
(1976) 07 PAT CK 0006
In the Patna High Court

Somari Rai and Others

APPELLANT

Vs

Raghu Nath Prasad Sharma and Others

RESPONDENT

Date of Decision : 16-07-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 3, 478, 484
General Clauses Act, 1897 — Section 7, 8

Citation : (1977) CriLJ 718 : (1977) 10 PLJR 635

Hon'ble Judges : Uday Sinha, J;C.N. Tiwary, J

Bench : Division Bench

Judgement

C.N. Tiwary, J.—This is an application in revision against the final order, dated 26-8-74 passed in a proceeding u/s 145 of the Code of Criminal Procedure, 1898 (hereinafter referred to as "the Code") by Sri K.K. Sharma, an Executive Magistrate posted at Muzaffarpur.

2. Initially a proceeding u/s 144 of the Code was drawn up on 7-11-71. It was converted into a proceeding u/s 145 of the Code on 2-2-72. The dispute related to survey plot No. 543 having an area of 6 acres 96 decimals of land situate in village Aurai in the district of Muzaffarpur. Both the parties filed written statements, documents and affidavits of witnesses. The learned Executive Magistrate Sri K.K. Sharma on consideration of the written statements, documents and affidavits filed by the parties declared the second party to be in possession of the disputed land by his order, dated 26-8-74. The petitioners, who were first party to the proceeding u/s 145 of the Code have filed this application in revision against the order, dated 26-8-74.

3. This case was, in the first instance, heard by a learned single Judge, who referred it to a Division Bench. It is how this has been placed before us.

4. It is submitted on behalf of the petitioners that the inquiry u/s 145 was pending immediately before the date, on which the Code of Criminal Procedure, 1973 (hereinafter referred to as "the new Code") came into force and therefore, in view of the provisions contained in Section 484(2)(a) of the new Code the

inquiry should have been made in accordance with the provisions contained in the old Code by a Magistrate of the first class and not by an Executive Magistrate. In the old Code power to initiate and dispose of proceeding u/s 145 was conferred on District Magistrate, sub-divisional Magistrate or Magistrate of the first class. Shri. K.K. Sharma is neither District Magistrate nor sub-divisional Magistrate nor a Magistrate of the first class. It is, therefore, contended that Shri K.K. Sharma, who is an Executive Magistrate had no jurisdiction to pass final order dated 26-8-74 in the proceeding u/s 145 of the old Code and hence, the final order passed by Sri Sharma is without jurisdiction and is liable to be set aside. According to the learned Counsel for the petitioners the proceeding u/s 145 of the old Code should have been disposed of by a judicial Magistrate of the first class.

5. The learned Counsel appearing on behalf of the opposite party, on the other hand, has argued that such a proceeding pending on the date immediately before the date on which the new Code came into force is to be disposed of by an Executive Magistrate.

6. We have heard the learned Counsel for the petitioners and the opposite party. Mr. Kailash Roy, a senior Advocate, was also good enough to assist us. The argument of Mr. Roy also is to the effect that a proceeding u/s 145, which was pending immediately before the date on which the new Code came into force, has to be decided by a judicial Magistrate of the first class.

7. Thus, the only point for consideration is whether a proceeding u/s 145 of the Code which was pending immediately before the date on which the new Code came into force is to be disposed of by an Executive Magistrate or a judicial Magistrate of the first class.

8. The new Code confers powers on the Executive Magistrate alone to initiate and dispose of proceeding u/s 145. Therefore, under the new Code it is the Executive Magistrate alone, who has jurisdiction to initiate and dispose of proceeding u/s 145, As stated above, under the old Code the power to initiate and dispose of a proceeding u/s 145 was conferred on District Magistrate, sub divisional Magistrate and Magistrate of the first class. There is no provision either in the new Code or in the old Code for initiation or disposal of the proceeding u/s 145 of the old Code by a judicial Magistrate of the first class. The court of the judicial Magistrate of the first class has been created by the new Code. Mr. Kailash Roy as also the learned Counsel for the petitioners has placed reliance on Section 484(2)(a) of the new Code, which deals with repeal and savings. Sub-section (2) (a) runs thus:

(2) Notwithstanding such repeal-

(a) if, immediately, before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of

Criminal Procedure, 1898 as in force immediately before such commencement, (hereinafter referred to as the old Code), as if this Code had not come into force:

Provided that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code.

