistrate observed that there was already an order dated 7-8-1972 passed by him attaching the disputed land.

5. The impugned order dated 4-10-1975 (sic) was made in presence of both the parties. He passed an order allowing the legal representatives to be added as parties in place of some of the deceased opposite parties.

6. Preliminary objections have been taken up by Shri S. N. Medhi, the learned Counsel appearing on behalf of the Opposite Parties questioning the maintainability of the application on the following grounds: -

(1) In view of the decisions of this Court reported in Rongseng Sangma Vs. The State of Assam, and also the unreported judgment in Criminal Revision No. 50 of 1974, disposed of on 2-6-1975 (since reported in Sankha Sahu and Others Vs. Bura Takbi and Others, (Gauhati) the revision petition u/s 439 of the Criminal Procedure Code, 1898, is not maintainable.

(2) The petitioners had a right of appeal under Rule 20 of the Rules for the Administration of Justice and the petitioners have not availed of that opportunity and as such the present revision is not maintainable.

7. Shri S. K. Sen, Senior Advocate appearing on behalf of the petitioners has submitted the following:

(1) That the decision cited by the learned Counsel for the opposite parties referred to above are applicable only in respect of cases covered by the Criminal

Procedure Code, 1898 and the said decisions are good laws in so far as the old Act is concerned. According to the learned Counsel the provisions contained in Chapters VIII, X and XI of the new Act of 1973 have been applied to the "Tribal Areas" and as such the provisions u/s 401 of the Criminal Procedure Code have also been applied in the "Tribal Areas" and as such the decisions referred to by the counsel on behalf of the opposite parties are not applicable in the present case.

(2) That in any view of the matter this is an application under Article 227 of the Constitution,

(3) On merits the learned Counsel submitted that the impugned orders have been made absolutely without jurisdiction. His submissions are that the impugned order dated 16-9-1976 does not show anything on the face of the order that there was any emergency for which the order of attachment was made by the learned Magistrate. The learned Counsel submits that a finding about the existence of an emergency is sine qua non of attachment of a land in a proceeding u/s 145, Criminal P. C. In regard to the order dated 14-10-1975, according to the learned Counsel, the Criminal Court had no jurisdiction to direct substitution of the parties in a proceeding of this nature.

8. This application has been filed u/s 439 of the Criminal Procedure Code, 1898 read with Section 401 of the Criminal Procedure Code, 1973 and Article 227 of the Constitution, Sub-section (5) of Section 439 of the Old Code is *pari materia* the same with the provisions contained in Section 401(4) of the Criminal Procedure Code, 1973, hereinafter to be referred to as the "New Code". Both u/s 401 of the New Code as also u/s 439 of the Old Code, proceedings by way of revision is barred when there is an appeal provided under the Code. In *G. B. Rangalal v. D. Langthasa* reported in 1973 ALR 324 a Division Bench of this Court considered the earlier decision reported in *Rongseng Sangma Vs. The State of Assam*, *Rongseng Sangma v. The State of Assam* and affirmed it. In the said decision, it was clearly and specifically held that there is a provision in the Rules for the Administration of Justice, 1937 for preferring revision in a case of the nature namely, a proceeding u/s 145 of the Criminal Procedure Code. These decisions clearly establish that the provisions contained in Section 439 of the Criminal Procedure Code is out of way. I am bound by and in respectful agreement with the conclusions arrived at in the above decisions. In fact, there is a provision for preferring a revision under the Rules for the Administration of Justice referred to above and the question of applicability of Section 439 cannot arise and cannot be availed of by a party who has a right to prefer an appeal or revision under the said Rules. In the present case the application u/s 439, in my opinion, is not maintainable.

9. Mr. Sen, the learned Counsel submits that there has been a change in law and the aforesaid decisions are not applicable. According to the learned Counsel some of the Chapters of the Criminal Procedure Code have been applied to the "Tribal Areas" and as such the limitations imposed by the decisions aforesaid are

not applicable in the present case. Section 1 (2) and (3) of the New Code reads as follows:

(1) *** **

(2) It extends to the whole of India except the State of Jammu and Kashmir:

Provided that the provisions of this Code, other than those relating to Chapters VIII, X and XI thereof, shall not apply-

(a) to the State of Nagaland,

(b) to the tribal areas,

but the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental, or consequential modifications, as may be specified in the notification.

Explanation.- In this section, "tribal areas" means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong.

(3) It shall come into force on the 1st day of April, 1974.

