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Tshering Wangchuk Bhutia and Others Vs Naksingh Bhutia and Others

Court: Sikkim High Court

Date of Decision: June 15, 1983

Citation: (1983) CriLJ 1904

Hon'ble Judges: Anandamoy Bhattacharjee, Acting C.J.

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

A.M. Bhattacharjee, Actg. C.J.

1. In reporting this case u/s 438 of the Code of Criminal Procedure, 1898, that being the Code still applying in Sikkim the learned Sessions Judge

has confessed his inability to understand the nature of the proceeding initiated by the lower Court, the procedure followed therefore and the

provisions of law applied and invoked therein. All the learned Counsel appearing before him for the parties, including the learned Public Prosecutor

appearing for the State, however submitted that the proceeding, which was initiated, purported to be u/s 145 of the Code and the learned Sessions

Judge also having decided to proceed on that basis, reported the case to this Court for necessary orders, as according to him, not only the

impugned order was passed in utter non-compliance with the provisions of Section 145 of the Code, but was also of a nature which could not be

passed under that section.

2. After hearing the learned Counsel for the parties and also the learned Public Prosecutor for the State, I have no doubt that the learned

Magistrate, if he intended or purported to proceed u/s 145 of the Code had no clear idea as to when and how to proceed under that Section and

as to what types of order can be passed thereunder. I would, however, like to note that when Rules in Revisional matters are issued and copies of

the revisionsl applications are sent to the Magistrates for the purpose of ascertaining what they might have to say regarding the allegations made in

such applications, then,,as pointed out, among others, in the Calcutta decision in Upendra Nath Paul v. Bankim Chatterjee 1947 Cri LJ 785 it is

the duty of the Magistrates below to peruse such applications and to give such explanation; as are necessary regarding the points raised or at least

to state that they have nothing to add if they are of opinion that their orders and the records of the proceedings contain all that can be said by them

on the points raised. Such a course, if adopted, would go a long way to save the Revisional Courts from being landed in confusion, as has

happened in this case.

3. u/s 145 of the Code of Criminal Procedure, the Magistrate is] required to decide which party was in possession and to issue,an order declaring

such party to be entitled to possession until evicted therefrom in due course of law, but the Magistrate cannot direct a party to take possession of

the property which was not in his possession or restore a party to possession of the disputed property, unless the Magistrate proceeds under the

Second Proviso to Sub-section (4) of the section and finds such a person to have been forcibly and wrongfully dispossessed from the property

within two months next before the order. But a bare perusal of the last sentence of the impugned order of the learned Magistrate, dated 20-4-82,

reading as ""the possession of the disputed area be taken by the O/P as both the parties state that this portion is not being possessed by either since

the dispute"", would leave no manner of doubt that the learned Magistrate went entirely beyond and jumped too far away from his jurisdiction u/s

145 by ordering restoration of possession to one of the parties simply and solely on the ground that none of them was in possession.

4. But that apart the impugned proceeding must also be regarded to be incompetent u/s 145 as there is no material on record to show that,

concerning this disputed land there was at any point of time any ""dispute likely to cause a breach of the peace"". Accepting, as one m,ay, that

absence of a formal record by the Magistrate as to his being satisfied as to the existence of a dispute likely to cause a breach of the peace, does

not, by itself, vitiate a proceeding, it must also be accepted that absence of anything on the record to suggest any likelihood of such dispute would

render the entire proceeding without jurisdiction. While it is true that if a Magistrate proceeds to take action u/s 145 and there are materials on the

record to show that there were grounds for his satisfaction as to the likelihood of a breach of the peace,,a mere failure of the Magistrate to formally

record his satisfaction and the grounds therefore cannot vitiate the final order. If the Revi-sional Court is satisfied from the materials on record that

the Magistrate had reasons to be satisfied as to the likelihood of a breach of the peace concerning any land and was, therefore, justified in taking

action under the section, it would not set aside the proceeding or the final order simply on the ground that the Magistrate failed to record the

proceeding in a formal manner as required by the section, because the failure of the Magistrate to make a formal record of his satisfaction and set

out the grounds therefore would not- by itself, affect his jurisdiction. But the foundation of the jurisdiction to proceed u/s 145 being an

apprehension of the breach of the peace, as pointed out by the Supreme Court in Bhinka and Others Vs. Charan Singh, if the materials on record

do not disclose such jurisdictional facts the proceeding cannot but be without jurisdiction.