9. It is urged that a proceeding u/s 145 is an inquiry and if the proceeding was pending immediately before the date on which the new Code came into force, it has to be disposed of in accordance with the provisions of the old Code as if the new Code had not come into force. It is argued that under the old Code a Magistrate of the first class had jurisdiction to dispose of a proceeding u/s 145. Hence, a proceeding u/s 145, which remained pending immediately before the date on which the new Code came into force, should be disposed of by a judicial Magistrate of the first class and not by an Executive Magistrate. This argument does not appear to be based on correct interpretation of Section 484(2)(a) of the new Code.

10. Classes of criminal courts under the old Code, as specified in Section 6 thereof, were;

I. Courts of Session;

II, Presidency Magistrates;

III. Magistrates of the first class.

IV. Magistrates of the second class;

V. Magistrates of the third class. Presidency Magistrates, Magistrates of the first class, Magistrates of the second class and Magistrates of the third class, specified in Section 6 of the old Code, ceased to exist on the commencement of the new Code and in their place courts of judicial Magistrate of the first class (in Metropolitan area a Metropolitan Magistrate), judicial Magistrate of the second class and Executive Magistrate have been created, as will appear from Section 6 of the new Code. These changes have been introduced with the clear object of separation of the judiciary from the executive, which the new Code seeks to bring about. Functions of the Magistrates are sought to be allocated between judicial Magistrates and Executive Magistrates under the new Code. There is nothing in Section 484 of the new Code, which deals with repeals and savings, to show that any of the classes of the Magisterial courts specified in Section 6 of the old Code namely, courts of presidency Magistrates, Magistrates of the first class, Magistrates of the second class and Magistrates of the third class was saved from being abolished on the repeal of the old Code. Section 7 of the General Clauses Act, 1897 provides:

7 REVIVAL OF REPEALED ENACTMENT (1) In any Central Act or Regulation made after the commencement of this Act, it shall be necessary for the purpose of reviving, either wholly or partially, any enactment wholly or partially repealed,

expressly to state that purpose.

11. If the Legislature had intended to revive the court of the Magistrate of the first class, it must have expressly stated so what Section 484(2)(a) of the new Code lays down is that if immediately before the date on which the new Code came into force, there was any appeal, application, trial, inquiry or investigation pending, then such appeal, application, trial inquiry or investigation shall be disposed of, continued, held or made as the case may be in accordance with the provisions of the old Code as in force immediately before such commencement, as if the new Code had not come into force. This means that such appeal, application, trial, inquiry or investigation as was pending immediately before the date on which the new Code came into force shall be disposed of, continued, held or made as the case may be in accordance with the procedure laid down in the old Code. This does not mean that it will be disposed of, continued, held or made as the case may be by any of the criminal court, which functioned under the old Code and which has been abolished by the new Code, The argument that for the limited purpose of disposing of the inquiry etc. specified in Section 484(2)(a) the court of the Magistrate of the first class, which functioned under the old Code, should be deemed to be existing even after the commencement of the new Code by virtue of the saving provisions contained in Section 484(2)(a) is misconceived. On coming into force of the new Code the courts of the Magistrate which will function in any area other than metropolitan area, would be only the courts of judicial Magistrate of the first class, judicial Magistrate of the second class and executive Magistrate. There will be no other class of Magisterial court. Argument that the proceeding u/s 145 which was pending immediately before the date on which the new Code came into force should be disposed of by a Magistrate of the first class as provided in the old Code and not by an Executive Magistrate, cannot be accepted for the simple reason that no court of the Magistrate of the first class exists after the commencement of the new Code. The court of judicial Magistrate of the first class has been created by the new Code and a judicial Magistrate of the first class has the jurisdiction conferred upon him by the new Code. The new Code does not confer jurisdiction on the judicial Magistrate of the first class to dispose of a proceeding u/s 145. Therefore on coming into force of the new Code final order passed by a judicial Magistrate of the first class in a proceeding u/s 145 will be without jurisdiction. It is the Executive Magistrate, who has jurisdiction to initiate and dispose of proceeding u/s 145, with effect from date on which new Code came into force. Hence, the irresistible conclusion is that the proceeding u/s 145, which was pending immediately before the date on which the new Code came into force, is to be disposed of by an Executive Magistrate as provided u/s 145 of the new Code.

