

Ram Asrey and ors. Vs. State and ors.

Ram Asrey and ors. Vs. State and ors.

SooperKanoon Citation : sooperkanoon.com/470005

Court : Allahabad

Decided On : Feb-10-1977

Reported in : 1977CriLJ848

Judge : P.N. Bakshi, J.

Appellant : Ram Asrey and ors.

Respondent : State and ors.

Judgement :

ORDER

P.N. Bakshi, J.

1. This is a glaring case in which the wild vacillation of the river Ganga has led to multiplicity of civil and criminal litigations. An application under Section 145, Criminal P.C. was filed by Ram Asrey and 14 others of village Nauranga against Chan-drama Ojha and 19 others of village Ojha-ballia in respect of area of land covering about 600 bigbas. The Sub divisional Magistrate, Ballia called for a report from the Station Officer. On being satisfied therefrom that there was an apprehension of breach of peace, a preliminary order was passed on 30-10-1972. The property in question was attached on 3-11-1972. Parties thereafter were directed to file their written statements and affidavits and to produce evidence in support of their respective claims. The Sub-divisional Magistrate Ballia held that the second party was in possession of the land in dispute on the date of the

preliminary order. The first party was therefore, restrained from disturbing their possession except in due course of law. The sale proceeds of the crops which had been attached during the course of the proceedings were directed to be delivered to the second party. Aggrieved thereby, a revision was filed before the Additional Sessions Judge which has been dismissed on 30-3-1973 : hence this revision.

2. I have heard learned Counsel for the parties at considerable length and have also carefully perused the impugned orders and the documents on the record.

3. Learned Counsel for the applicant has made a number of submissions. He has contended that since the land in dispute lies in village Ojhaballia on the finding recorded by the S.D.M., Ballia, it had no jurisdiction to proceed with the case under Section 145, Criminal P.C. He has also contended that the individual affidavits filed by the parties have not been considered in accordance with law. He has lastly contended that the Magistrate has acted illegally in making a spot inspection and enquiries from the residents of the village and in not maintaining a memorandum of his inspection which he is required to do so under Section 539-B (1), Criminal P.C. I shall now deal with these submissions.

4. In the written statement filed by the applicant Ram Asrey he has mentioned in paragraph 3 that the land in dispute lies in village Nauranga, district Ballia and that it does not lie in village Ojhabalia. In paragraph 5 of the written statement he has alleged that the disputed land had gone to the district of Behar on account of the changes in the river current, but the applicants remained in possession thereof. In paragraph 8 of the written statement it has been alleged by Ram Asrey that on account of the alteration of Boundaries Act, 1968 between the States of Behar and Uttar Pradesh the land in dispute lies in Mauza Nauranga, district Ballia (U.P.). As such in paragraph 9 of the statement, it has been mentioned that the boundaries of the land as given in the police report are correct and proceedings under Section 145, Criminal P.C. have been correctly initiated.

5. The second party namely Chan-drama Ojha has alleged in his written statement that the land in question is a part of an area of 1238 Bighas of village Ojha Ballia and that the opposite parties are in possession of the same, In subsequent paragraphs of the statement reference was made to proceedings under Section

145, Criminal P.G. initiated in the court of the S.D.M. Ara (Behar) which was fought up to the High Court of Patna. Reference was also made to Civil Suit No. 50/2 of 1952 filed in the court of the District Judge Shahabad, Arrah which pertained to an area including the area now in dispute and which was also fought upto the stage of High Court at Patna.

6. From a perusal of the order of the S.D.M, dated 8-5-1972 I find that issue No. 4 is to the effect:

Whether the land in dispute is part of village Nauranga or village Chakki Nauranga mauseme Ojhabalia.

7. While dealing with this issue, the S.D.M. was of the opinion that 'it was not necessary to give any finding regarding the fact whether the land was part of village Nauranga or Chakki Nauranga Ojhaballia, for deciding this case under Section 145, Criminal P.C. specially when the identity of the land is fixed otherwise.' From the above observations it is clear that no decision has been given by the S.D.M. on the question whether the land in suit lay in village Nauranga or village Ojhaballia. As I have mentioned above, the wild fluctuating current of the river Ganga has led to accretion of land sometimes towards the Behar side and sometime towards U.P. with the result that there has been a series of litigation between the parties who reside in that area. In order to provide for the alterations of boundaries of the States of Behar and U.P. and for matters connected therewith, the Behar and U.P. (Alterations of Boundaries) Act 24 of 1968 was enacted. Under the schemes of this Act the intervening borders lying between both the States have been demarcated. The boundary has been fixed by the fixation of pillars. This has obviously been done in order to set at rest the disputes regarding the boundaries of the two States caused by the erosions of the river Ganga, The schedule attached to the Act shows village Nauranga completely in U.P. and villages Nauranga Chakki and San Barsa completely in Behar. Paragraph 4 of the Schedule fixed the exact boundary which is relevant for purposes of the instant case The S.D.M. made a local inspection of the area in dispute with reference to the fixed boundaries as indicated by the pillars that have been fixed under the provisions of the aforesaid Act and this was done with a view to verify whether the

land in dispute as mentioned in the application filed under Section 145, Criminal P.C. by the applicant was the same as the land which had been shown by boundaries in the report of the Station Officer and as also indicated in the preliminary order. The S.D.M. while deciding the issue No. 6 has recorded a finding that the disputed land is in the possession of the people of Ojhaballia. He has arrived at this finding on a consideration of the oral and documentary evidence on the record.