5. But even that apart, the impugned proceeding is also to be regarded to have been vitiated u/s 530(j) of the Code as the learned Magistrate does

not appear to be empowered to invoke Section 145 of the Code and initiate proceedings thereunder which can only be done by a District

Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class. The learned Magistrate who has passed the impugned order appears to

have been designated as ''Deputy District Magistrate"" an expression unknown to the Code of Criminal Procedure and the learned Public

Prosecutor appearing for the State has frankly conceded that the learned Magistrate was neither a District Magistrate nor a Sub-Divisional

Magistrate nor a Magistrate of the First Class. If that is so, and the learned Public Prosecutor should know it better then the impugn-ed

proceeding, if the same is purported to be u/s 145 of the Code, was also bad on that ground.

6. It has, however, been urged by Mr. B. C. Sharma the learned Counsel for the petitioners that even if the proceeding was incompetent as one u/s

145 of the Code, the application filed by the petitioner, on which the present proceeding was initiated, was very much a complaint in writing

disclosing commission of offences like trespass theft and the like and therefore Mr. Sharma has urged that even if the present proceeding is

quashed as one u/s 145, the complaint should be remitted to -the District Magistrate for taking cognizance and/or other actions according to law. If

there was a complaint within the meaning of Section 4 (h) of the Code, but the learned Magistrate confused the whole thing by purporting to

proceed u/s 145 without any justification in law or in facts, I would have while quashing the proceeding, sent back the complaint to the District

Magistrate for proceeding according to law. It appears from the record that on receipt of the application, the learned District Magistrate sent it for

an enquiry by the Officer-in-Charge of the Sadar Police Station and after the enquiry report was received, the Deputy District Magistrate

proceeded with the proceeding and disposed of the same in the manner rioted hereinbefore, though I am yet to understand, and learned Counsel

appearing for the parties and the State could not make me understand as to how the Deputy District Magistrate could in any way be in seisin of the

matter without any order of transfer to that effect by the District Magistrate. Mr. Kharga the learned Public Prosecutor, has also conceded that he

is not in a position to contend that at the relevant time the Deputy District Magistrate temporarily succeeded to the office of the District Magistrate

and was accordingly entitled under the provisions of Section 11 of the Code to exercise the jurisdiction of the District Magistrate u/s 145 of the

Code. Be that as it may, on a perusal of the application filed by the petitioner, I am not satisfied that the same discloses commission of any offence

to justify any further action. All that the petition discloses is that some boundary dispute was going on between the parties for a long time and on a

written complaint being made by the petitioner in 1979 the matter was referred to the Police for enquiry and report and that during such enquiry it

was felt that the dispute could not be settled unless some surveyor investigated the matter and demarcated the boundary. It is alleged in the

application that it w,as agreed in writing by and between the parties in the presence of the Police and the village elders that until the boundary

dispute was resolved, by a Surveyor or otherwise, none of the parties would use the disputed area or its produce and the crux of the allegations of

the petitioner in the application appears to be that the respondent has violated such agreement as aforesaid. The enquiry report submitted by the

