(1974) 03 BOM CK 0034

Bombay High Court (Nagpur Bench)

Case No: None

Chandrakalabai		APPELLANT
	Vs	
Sharadchandra and Another		RESPONDENT

Date of Decision: March 14, 1974

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 145(4)

Citation: (1975) CriLJ 1294 : (1974) MhLj 871

Hon'ble Judges: Shimpi, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Shimpi, J.
Party No. 1 Chandrakalabai, widow of Badrilal Paliwal, has filed this revision application praying that the record and proceedings of Criminal Revision No. 29 of 1970 of the Court of the Additional District Magistrate, Bhandara, arising out of an order dated September 17, 1970, passed by the Sub-Divisional Magistrate Bhandara, be called for and the orders passed by both the authorities be set aside.

2. The facts in brief are as under:

Applicant Chandrakala, party No. 1, is the widow of one Biharilal Paliwal. Shri Biharilal Paliwal held agricultural lands at village Sihora as well as at other villages, one of which is Bamni in the State of Madhya Pradesh. In this application we are concerned with the lands and a wada which has been numbered by the Gram Panchayat, Sihora as houses Nos. 2 to 7. Party No. 2 Sharadchandra was the nephew of Biharilal Paliwal. His genitive father Daulatram is the real brother of Biharilal. Sharadchandra, when he was a minor of 6 years was taken in adoption by Biharilal on February 16, 1956. It is further seen that Biharilal, during his lifetime, executed a Vyawasthapatra on July 25, 1956. This document is to be found at page 31 of the

proceedings before the Sub-Divisional Magistrate. Under this document all the lands of Sihora which admeasure approximately 59 acres were given in the management of Sharadchandra till his lifetime. This arrangement was made during the lifetime of Biharilal himself. The name of Sharadchandra was mutated in the record of rights of these lands during the lifetime of Biharilal and Biharilal was shown as guardian of Sharadchandra, Sharadchandra being minor. Biharilal died on June 14, 1966. After the death of Biharilal, the name of Chandrakala, party No. 1 was entered in the revenue records as well as the Gram Panchayat records as the guardian of Sharadchandra. It is also common ground that Sharadchandra attained majority on February 10, 1960.

3. It is the case of Chandrakala, party No. 1, that she was in exclusive possession of the fields and the houses at Sihora. It is her case that sometimes on January 11, 1969, she went to Najibgarh near Delhi for attending marriage ceremony at the house of her brother-in-law and while she was staying at Najibgarh, she received certain letters and a telegram from one of her servants by name Ramkishore, whom she had kept as a cook, who was residing on her behalf at the wada at Sihora along with her invalid brother. The wire was received to the effect that party No. 2 Sharadchandra and his father, i. e. genitive father Daulatram broke open the locks of the house and they have illegally taken possession of the house. After learning from this telegram, Chandrakala, party No. 1 wrote an Inland letter to the P. S. I. Tumsar. It was sent by registered post. It is dated February 4, 1969 and is to be found at record page 23, By this letter she intimated that she came to know at Najibgarh about party No. 2 and his genitive father taking forcible possession of her house. They had removed her invalid brother by forcibly putting him in a cart and expressed suspicion that they may even do away with his life. She further stated that her servant Ramkishore was also given threats and he was directed to leave the place. As nobody was in possession of the house, she was not in a position to state as to what property of her was stolen away or taken away by Sharadchandra from the house. In this letter she also referred to her first going to Bamni which is in Madhya Pradesh. I have already stated that Biharilal had landed property at Bamni also. It is seen from the proceedings that Chandrakala is the Sar Panch of Gram Panchayat of village Bamni. After this letter Chandrakala came to village Sihora and then sent letters to the authorities. She addressed an application to the D. S. P., Bhandara on March 3, 1969 which is to be found at page 27 of the proceedings. She has reported what she stated in the application. Thereafter we find that she has made some applications again to the D. S. P. to take steps. Her statement has been recorded by the police on March 25, 1969, which is at page 49 of the record. In that statement she has clearly admitted that between January 11, 1969 and January 30, 1969, sometimes forcible possession of the wada has been taken and she was not allowed to enter or use the wada, i. e., house Nos. 2 to 7. All these applications made one after another were ultimately considered and it appears that police, made panchanama dated March 29, 1969. A copy of the panchanama is at page 35. The