8. Counsel for the applicant has very strenuously contended that unless the court recorded a clear finding whether the land was situate in village Ojhaballia or in village Nauranga he would not have the jurisdiction to proceed under Section 145, Cr.P.C. He has urged that Section 145, Criminal P.C. gives Jurisdiction to a S.D.M : to proceed with respect to immovable property lying within the local limits of his jurisdiction, Village Nauranga as given in the schedule is in U.P. whereas village Ojhaballia is in Behar. Therefore, if the property is situate in village Ojhaballia, the S.D.M. Ballia would have no jurisdiction to proceed with the matter. To my mind when demarcation has been effected under the statute by the fixation of pillars in the bed of the river which keeps vacillating most of the time, that boundary itself should be a sure indication to prove whether the land lies in the State of U.P. or in the State of Behar. It must be repeated that the applicant has himself invoked the jurisdiction of the S.D.M. Ballia and specifically alleged in paragraph 3 of his application that the disputed land lies in Mauza Nauranga. The schedule attached to the Behar and U.P. Boundaries Act 1968, paragraph as indicated above shows village Nauranga in U.P. As such, to my mind it does not lie in the mouth of the applicant to allege that the land in question is not situate in village Nauranga and as such is not amenable to the jurisdiction of the court in U.P. From the perusal of the order of the S.D.M., I find that he has held that 512 Bighas of land now in dispute formed a part of the larger block of 1238 Bighas which had been the subject-matter of litigation in Behari courts and which were termed by the second party as part of Chakki Nauranga Ojha Ballia. On the basis of the earlier decisions of the criminal and civil courts of Behar, the Magistrate came to the conclusion that the area now in dispute was in the possession of the opposite parties. On a fair appraisal of the judgment of the S.D.M., I am not prepared to hold that he has given a contradictory finding on the question of the location of the disputed plot. It

is clear that an application was given on 2-12-1971 for inspecting the site in order to locate whether area in question lies in the State of U.P. or in Behar. I find from the order of the Magistrate on that application that he has directed that if at any stage it was felt that spot inspection was necessary the same shall be conducted. I have no reason to believe that the Magistrate would shut his eyes and would assume jurisdiction over the land in dispute if it did not fall within his territory. For the aforesaid reasons, I am of the opinion that the first submission made by the applicant's counsel must be repelled.

9. Learned Counsel for the applicant has cited two decisions of the Supreme Court namely (: [1955]1SCR117) Kiran Singh v. Chaman Paswan and (: [1974]1SCR290) Chandrika Misir v. Bhaiyalal, and on its basis he has submitted that the defect of jurisdiction cannot be cured by consent of parties. I have carefully analysed both those cases. In my opinion, the facts of these cases were quite different from the facts of the present case. Here the situation was that the Magistrate has himself inspected the locality with a view to understanding whether the territory in question lies in the State of U.P. or in the State of Behar. According to the Behar and U.P. Alteration of Boundaries Act 1968, he has prepared a sketch map Ex. C-1 which has been placed on the record of the case. Tin's indicates that he had applied his mind to the question whether the area in dispute lay within the territory of U.P. or not. If the Magistrate had thought otherwise and had come to the conclusion after inspection that the land lay in the province of Behar, he would not have and could not have assumed jurisdiction; but the fact that he has found the identity of the land to be fixed otherwise is clearly indicative of the fact that the land in question lay within his territorial jurisdiction. As a matter of fact there was no dispute with regard to northern, southern and western boundaries of the disputed land. The only dispute was with regard to the eastern boundary which has been corrected by the Magistrate. This was a pure question of fact which has been endorsed by the Sessions Judge, Ballia. As such, I am of the opinion that the authorities cited by learned Counsel do not come to his assistance.

