

(1992) 11 OHC CK 0004

In the Orissa High Court

Case No : Criminal Revision No. 271 of 1992

Sri Narain Das Gupta and Others

APPELLANT

Vs

Sri Shyam Sundar Gupta

RESPONDENT

Date of Decision : 11-11-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 148, 310

Citation : (1993) 76 CLT 327 : (1993) 1 OLR 218

Hon'ble Judges : L. Rath, J

Bench : Single Bench

Advocate : S.K. Misra, for the Appellant; D.P. Dhal, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The members of the second party who are the losers in a Section 145, Cr PC proceeding, are the petitioners. The proceeding was initiated on the basis of police report on 7-11-1991 with orders simultaneously passed u/s 146(1), Cr PC attaching the land and restraining both the parties from going upon it. An application was filed by the petitioners on 12-11-1991 u/s 148, Cr PC for a local enquiry. The first party (opposite party, here) filed objection to the application and on 9-12-1991 the learned Magistrate rejected the application. Thereafter the proceeding was continued and witnesses were examined. After examination of the witnesses on behalf of the second party, an application was filed by the petitioners on 11-3 1992 seeking local inspection of the spot by the Magistrate or to direct the receiver to verify the records. In the written statement filed by the petitioners the stand taken was that the disputed premises was a shop room of which they were the tenants and that as the opposite party wanted them to vacate the premises and they expressed unwillingness, the proceeding had been initiated, It was their further case that they were running their business in the premises under the firm's name "Narain Das Tejpal Firm" dealing with essential commodities under licence issued by the Collector, Balasore, valid upto 31-3-1992. The shop room had also electric connection in the name of the

petitioner No. 1 bearing Consumer No. 1037(C) and that the shop was also insured with the Oriental Insurance Company holding Policy No. 316307/48/92/00015. The members of the second party had also licences under the Central and State Sales-Tax Acts in respect of the shop, that they had raised a loan of Rs. 2,00,000/- from the United Bank of India, Charampa Branch on their business carried on in the shop, and that stock was hypothecated to that Bank. They also pleaded that they had telephone connections bearing Nos. 2496 and 2086 in the same premises. The application filed by the petitioners, for local inspection by the Magistrate was rejected on 8-4-1992 and thereafter, after hearing the arguments of the parties, final order was passed by the Executive Magistrate on 20-5-1992 dropping the proceeding on the view that he was not able to ascertain and decide the possession of either of the parties and that hence they should take shelter in the competent Court of law. In passing the order he directed continuance of the order u/s 146(1), Cr PC passed on 7-11-1991 so as to avoid breach of peace. It is this order which is impugned in this revision.

2. In coming to the conclusion of he being not able to decide as to which party was in possession within the stipulated period the learned Magistrate observed that the petitioners, since the initial stage of the proceeding, had been trying to convince the Court that all the documents and proofs in shape of materials were lying in the disputed premises which had been locked, but the application being u/s 148, CrPC, it had been wrongly filed before him as the Magistrate conducting the Section 145, CrPC proceeding is not empowered to hold local inquiry. It was his view that the petitioners could have taken steps when the proceeding was in the Court of the Sub-Divisional Magistrate. Bhadrak who could have directed local inquiry but that having not been done, the local inquiry sought for by the petitioners before him was beyond his authority to direct.

3. Mr. Misra for the petitioners urges the sole submission that the petitioners were deprived of the opportunity to establish their possession as all the records relating to possession of the premises were locked up inside the premises and that even if their application u/s 148, CrPC before the Magistrate was not maintainable, yet he could have at least undertaken a local inspection of the premises u/s 310, Cr PC on the basis of their application made on 11-3-1992 and that having not been done, and the application having been rejected without any proper reasons, the impugned order is vitiated. It is on the other hand the submission of Mr. Dhal, the learned counsel appearing for the opposite party that Section 310, Cr PC has no application to a proceeding u/s 145, Cr PC in view of Section 148, Cr PC and that on earlier application u/s 148, Cr PC having been rejected as early as on 9-12-1991 and the petitioners having not taken steps either to challenge that order or to take proper steps u/s 148, CrPC to have a local enquiry done, a subsequent application for local inspection was not maintainable.