Police under the order of the District Magistrate in this case also shows that all that has been reported to have been done by the respondent was to

use the portion of the land, about which there was a bona fide boundary dispute, in violation of the agreement not to do so until the boundary was

determined by the Surveyor. The Police report further shows that no one, including the village elders, Is certain about the boundary line. It also

appears from the record that under the order of the Deputy District Magistrate, a Government Surveyor was deputed to inspect and report and

that it is stated in his report that the disputed area forms part of Plot purchased by the respondent from its previous owner as early as in 1965. It is

true that it may not be possible to make free use of or to treat these reports as evidence at this stage; but as already noted, even if the application

lodged by the petitioner is examined without the aid of these reports, it only discloses the existence of a long standing boundary dispute between

the parties and the user of the disputed area and its produce by the respondent in disregard of some agreement between the parties not to do so

until the boundary was ascertained by the Surveyor, This cannot,and does not disclose commission of any criminal trespass or theft or any other

offence which would justify taking cognizance of this application as a criminal complaint and therefore there can be no justification for remitting the

same to the District Magistrate with the direction to treat the same as such a complaint and to proceed accordingly. The prayer made by Mr. B. C.

Sharma on behalf of the petitioners cannot therefore be allowed and is rejected.

7. One word more. It appears that during the pendency of the Revision before the Court of Session, the original petitioner died and was

substituted by his heirs, the present petitioners. The learned Sessions Judge allowed such substitution as he thought that ""the matter in question is

not exactly a criminal proceeding"" and as the respondents, including the State, consented to such substitution.I do not think that the learned

Sessions Judge was required to designate a proceeding u/s 145 of the Code of Criminal Procedure, 1898, as ""not exactly a criminal proceeding

and to obtain the consent of the respondents to effect substitution of the deceased petitioner by his legal representatives, to enable the learned

Judge to proceed with the Revision before him. It is true that the Supreme Court in Nandlal Misra Vs. K.L. Misra, and in Jagir Kaur and Another

Vs. Jaswant Singh, has observed that proceedings for maintenance u/s 488 of the Code of Criminal Procedure, 1898, ""are in the nature of civil

proceeding"". But even though in the nature of civil proceeding, they are nevertheless criminal proceedings, being judicial proceedings governed by

and under the Code of Criminal Procedure. I would like to think that a proceeding u/s 145, orders whereunder were described by the Privy

Council in Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani ILR 1901 Cal 187 at 197 as ""merely Police orders made to prevent breaches of

the peace"",and which observations were quoted with approval by the Supreme Court in Bhinka and Others Vs. Charan Singh, cannot be

designated as ""not exactly a criminal proceeding"", as has been done by the learned Sessions Judge. The jurisdiction which is given to the

Magistrate by this Section is a jurisdiction which is intended for the purpose of preserving the public peace, which is evidently a criminal jurisdiction

and the proceeding thereunder which is regulated from beginning to the end by the provisions of the Code of Criminal Procedure, cannot but be a

criminal proceeding, though not a criminal prosecution or a criminal trial, even though the nature of such proceedings may be described as civil

quasi-civil, quasi-criminal and all that and in fac has been described in some judicial decisions as quasi-civil and also as quasi-criminal. The

expression ""quasi"", as has been pointed out by Bernard Schwartz in ""American Administrative Law"" 1950 Ed.Ã¯Â¿Â½ pages 57 58), is ""a confession

of vagueness"". But even though these proceedings are criminal proceedings, the learned Sessions Judge failed to note that, under the law as finally

settled by the Supreme Court in Pranab Kumar Mitra Vs. The State of West Bengal and Another, and the The State of Kerala Vs. Narayani

Amma Kamala Devi, A Criminal Revision unlike a Criminal Appeal, does not abate by reason of the death of the petitioner and that, in the

absence of a provision like Section 431 of the Code providing for the abatement of appeals in certain cases on the death of the parties, the

inference must be that the power of revision remains unaffected by the death of the petitioner and the revisional Courts have been left with

complete discretion to deal with a pending Revision even on the death of the petitioner, in accordance with the requirements of justice and may

proceed to substitute the heirs of a petitioner for the ends of justice, if so required.

8. The revision is, therefore accepted and the entire proceeding culminating in the impugned order is quashed. This however would not prevent the

petitioner from taking such action in respect of the dispute as would be available to rum under the law.