
(2012) 05 PAT CK 0074

In the Patna High Court

Case No : Criminal Miscellaneous No. 21280 of 2007

Sri Kishun Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 147, 147(3), 148, 482

Citation : (2012) 05 PAT CK 0074

Hon'ble Judges : Ashwani Kumar Singh, J

Bench : Single Bench

Advocate : Avanish Kuamr Singh, for the Appellant; Rajendra Prasad Singh and Mr. Rakesh Kumar Singh, For the O.Ps and Dr. Mayanand Jha, Assistant Public Prosecutor For the State, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Ashwani Kumar Singh

1. Heard Mr. Avanish Kumar Singh, learned counsel for the petitioner, Mr. Mayanand Jha, learned A.P.P. for the State and Mr. Rajendra Prasad Singh, learned senior counsel for the opposite party no. 2. The present application is for quashing the order dated 13.3.2007 passed by the learned District & Sessions Judge, Rohtas at Sasaram in Criminal Revision No. 211 of 2005 whereby and whereunder he has set aside the order dated 3.8.2005 passed by the learned Sub-Divisional Magistrate, Dehri-on-sone in Case No. 415(M)/2002 declaring the petitioner's right of easement for draining water through plot no. 1072 and prohibited the opposite party no. 2 to 5 from interfering with the exercise of such right by making any obstruction over the same.

2. On the basis of a petition filed by the petitioner, the Sub-Divisional Magistrate, Dehri-on-Sone, Rohtas initiated a proceeding u/s 147 Cr. P.C., being Case No. 415(M)/2002. It was stated in the petition that the petitioner and the opposite parties are residents of village-Bheria in Rohtas district. The petitioner's

ancestral house and those of his close relatives stand on plot nos. 2143, 1063, 1064, 1065 & 1066. There are houses on plot nos. 1067 and 1068 too, owned by other persons. To the east of the house of the petitioner exists a lane and sehan which runs from south to north. Rain water flows from the "Sehan" and the "gali" towards north and joins a drain which exists to the north of the houses on plot nos. 2143 and 1063.

3. It has further been stated in the petition that on the south-western corner of plot no. 1063, the drain turns towards south and, thereafter, it flows in between plot nos. 1064 and 1065 and on the western corner of plot no. 1065 it turns towards north and flows into plot no. 1072 which is the field of the opposite parties and, thereafter, goes towards the west in the field. This was the only source of flow of rain water as well as the drain water of all the houses existing on the aforementioned plots since time immemorial without any obstruction. The continuous flow of the "Nali" finally out flowing in plot no. 1072 has given easementary as well as customary rights to the petitioner and the residents of the various plots mentioned above for discharging the water of the houses, Gali and Sehan in plot no. 1072, an open field.

4. The petitioner submits that with the purpose of interfering with the exercise of such rights by obstructing the free flow of "Nali", the opposite parties had started constructing a wall which could completely close the Nali resulting in water logging and creating further serious problems for the petitioner and other residents of the houses existing on the plots mentioned above. Thus, it was contended in the petition that by constructing a wall, the opposite parties had interfered with the petitioner's easementary as well as customary rights of discharging the drain water of the houses, gali and sehan into the field. It was also submitted that due to such obstruction, there was apprehension of breach of piece between the two parties.

5. The learned Sub-Divisional Magistrate on the basis of petition filed on behalf of the petitioner initiated a proceeding u/s 147 of the Code of Criminal Procedure and issued notices to the opposite parties. The opposite parties filed their written statement denying the allegations. Both the parties examined witnesses and filed documents in support of their respective claims and counter claims. The Sub-Divisional Magistrate got an inquiry conducted by the Land Reforms Deputy Collector, Dehri-on-Sone u/s 148 of the Code of Criminal Procedure. The L.R.D.C., Dehri-on-Sone submitted his report on 5th July, 2002. After considering the evidence on record, the Sub-Divisional Magistrate by his order dated 3.1.2005 ordered that the petitioner had the right of easement for draining water and prohibited the opposite parties no. 2 to 5 from interfering with the exercise of such right by making any obstruction over the same.