4. On the premises of the contesting submissions advanced, the sole question

falling for decision is whether a Magistrate conducting a Section 145, CrPC proceeding has the authority to undertake local inspection u/s 310, Cr PC or not. Section 148, Cr PC which occurs in Chapter X of the Code, deals with local inquiry and states that whenever a local inquiry is necessary for the purposes of Sections 145, 146 and 147, a District Magistrate or Sub-Divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry and may furnish him with such written instructions as may seem necessary for his guidance and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid the report of the person so deputed may be read as evidence in the case; and that when any costs have been incurred by a party to a proceeding, the Magistrate while making the decision may direct by whom such costs shall be paid either wholly or proportionately. On a plain reading of the provisions of the section, there cannot be any two opinions that in fact Section 148, CrPC does not vest any authority in the conducting Magistrate of a Section 148, CrPC proceeding to hold a local inquiry himself and that an application for the purpose lies only before the District Magistrate or the Sub-Divisional Magistrate who may direct any Magistrate subordinate to him to carry it out if necessary. It must hence be held that the application u/s 148, Cr PC filed by the petitioners before the conducting Magistrate was misconceived and did not lie.

5. Section 310, CrPC is in the following words :

"310. Local inspection-(1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case and if the prosecutor; complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost."

Apparently the local inspection is to be undertaken by the presiding officer of the Court himself and is to be undertaken only when he forms the opinion that such an inspection is necessary to properly appreciate the evidence given at the inquiry of the trial. It is the submission of Mr. Dhal that the inspection contemplated u/s 310, Cr PC is the same as the enquiry contemplated u/s 148, Cr PC and that in a 145, Cr PC proceeding Section 310 has no role to play. Section 148, Cr PC being the specific provision applicable to such proceeding for the very same purpose. The submission, even on a superficial examination, does not stand scrutiny, "Inquiry" has been defined u/s 2(g), CrPC as meaning "every enquiry, other than a trial, conducted under this Code by a Magistrate or Court". Because of the use of the words both "trial" and "inquiry" in Section 310, CrPC it must be held that those have been used to connote different concepts and hence

inquiry and trial are different things with trial meaning trial of offences and inquiry on its own definition means all inquiries which are not trial. Inquiry as such would embrace a judicial investigation of disputed facts, I need not pursue the matter further as to the difference between "inquiry" and "other proceeding" since there is no dispute that the Section 145, CrPC proceeding is covered within the words "other proceeding" in Section 310, CrPC. That apart, that "inquiry" and "other proceeding" may overlap each other is also apparent in Section 310, CrPC itself which says that any Judge or Magistrate may at any stage of any inquiry, trial or other proceeding visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at the inquiry or trial. It will be noticed that in the latter part: of the section, the words "other proceeding" are not present. It is hence pre-eminently clear that whenever the presiding officer of a Criminal Court feels it necessary that for properly appreciating the evidence given at any inquiry or trial or other proceeding, he may inspect the premises either where the offence is alleged to have been committed or any other place.

6. The purpose of Section 310, CrPC and that of Section 148 are completely different. In so far as Section 145, CrPC proceeding contemplates an inquiry into the fact of possession during" the stipulated period prior to the preliminary order Section 148, CrPC makes provision for local inquiry therein. The proceeding of the local inquiry is in the section itself with the further direction that the report of the inquiry shall form evidence in the case. The power cannot be exercised suo motu by the conducting Magistrate and can be invoked only in the manner provided for. So far as the local inspection is concerned, it is to be undertaken by the presiding officer, not to collect evidence or to treat the result of the inspection as evidence, but only if he feels its necessity to appreciate properly the evidence led in the inquiry and such a step may be taken by the Magistrate at any stage of the inquiry. It is hence possible for the Magistrate even at the close of the evidence and while shifting the same for the purpose of the decision, to undertake the local inspection if the necessity so arises. But in making the local inspection it is of paramount importance that the Magistrate must not reduce himself to the position of a witness or treat the result of his inspection as evidence. The limits of the inspection and the purpose of its use are fixed within the parameters of the section itself i.e. only to appreciate the evidence already given. The power obviously can be exercised either suo motu or on the application of the parties. But there is Section 148, CrPC which excludes the application of Section 310, CrPC to a proceeding u/s 148, CrPC. The two provisions operate in complete different fields.