recitals in the panchanama show that there were two locks to each door but three locks were recent and there was also one window by which a person could enter or come out of that house and there were three servants at the time of the panchanama inside the house and those three servants were of Sharadchandra, party No. 2. After knowing this position, the house was seized by the police by sealing it. Thereafter application has been made by the P. S. I. to the Sub-Divisional Magistrate to take steps as there was likelihood of breach of peace and the Sub-Divisional Magistrate decided to take proceedings u/s 145, Code of Criminal Procedure, and passed a preliminary order dated June 5, 1969.

4. Before the Sub-Divisional Magistrate both the parties filed their written statements as well as affidavits. Party No. 1 filed affidavits of three witnesses on August 3, 1970, of some witnesses on August 14, 1970 and August 17, 1970. Prior to her filing of the affidavits, party No. 2 Sharadchandra filed his written statement on July 22, 1970 and filed affidavits of nine persons to show that he was in exclusive enjoyment of the lands at Sihora, after he attained majority. He also submitted that he was in possession of the houses and a part of it was being used by him for the purpose of storing agricultural produce and tethering the cattle. His contention in the affidavit was that Chandrakala was not residing at Sihora. She was residing at village Bamni where she was discharging the duties of Sar Panch. This reference we find in para 7 of his affidavit at record page 257.

5. Chandrakalabai, party No. 1, in her statement as well as her affidavit and the affidavits of her witnesses had contended that she was in possession of the lands and she was in exclusive possession of the wada, i. e. houses Nos. 2 to 7. It is material to note that in all the affidavits she filed, all the witnesses have contended that Chandrakala was in possession of the wada upto March 29, 1960 and Sharadchandra was not in possession. The Sub-Divisional Magistrate perused these affidavits, heard the parties and on consideration of the evidence in the shape of documents as well as these affidavits he came to the conclusion that Chandrakala was not in physical possession of the lands but she was in possession of the house and was living , there. However, the learned Sub-Divisional Magistrate further observed that on her own showing Chandrakala left the village in January 1969 and on January 30, 1969, she received a telegram that her locks were broken and her possession of the house was disturbed and thereafter she filed her complaint about it. The learned Sub-Divisional Magistrate came to the conclusion that at any rate she was dispossessed in January, according to her own showing. That therefore she was dispossessed more than two months before the preliminary order which was passed on June 5, 1969 and in that view he rejected the claim of Chandrakala and accepted the claims of party No. 2 Sharadchandra.

6. Feeling aggrieved, Chandrakala filed the revision application. The Additional District Magistrate, Bhandara, who heard that revision application No. 29 of 1970, confirmed the order of the Sub-Divisional Magistrate passed on June 25, 1973.

Feeling aggrieved, the present revision application is filed.

7. Shri Badiye, who appeared for Chandrakala, party No. 1 urged that the learned Judge was in error in rejecting the claim of Chandrakala in preference to that of Sharadchandra. He submitted that there was a clear breach of mandatory provisions of Clause (4) of Section 145, Code of Criminal Procedure, which enjoins upon the Magistrate to peruse affidavits and other documentary evidence. Shri Badiye submitted that ''peruse'' means that the Magistrate must apply his mind to the facts stated in the affidavits and his order must show that he has applied his mind, carefully considered the contents of the affidavits; He submitted that the Magistrate may reject or accept the affidavit but he must carefully consider all the averments in the affidavits and his order must show on the face of it that the Magistrate has considered the affidavits. Shri Badiye further submitted that Chandrakala had filed nearly 10 affidavits, out of which seven were more material for the purpose of establishing the exclusive possession of the lands as well as of the houses in question. He urged and he read the portions of the orders to show that both the lower authorities did not peruse each and every affidavit. He further submitted on reading the order that both the authorities have not carefully considered the averments made in the affidavit. He, therefore, submitted that the findings arrived at by the learned lower authorities are, therefore, vitiated and they should be set aside.

