

Smt. Asha Agarwal and Others Vs Mohan Sharma and Others

Court: Calcutta High Court

Date of Decision: Dec. 23, 2003

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 145, 147, 482

Citation: (2004) 2 CALLT 164 : 108 CWN 217

Hon'ble Judges: Rajendra Nath Sinha, J

Bench: Single Bench

Advocate: Minoti Gomes, S.S. Roy, R. Basak, Bidyut Dutta and Bijan Dutta, for the Appellant; Jayanta Kumar Das and Sujit Bhunia, for the Respondent

Judgement

Rajendra Nath Sinha, J.

This is to consider an application u/s 482 of the Code of Criminal Procedure being aggrieved by an order dated

12.3.2003 passed by Sri Sukumar Chakraborty, Additional Sessions Judge, 4th Court, Midnapore in Criminal Revision No. 22 of 1994 affirming

the order dated 31.8.1994 passed by Sri M. Murmu, Executive Magistrate, Midnapore in M.R. Case No. 104(S) of 1986 u/s 147 of Code of

Criminal Procedure directing the Dwaraka Prosad Agarwal (since deceased) to remove the illegal construction or to demolish the construction of

brick wall and iron gate of the premises.

2. In short the petition is that R.S. Plot No. 868 of Mouza Kharagpur Khas Jungle measuring an area of 0.10 acre of land belonged to one

Gorelala. On 7.7.1959 he sold 7 decimals out of 10 decimals of land to one Pyarelal and the rest 3 decimals of land was sold to Badami Devi on

25.1.62. Pyarelal purchased Badami's 3 decimals of land on 23.6.1964, thus, became the owner of 10 decimals of land and sold the same to the

petitioners's predecessor-in-interest, Dwaraka Prosad Agarwal (since deceased) on 22.9.77. He mutated his name with the Municipal Authority,

paid municipal taxes and obtained a sanction plan from the office of Kharagpur Municipality and constructed a house thereon as per plan. The

opposite party No. 1 to 7 having no right, title and interest in the said property forcibly occupied a small tin-shed room in a separate room. After

purchase of the said land by Dwaraka Prosad Agarwal, the predecessor of the present petition had to fight against a title suit filed by the opposite

party No. 1 before the learned second Court of Munsif at Midnapore being Title No. 190 of 1977 which was dismissed on 6.7.1987. Dwaraka

Prosad Agarwal filed a Title Suit No. 47 of 1980 before the learned Second Court of Munsif at Midnapore for declaration and recovery of khas

possession and permanent injunction which was decreed on 18.8.1987 which is as follows:

(i) "It is ordered and decreed that the suit and the same be decreed ex parte against the defendant with cost, that the right title, interest of the

plaintiff in the suit property be hereby declared. It is also declared that the defendant is a trespasser in the suit property as mentioned in the

schedule of the plaint. Plaintiffs do recover khas possession of the suit property.

(ii) "Defendant be permanently restrained from making any interference with peaceful possession of the plaintiff in the suit property.

3. The opposite party Nos. 1 to 7, however, filed an application before the learned Executive Magistrate, Midnapore, against Dwaraka Prosad

Agarwal u/s 147 Code of Criminal Procedure in the year 1985 which was rejected by the learned Magistrate. A criminal revision was preferred

against the said order and the learned 4th Additional Sessions Judge in Criminal Motion No. 134 of 1986 was pleased to direct the Court below

to proceed afresh according to law. Thereafter a proceeding u/s 147 Code of Criminal Procedure has been drawn up by the learned Magistrate

and registered as Miscellaneous Case No. 104(3) of 1986 wherein Dwaraka Prosad Agarwal submitted a written statement.

4. Admittedly there are civil and criminal litigation in between the parties that in Criminal Motion No. 100 of 1985 learned Additional Sessions

Judge in his order dated 19.6.1985 observed that a portion of the disputed Dog was occupied by the said Dwaraka Prosad Agarwal and that too

by the side of a cycle stores belonging to the opposite party No. 1.

5. In the aforesaid proceeding findings of the opposite parties were taken and closed and Dwaraka Prosad was cross-examined in part on

1.9.1993. Thereafter he was taken ill and had to go to Vellore (Tamil Nadu) for treatment of his left leg. Petition was filed before the learned

Magistrate praying time which was eventually not considered and no opportunity was given to adduce further evidence on their part and

20.11.1993 was fixed for argument. Thereafter the said case record missed the cause list and the date of argument could not be made known to

the parties. The said case was in the jurisdiction of SDO, Kharagpur and the record was sent there on 10.8.1994 and by an impugned order the

learned Magistrate had directed to remove the illegal construction or to demolish the construction of brick wall and Iron Gate from the premises on

20.9.1994. It is stated that Sri M. Murmu, the learned Executive Magistrate was not authorised to take the matter i.e., cases u/s 23(2) of Code of

Criminal Procedure of the said Kharagpur jurisdiction. As against the order of the learned Magistrate a Criminal Revision was filed (No. 220 of

1994) and during the pendency of the same Dwaraka Prosad Agarwal expired. However, the present petitioner continued the same and the order

of the learned Magistrate was affirmed by the learned Sessions Judge by the impugned order which is under challenge.