12. Reliance has also been placed on Section 3(3)(a) of the new Code, which is as under;

(3) unless the context otherwise requires, any reference in any enactment passed before the commencement of this Code;-

(a) to a Magistrate of the first class, shall be construed as a reference to a judicial Magistrate of the first class;

13. It is argued that the expression "any enactment passed before the commencement of this code" occurring in Sub-section (3)(a) of the new Code includes also the old Code and therefore, reference to Magistrate of the first class in Section 145 of the old Code is to be construed as reference to a judicial Magistrate of the first class and therefore, the proceeding u/s 145 pending immediately before the date on which the new Code came into force is to be disposed of in accordance with the provisions of the old Code by a judicial Magistrate of the first class in view of the provisions contained in Section 484(2) (a) read with Section 3(3)(a) of the new Code. In my opinion, the expression "any enactment" occurring in Section 3(3)(a) of the new Code does not include the old Code. There are several enactments other than the old Code passed before the commencement of the new Code, in which there is reference to a Magistrate of the first class. On the repeal of the old Code and on coming into force of the new Code the court of Magistrate of the first class, which functioned under the old Code, ceased to exist and court of the judicial Magistrate of the first class has been created under the new Code. Therefore, it was necessary to lay down that a reference to a Magistrate of the first class in any enactment passed before the commencement of the new Code shall be construed as a reference to the judicial Magistrate of the first class. The old Code has re-appeared with necessary changes made therein in the form of the new Code. Whatever changes the legislature had to make in the old Code were made and the old Code with amended provisions has re-appeared as the new Code. Therefore, in my opinion, the expression "enactment" occurring in Section 3(3) (a) of the new Code does not include the old Code.

14. Section 8 of the General Clauses Act 1897 may be referred to in this connection. It lays down:

8. CONSTRUCTION OF THE REFERENCES TO REPEALED ENACTMENTS.- (1) Where this Act. or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

15. Thus, according to Section 8 of the General Clauses Act references in any other enactment (enactment other than the repealed one) or in any instrument to the provisions of the repealed act shall, unless a different intention appears, be construed as reference to the provisions so re-enacted. Section 3(3)(a) of the new Code read with Section 8 of the General Clauses Act makes it clear that the repealed Code is not included in the expression "any enactment" occurring in Section 3(3)(a) of the new Code. In construing an Act which alters the law it is necessary to inquire what was the law before alteration was made, what was the mischief intended to be remedied and what was the nature of the remedy

provided. Provisions of Section 484(2) of the new Code have to be read with other provisions of the new Code in this regard. Section 478 of the new Code lays down:

If the state legislature by a resolution so requires, the State Government may, after consultation with the High Court, by notification, direct that-

XX XX XX (b) references in Sections 145 and 147 to an Executive Magistrate shall be construed as reference to a Judicial Magistrate of the first class.

16. Under the new Code, in respect of the dispute for immovable properties the power is to be exercised only by Executive Magistrates as the main purpose is related to maintenance of law and order. Section 478 confers power on the State Government to alter the arrangement by means of notification (in consultation with the High Court). If the intention had been that the proceeding u/s 145 pending immediately before the date on which the new Code came into force should be disposed of by the court of judicial Magistrate of the first class, created by the new Code, specific provisions to this effect must have been made in the new Code.

17. In view of the aforesaid discussions it must be held that the proceeding u/s 145 of the Code which was pending immediately before the date on which the new Code came into force is to be disposed of by an Executive Magistrate in accordance with the procedure laid down in the old Code.

18. There is no merit in the application, which is accordingly dismissed.

Uday Sinha, J.

11. I agree.