10. Previously there was no such provision like Section 1(2). Only the spirit of the Criminal Procedure Code could at best be applied. By virtue of the provision to Section 1 (2) of the New Code only Chapters VIII, X and XI of the Code have been applied, but there is a special prohibition to the effect that the rest of the Criminal Procedure Code shall not apply unless they are specifically applied by notifications. There is no notification applying the provisions relating to appeal or revision under the Criminal Procedure Code in the "Tribal Areas". Therefore, in my opinion, the provisions contained in other Chapters cannot apply in any form whatsoever in the "Tribal Areas". The provisions relating to revision find place in Chapter XXX of the New Code. The said chapter is not at all applicable in the Tribal Area in question. Under these circumstances, a party cannot claim a right of revision u/s 401 of the New Code in respect of a Criminal Proceeding of this nature. His remedy is by way of a revision under the provisions contained in the Rules for the Administration of Justice and Police. As such, I am of the opinion that the revision petition cannot be entertained by this Court either u/s 439 of the Old Code or u/s 401 of the New Code.

11. The indubitable position is that there is a right of appeal provided in the Rules for Administration of Justice. The petitioners have not availed of that right. Even assuming that there is a right of revision, no such revision can be entertained by this Court in exercise of its revisional jurisdiction when there is a right of appeal. Even if the spirit of the Code is applied, the provision taking away the revisional jurisdiction in such cases cannot be overlooked as well. In

the present case, the petitioners have not availed of the right of appeal and as such no revision is entertainable, even if the spirit of the Criminal Procedure Code can be said to be applicable. However, this question does not require consideration in view of my positive finding that there is no statutory right of the petitioner to prefer a revision u/s 439 of the Old Code or u/s 401 of the New Code.

12. The learned Counsel for the petitioners has submitted that even if the application is not maintainable under the Criminal Procedure Code, his case is fully covered by Article 227 of the Constitution of India. The jurisdiction conferred by Article 227 and powers conferred thereunder are merely powers of superintendence to be exercised sparingly and to keep the Tribunal within the limit of its authority. The power is neither appellate nor revisional. It cannot be exercised to correct mere errors of laws and facts. This power cannot be exercised to interfere with the exercise of discretion by the trial court. This Court cannot re-appreciate the evidence.

13. In the present case the petitioners had a statutory right of appeal and the same has not been availed of. No reason is forthcoming as to why the petitioners have skipped over their right. There was an alternative and more efficacious remedy provided for in the Rules for Administration of Justice. The said relief would have been just and sufficient. The same has not been availed of. Under these circumstances, I am of definite opinion that this Court should not exercise its extraordinary power under Article 227 of the Constitution.

14. Apart from the above, on merit. I do not find that this Court should interfere with the impugned orders. By the impugned order dated 16-9-1975 the learned Magistrate directed the Officer-in-charge, Howraghat Police Station for attachment of the disputed land. There is already an order of the attachment made by the Magistrate on 4-8-1972. According to the learned Magistrate, the order could not be carried out by the Officer-in-charge in view of the pendency of the proceeding before the High Court. This order is the follow up action and the real order of attachment was made on 4-8-1972. The petitioners have not questioned the correctness or legality of the order dated 4-8-1972. If the order dated 4-8-1972 is not set aside the follow up action taken on 16-9-1975 cannot be set aside. Under these circumstances, the question of setting aside the order dated 16-9-1975 does not arise.

15. On perusal of the records I do not find anything wrong with this order. It is undoubtedly true that in the order dated 16-9-1975 there is nothing to show that there was any existence of emergency on 16-9-1975. But, as stated earlier, the order is a continuation of the order dated 4-8-1972, which has not been impugned. As such, the question of non-existence of emergency cannot be agitated by the petitioners at this stage.

16. The other impugned order is dated 4-10-1975. The said order was made in the presence of the parties. The learned Magistrate allowed the legal

representative of the present opposite parties to be added in place of some of the deceased Opposite Parties. The learned Counsel for the petitioners has not been able to satisfy me as to why the said order is either improper or illegal. The provisions contained in Section 145(7) of the Code run as follows:

145 (7)-When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representative of the deceased party shall be made parties thereto.

This power of substituting the legal representative is provided in Section 145 itself and as such, the said impugned order is absolutely in conformity with the law.

17. Under these circumstances, I find no merit in the contention made on behalf of the petitioners and as such, I dismiss this application.

The records must be sent down immediately and the learned Magistrate shall dispose of the matter expeditiously.