6. Mr. S.S. Roy, learned counsel leading the petitioners' side has submitted that the Criminal Court does not have the jurisdiction to adjudicate the

substantive rights of the parties save and except that of taking temporary measures in connection with the security proceeding as u/s 147 or so. He

has, however, argued that the learned Sessions Judge failed to appreciate the effect of the Civil Court's judgments in favour of the petitioner. Thus,

came to an erroneous finding which suffers from illegality and requires to be correct/set aside/modified invoking the inherent Jurisdiction of this

Court. Sri Roy has cited the following reported decisions:

(1) AIR 1995 CriLJ 1376 (Yaquub Ali v. State of Rajasthan and Ors.)

(2) Amresh Tiwari Vs. Lalta Prasad Dubey and Another,

(3) Hitlal Mahton Vs. Bhikhari Mahton and Others,

7. Mr. Jayanta Kumar Das and Mr. Sujit Bhunia for the opposite party and Mrs. Minoti Gomes for the State appeared and supported the

impugned order stating that the impugned order is the resultant effect of the finding of the learned Magistrate that the dispute in between the parties

is essentially a cause for breach of peace and to prevent the same the following remedial measures were ordered. Learned Sessions Judge has also

so held that despite the order of the Civil Court the learned Magistrate's writ reigns when there is likelihood of breach of peace.

8. Mrs. Gomes on behalf of the State, however, did not support the present finding of the learned Magistrate because there was a pending civil

litigation in between the parties and according to her the domain is that of the Civil Court in respect of property rights and that chapter 10 of the

Code of Criminal Procedure and its different sections are intended for the purposes of maintenance of public order and tranquillity including that of

dispute as to immovable properties but those are of temporary nature subject to final adjudication by the Civil Court. Here in this case it is the

admitted position that opposite party's Civil Suit No. T.S. 190/1977 still pending.

9. In this instant case it is found that there is a specific direction of the learned Magistrate for removal of the illegal consideration and/or to demolish

the brick wall and iron gate from the suit premises, i.e., of the schedule land.

10. Construction of the brick wall and placing an iron gate therein, meaning thereby that the compound has been surrounded and secured, has not

been made or raised overnight. Thus, when these were raised the parties were possibly fighting the civil litigation. As I nowhere find from the four

corners of the impugned order of the learned Magistrate that such a flat of surrounding denying the user of something on the part of the opposite

parties are sought to be maintained for the present. It, however, transpires that the learned Magistrate relied on the learned Commissioner's report

dated 28.11.77 in connection with Title Suit No. 190 of 1977 but did not take the resultant fact of serving suit into account. Mr. S.S. Roy learned

advocate for the petitioner has drawn the attention of the Court to the case referred above AIR 1995 CriLJ 1376 (Yaqub Ali v. State of Rajasthan

and Ors.) (supra) wherein the question of maintainability and continuance of parallel criminal proceeding in addition to civil one has been

deprecated. It has been held that during the pendency of a civil suit parallel proceedings u/s 145, 146 cannot be allowed to be continued by

converting the same to proceeding u/s 147, it has also been pointed out that wherein question of user of possession is involved that question can

also be adjudicated even by way of an interim injunction and/or any other appropriate orders of the Civil Court, thus, continuance of any criminal

proceeding is unwarranted. The next case Amresh Tiwari Vs. Lalta Prasad Dubey and Another, : it was held in this decision wherein the appellant

by filing a petition for dropping the proceeding u/s 145 on the ground that the civil suit in respect of the same property was pending wherein an

order directed maintenance of status quo has already been passed--but the respondent taking the stand that the property which formed the subject

matter of the aforesaid suit was different from the property involved in the proceeding. Appellant's application dismissed by SDM and revision and

review preferred were also dismissed. When proceeding u/s 145 resumed respondent in his statement admitted that civil suit was for possession

and stay and the same was in respect of the same property. Accordingly, the SDJM was justified in dropping the proceeding in Section 145. The

question arose in that case as to whether the earlier order of the learned SDM which was formed by the higher Court in revision and review would

become final. It was held that the same was on the footing that the civil suit relating to different property has been submitted by respondent therein

in that case.

11. The other cases reported is Ram Sumer Puri Mahant Vs. State of U.P. and Others, wherein it has been held inter alia that when a civil litigation

is pending for the property wherein question of possession is involved and has been adjudicated initiation of a parallel criminal proceeding u/s 145

of the Code would not be justified. The parallel proceeding should not be permitted to continue and in the event of a decree of the Civil Court the

Criminal Court should not be allowed to invoke its jurisdiction particularly when possession is being examined by the Civil Court and the parties

are in a position to approach the Civil Court for interim orders such as injunction or appointment of receiver for adequate protection of the

property during the pendency of the dispute. Multiplicity of litigation is not in the interest of the parties nor should public time be allowed to be

wasted over meaningless litigation. The other case has been relied on by Mr. Roy, learned counsel for the petitioner is Hitlal Mahton Vs. Bhikhari

Mahton and Others, wherein it was held that a proceeding u/s 147 is a quashable proceeding. If, therefore, the question at issue in between the

parties has already been the subject matter of a suit in the Civil Court. The trying Magistrate has no jurisdiction to institute the proceeding.

12. In this instant case in hand here the admitted position is that the parties are at logger head and that civil litigations are there in between them

including those of two Civil Suits: one filed by the opposite party which was dismissed and the other being the predecessor of the present petitioner

which was decreed.

13. Keeping in view of the matter and in view of the aforesaid discussion made above I am of the view that the impugned order cannot be

sustained and has got to be set aside and accordingly set aside.

14. In the result the petition succeeds without any costs whatsoever. The parties will be at liberty to approach before the Civil Court for

appropriate remedy and protection of their respective rights, if any or at all, in peril.

Xerox copy of the judgment, if applied for, be supplied to the parties at the earliest.