6. The private opposite parties being aggrieved by the order dated 3.8.2005 passed by the learned Sub-Divisional Magistrate filed an application in the court of learned District & Sessions Judge, Rohtas at Sasaram which was numbered as Criminal Revision No. 211 of 2005. The learned District & Sessions Judge, by his

order dated 13.3.2007 allowed the revision application filed on behalf of the private opposite parties and set aside the order of the trial court, on the ground that the learned S.D.M. had passed the order on the basis of photostat copies of certain documents and there was no finding regarding the fact that such right had been exercised within three months from the date of initiation of the proceeding. The learned Sessions Judge held that the S.D.M. could not have passed such order without giving specific finding as in terms of Sub-section (3) of Section 147 of the Code of Criminal Procedure. Such easementary right can be ordered only if the right is exercised within three months of the receipt of information or police report in cases of rights exercisable at all times of the year. The petitioner has filed the present application u/s 482 of the Code of Criminal Procedure against the aforesaid order dated 13.3.2007 passed by the learned District & Sessions Judge, Rohtas at Sasaram.

7. Learned counsel for the petitioner submits that the Sub-Divisional Magistrate had passed the order after taking into consideration oral and documentary evidences adduced by the respective parties as well as after taking into account the local inquiry report submitted by the L.R.D.C., Dehri-on-Sone u/s 148 of the Code of Criminal Procedure. The inquiry report of the L.R.D.C. clearly stipulated that upon inspection of the disputed area, it was found that the drain water of the plots aforesaid flow in plot no. 1072. The inquiry report further reveals that if the drainage is obstructed, the plot nos. 1063, 1064, 1065 and 1066 would be severely water logged. In the report, it is also stated that the private opposite parties wanted to create obstruction of the drainage and with that intention they had partly constructed boundary wall. He submits that the L.R.D.C. on physical verification found that on plot no. 1072 some bricks and sand were still lying. However, on the date of inquiry, the construction of boundary wall was not going on. He submits that a perusal of the inquiry report of the L.R.D.C. clearly shows that on the date of inquiry also process of obstruction of easementary right of the petitioner was found going on which clearly satisfy the mandate of the proviso to Section 147(3) of the Code of Criminal Procedure.

8. He further submits that though there was definite finding in the order of the Sub-Divisional Magistrate regarding the period of user since the local inquiry report clearly mentioned that the "nala" was being used since several years and even at the time of inquiry.

9. Mr. Rajendra Prasad Singh, learned senior counsel, appearing on behalf of opposite party no. 2 submits that the revisional court has rightly allowed the petition filed on behalf of the opposite party nos. 2 to 5. The revisional court while setting aside the order has taken into consideration the fact that the learned S.D.M. had passed the order relying upon Photostat copy of certain documents and further the order did not disclose that such right was exercised by the petitioner since before the date of initiation of the proceeding which is mandatory in terms of proviso to Section 147(3) of the Code of Criminal Procedure.

10. He further submits that as a matter of fact, the claim of the petitioner and his relatives that their houses stand on plot nos. 2143, 1063, 1064, 1065 and 1066 is patently false. According to him, it is not true that there are houses on plot nos. 1067 and 1068 too, owned by some other person.

11. Taking into consideration the rival submissions, I am of the considered view that dispute as to question of title cannot be settled by a proceeding u/s 147(3) Cr. P.C. Such issues can be decided only by a civil court of competent jurisdiction on proper adjudication of the matter. The Section comes into operation only if the right is exercised within three months of the receipt of information. Such finding is a condition precedent. An order u/s 147 of the Code of Criminal Procedure would be without jurisdiction unless it is based upon a finding that the right/claim has been exercised within three months next before the institution of inquiry. It is well-settled that the date of institution of the inquiry is the date when the likelihood of breach of peace is brought to the notice of the Magistrate by an aggrieved person or by a police report.

12. Taking these facts in mind, in my view the revisional court has rightly set aside the order of the learned S.D.M. but while setting aside the matter on technical ground, the revisional court ought to have remanded the matter back to the Sub-Divisional Magistrate, Dehri-on-Sone for passing an appropriate order taking into consideration proviso to Section 147(3) of the Code of Criminal Procedure. In the result, the present application is allowed. The order dated 13.3.2007 passed by the learned District & Sessions Judge, Rohtas at Sasaram in Criminal Revision No. 211 of 2005 is set aside and matter is remanded back to the learned S.D.M., Dehri-on-Sone, who would take up and decide the matter afresh keeping in mind the proviso to Sub-Section (3) of Section 147 of the Code of Criminal Procedure. Since a considerable length of time has already elapsed as the matter remained pending before this Court, it is expected that he would dispose of the case expeditiously as early as possible and preferably within six months from the date of production/receipt of a copy of the order.