8. In support of his contention, Shri Badiye pointed out observations from various authorities. He first of all referred to Vijay Rao and Others Vs. Laxman Rao and Another, The observation relied upon by Shri Badiye are from paragraph 3, which runs as under:

In my view, this is thoroughly wrong. Though a Court may not believe the documentary evidence, that does not mean that the affidavits produced on behalf of a party whose documentary evidence has been disbelieved, do not require any consideration. This summary way of rejecting the evidence produced in the form of affidavits on behalf of the second party is a serious mistake which affects the merit of the order.

There cannot be any quarrel with the legal proposition of this authority. The learned advocate for the opponent No. 2 has also accepted this observation.

9. Shri Badiye also drew my attention to Raghunath Behera and Others Vs. Purna Chandra Mahanta and Others, . Placitum (D) was read out. It runs as under:

After amendment in 1956, an affidavit substitutes oral evidence except where the Magistrate may summon and examine a person whose affidavit has been put in, to test the correctness of the facts mentioned in it. It is the bounden duty of the Magistrate to examine carefully the affidavits of each deponent. He must give clear reasons for accepting or rejecting the affidavit. The order of the Magistrate must give indication that he had applied his mind to the affidavits. The affidavits cannot

be dealt in a perfunctory manner by general observations. They should be weighed as oral evidence was being done prior to the amendment in 1956.

The same observations are to be found in Nadia Chand Das v. Baishnab Charan Das AIR 1965 Trip 43 : (1965) 2 Cri LJ 811 ; Laiphrakpam Leiren Singh and Others Vs. Nongthombom Leiren Singh and Others, relevant observations being at page 27, Raghubir Singh Vs. Gram Samaj Kotra through Ram Asrey, . He also drew my attention to the observations of this Court reported in State of Maharashtra Vs. Kalabai Natthuji Rajurkar and Others, His Lordship Bhole, J, has observed:

It is the duty of the Magistrate not only to peruse all evidence led by both parties, but also assess its value by proper application of mind and then to come to a finding regarding possession ... Failure to do so will vitiate the order.

I have already stated that there cannot be any two opinions about these observations, but the observations have to be considered in the light of facts and circumstances established in a particular case. We have therefore to find in this case whether there is really a breach of Section 145 (4) of the Code of Criminal Procedure, as contended by Shri Badiye. Shri Badiye then read out the various affidavits made by Chandrakalabai and her witnesses. It is seen from the case made out from time to time that Chandrakala''s main contention was as regards her forcible dispossession of the house. Apart from her affidavit, it will be seen that in all other documents which consist of her letter addressed to the P. S. I., Tumsar, or an application to the D. S. P. or her own statement before the police, that she was all the while contending about the house and not about the lands. The dispute about the land is raised for the first time by her written statement and her affidavit. The Sub-Divisional Magistrate in his order has referred to the affidavits filed by Chandrakala as well as her witnesses. It is true that in the order of the Sub-Divisional Magistrate, or in the order of the Additional District Magistrate, all the names of the witnesses whose affidavits are filed by Chandrakala, are not mentioned but that fact alone would not go to show that those affidavits were not before the authorities or that they have not perused them, i. e., they have not considered and assessed their value, because I find that reference has been made to the affidavits and the Sub-Divisional Magistrate has stated:
However, perusal of the affidavits in her support show that except one affidavit (by Pisaram) all other affidavits mainly say about her possession of house only.

What the learned Sub-Divisional Magistrate wanted to emphasise was that the affidavits gave emphasis on her possession about the house, not that there was no inclusion of the contention of Chandrakala of her claim to possession of the lands. These are summary proceedings and in that light we have to consider the orders passed. What is necessary to appreciate and consider is whether the evidence in the shape of affidavits as well as in the shape of documents produced by the parties was considered by the authorities for the purpose of coming to the conclusion as to who

was in actual possession of that property and in that light I find that there is no breach of the mandatory provisions committed by the two authorities, as contended by Shri Badiye. the affidavits were considered and in the light of the respective evidence of the parties, both the authorities came to the conclusion that in respect of the lands Sharadchandra was in actual possession. Chandrakala had filed 10 affidavits, out of which seven were important. Sharadchandra had also filed 9 affidavits. They were considered and in the light of the evidence before him, the Sub-Divisional Magistrate had come to the conclusion that Sharandchandra was in actual possession of the lands.