7. The view taken by me regarding the power of the Magistrate to take recourse to Section 310, Cr PC, even if no move has not been made u/s 148, Cr PC, is also supported by different authorities including our own. A case arose in 1972(2.) CWR 1998 (Batakrushna Naik v. Khageswar Kunda and Ors.) where Hon"ble Mr. Justice R. N. Misra. disagreed with a view taken by Hon"ble Mr. Justice B. C. Das,

in view of the long settled position of law, but refused to refer the matter to a larger Bench in view of the fact that in that particular case the Court was not agreeing with the local inspection and its result. But so far as the present case is concerned, it is relevant to note the observations :

".....Mr. Dhal seeks to rely upon a decision of Das, J. in this Court in the case of Daitari Patnaik and 2 others v. Hadibandhu Singh and 13 others 1972(2) CWR 1309 where in it has been observed that the Magistrates are not entitled to make local inspection. I do not endorse the view as such because it seems to be too well settled in this Court as also in series of decisions of other Courts that local inspection is permitted within its own limitations and where it is done for the purposes of appreciating the evidence already on record, objection, is not taken. The decision of Das, J. therefore, would run counter to the law established in this Court and it is unnecessary to indicate further about the said decision, I am not inclined to refer this revision application to a larger Bench for disposal because in the present case I am also not supporting a local inspection and its result. Even if the learned Magistrate was entitled to visit the spot, he was not entitled to make enquiries, gather evidence by taking to witnesses present at the spot, form an impression about the merit of the dispute and dispose of the dispute keeping these in view. Local inspection has its own limitations and if conducted within these limitations may not be objected to. It has often been said that when making local inspection the Magistrate should avoid making enquiries from people on the spot as to the truth of the matter, in dispute. AIR 1929 Lah 120ee ; Udho Ram v. Emperor, In Re: Mangru Feku Momin, , AIR 1959 Man 38 Nijarrudin v. Abdulboi In AIR 1964 Kar 177 (Appayya Naisa v. State of Mysore) where determination of the question of actual possession was largely influenced by extra-judicial information collected and observation made during local inspection was held to be vitiated. As was rightly indicated in a Nagpur decision 39 Cri LJ 92 : Daljia Singh v. Emperor) a Magistrate is entitled only to embody in his inspection note the facts observed by him on the spot and not the result of statements made to him there."

The decision of this Court was relied upon by the Allahabad High Court in 1983 All. LJ 722 (Satya Prakash v. State of U. P. and Anr. where precisely the difference between Section 148 and Section 310, Cr PC was pointed out. The Patna High Court also took the similar view in (1906) Cri LJ 193 (Emperor v. Tyabally Carimbhoy), Mr. Dhal, however, draws my attention to a later decision of the Patna High Court in Deo Prasad Saha and Others Vs. Ravi Ravidas and Others, which has taken the contrary view that in view of Section 148, Cr PC the Executive Magistrate conducting the Section 145. Cr PC proceeding has no authority to make local inspection by applying Section 310, Cr PC. Even though the decision supports Mr. Dhal, yet I am not prepared to place reliance on the same because it not only runs counter to 1972(2) CWR 1998 {supra}, but also runs counter to (1906) Cri LJ 193 (supra) without referring it. Since it has been rendered without reference to the earlier decision of the same Court on the question, the decision must be held to be per incuriam. Besides I find that 1983

All LJ 722 {supra} has also referred to another earlier decision of the Patna High Court to support its view, but that also has not been taken note of by Deo Prasad Saha and Others Vs. Ravi Ravidas and Others, .

8. The petitioners filed an application on 11-3-1992, after the evidence had been completed, to visit the spot or direct the receiver to verify the records. It has been their stand throughout that the records supporting their possession are all lying inside the premises locked up. Hence whatever might have been the description of the application, it was in effect an application for local inspection by the Magistrate to find the existence of the records so as to properly appreciate the evidence already led. It was within the competence of the Magistrate to have considered the application and decide as to whether the inspection is worthwhile to be undertaken. That having not been done the conclusion by the Magistrate that he was unable to reach any finding regarding possession of the respective parties was reached in an improper way. The order as such becomes liable to be set aside.

9. In the result, the revision is allowed, the impugned order is set aside, and the matter is remitted to the learned Magistrate to consider the application of the petitioners filed on 11-3-1992 as an application u/s 310, Cr PC, and consider as to whether a local inspection is to be undertaken so as to properly appreciate the evidence led by the parties. The case be disposed of within two months from the date of the communication of the order.