10. Shri Badiye submitted that apart from the lands, the Sub-Divisional Magistrate should have considered that Chandrakala was in exclusive possession of the house. The order of the Sub-Divisional Magistrate does show on the face of it that the Sub-Divisional Magistrate has considered the question in respect of possession of the house of Chandrakala. I am unable to agree with the submissions of Shri Badiye. It is seen from the order of the Sub-Divisional Magistrate that after considering all the affidavits of Sharadchandra as well as Chandrakala, he has observed that Sharadchandra''s evidence falls short of showing that he was actually residing there. At the most he was using the house for storage of agricultural implements. He further observed that the affidavits of Chandrakala show that she was in possession of the house and she was residing there. However, the learned Sub-Divisional Magistrate on the facts established came to the conclusion that she was dispossessed forcibly by Sharadchandra more than two months prior to the date of passing of the preliminary order and as such he did not grant her relief. This order was confirmed by the Additional District Magistrate on the same grounds. I am inclined to hold that both the lower authorities did not commit any error of law or that they have not arrived at manifestly wrong findings on the facts established. It is true that the Vyawasthapatra does not say that the house was given for the maintenance of Sharadchandra. There is no reference to the house at all. It is also seen from the evidence adduced by the parties that Sharadchandra is a college student. He was prosecuting his studies. He was residing at Nagpur along with his genitive father and he never resided at Sihora in houses Nos. 2 to 7, It has come in evidence that Chandrakala was residing either at Sihora or at Bamni. Therefore, Chandrakala was in possession of Sihora houses upto January 11, 1969, i.e., till the time she left for Delhi, i. e., Najibgarh for attending the marriage ceremony and sometimes between January 11, 1969 to January 30, 1969, Sharadchandra wrongfully dispossessed her of that house. He constructed three blocks there and inducted some three servants to reside in that house. Prima facie it appears that Sharadchandra did take illegal and forcible possession between that period, as mentioned above with the help of his servants. It is further established that the police have taken possession of the house under a seizure memo sometimes on March 29, 1969. Shri Badiye submitted that the possession of the house, i. e., houses Nos. 2 to 7, was of the police from March 29, 1969 till the date of the preliminary

order, which is passed sometimes in June 1969. Shri Badiye submitted further that if 60 days are calculated from the dispossession upto the date of police taking possession, then it can be held that Sharadchandra dispossessed Chandrakala some 60 days prior to the police taking possession of it and this aspect should have been considered by the Sub-Divisional Magistrate. Shri Badiye submitted that Sharadchandra was not in possession from March 29, 1969 till the preliminary order was passed and, therefore, that period would not be considered either in favour of Sharadchandra or against Chandrakala. I am unable to agree with the submission of Shri Badiye. The proviso to Section 145 (4) runs as under

Provided further that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, ho may treat the party so dispossessed as if be had been in possession at such date.

In the instant case, the argument is that the period between March 29, 1969 to June 5, 1969 should not be taken into consideration at all and what is to be considered is two months from January 30, 1969 when Chandra kala came to know and between March 29, 1969 when police seized the house. I am unable to accept this argument in view of the clear wordings of the proviso which I had reproduced above. I have already stated that Sharadchandra had taken forcible possession between January 11, 1969 and January 30, 1969. That means he has taken forcible possession more than two months prior to the date of the preliminary order. There is nothing in the record to show that the seizure done by the police was pursuant to any order obtained from the Magistrate. Under such circumstances, I am inclined to accept the findings of both the authorities and I am further inclined to hold that there is no error of law or that the findings arrived at are perverse.

11. In that view, I reject the revision application.