10. The next submission made by the applicant's counsel is that the Magistrate has not given adequate consideration to the affidavits filed by the parties. I find

from the impugned order of the Magistrate that he has observed that the affidavits filed by both parties have been examined by him. Thereafter he has mentioned that the first party has filed affidavits of residents of various villages of Nauranga etc. He then proceeds to say that the second party has filed affidavits of residents of Sarbarsa etc. In the end he has observed that the affidavits filed in support of the claim of the second party by the people of Nauranga strengthens their case although the affidavits have hardly any meaning, in a case which has been adjudicated by various courts and received finality'. The Sessions Judge while considering this aspect of the matter was of the opinion that the affidavits were stereotyped and merely of a formal nature. As such, he was of the view that the failure of the Magistrate to discuss these affidavits is of no consequence. The judgment indicated that the Magistrate has not applied his mind nor given a judicial consideration to the affidavits. I am not inclined to accept the view of the courts below on this question. There is abundant legal authority for the proposition that in proceedings under Section 145, Criminal P. C the factum of possession has to be adjudicated on the date of the preliminary order in the light of document and affidavits and other evidence produced by the parties. A mere narration of the affidavits in the order with an observation that they have been examined by a court is in my opinion not a fair and judicial consideration as required by the provisions of Section 145, Criminal P.C. It may not be necessary to give the substance and details of each affidavit in the impugned order but the interest of justice certainly requires that there should be an adequate and reasonable consideration of the affidavits filed by the parties in proof of their possession. It is of course open to courts to reject the affidavits on grounds, inter alia, that they have been sworn by interested persons, or they are not worthy of credit, and for several other reasons but mere enumeration of affidavits is not a fair and proper consideration of the contents thereof. It was the beaunden duty of the Magistrate to have briefly analysed those affidavits in a judicial manner and to have given his final decision thereon after due consideration. In my view, therefore, these is sufficient force in the contention of the learned Counsel for the applicants that the affidavits filed by the parties have not been considered in accordance with law.

11. The last contention of the applicant's counsel is that under Section 539-B, Criminal P.C. (old) it was incumbent upon the Magistrate to have made a

memorandum of his inspection. It is urged that any relevant fact observed by the Magistrate should have been recorded by him so that the parties may have an opportunity of explaining the same. The respondents' counsel on the other hand contends that the map C-1 is a memorandum of what the Magistrate has observed on the spot with regard to the location of the disputed area and that no further memorandum is necessary. He also submits that even if there has been an omission on this ground it is mere irregularity which does not vitiate the proceedings. Both parties have cited cases in support of their respective contention. I have considered those cases carefully. It is not necessary for me to cite each one of them. The substance of these cases appears to be that if the Magistrate has failed to record evidence and has based his decision only on the inspection of the site, or if he has made consultation on the spot with people either than the counsel or the parties and has based his decision thereon, his order is vitiated in law and liable to be set aside. That is not the position here. The Magistrate had already prepared the entire judgment on 20-3-1972 when he was of the opinion that in order to understand the exact location it was necessary for him to inspect the spot, The merits of the cases of the parties have not in any way been affected by the inspection conducted by the Magistrate. The inspection was absolutely for the purpose of getting a clear idea as to the location of disputed land. In the circumstances of the case mentioned above, I am of the view that even if it is assumed that the Magistrate has committed an error in not preparing a memorandum of his inspection such an error could not amount to an illegality. It has not occasioned any failure of justice and as such the impugned order cannot be questioned on this ground.

12. Since the affidavits of the parties have not been considered in accordance with law either by the Magistrate or by the Sessions Judge concerned, I consider it necessary that the case should be remanded to the court below for a decision on the question of possession on the date of the preliminary order after considering the entire evidence on the record including the affidavits filed by the parties.

13. Normally I would have remanded this case to the Magistrate for decision, but the parties are apprehensive that remand to the Magistrate will delay the decision leading to breaking of heads between the parties. Counsel for the respondents has

submitted that these proceedings were initiated in 1970 and have taken seven long years for the revision to be finally decided by the High Court. It is also admitted by the parties that over a lac of rupees are in deposit in the court of the Magistrate which represents the proceedings of the crops that has been raised during this intervening period. The petitioner's counsel submits that huge stakes are involved in the case and it is necessary in the interest of justice that the matter should be decided now as expeditiously as possible. If the case is sent back to the Magistrate, it will again take several years before final decision is arrived at.

14. Under Section 435, Criminal P.C. (old) which is applicable to the instant case, the Sessions Judge has a right to summon the record of any case decided by subordinate court in order to judge the propriety, correctness and legality of any order passed by it. The Magistrate, as I have mentioned above has not considered the affidavits of the parties in a judicial manner as he should have done. In these circumstances the revisional court will have full jurisdiction to reassess the evidence on the record and to consider also the affidavits filed by parties in accordance with law. It is not always necessary that the Sessions Judge must remand the case to the Magistrate for a consideration of the question of possession. It is true as has been held in a few cases that the satisfaction with regard to the apprehension of breach of peace is that of the Magistrate and not of the Sessions Judge but when the Magistrate commits an illegality in his order by not giving a decision in accordance with law, it is always open to the Sessions Judge to vary or modify that order in accordance with law after taking all material on the record into consideration. Having regard to these exceptional circumstances, I am of the opinion that the interest of justice would be served if this case is remanded to the Sessions Judge with a direction that he should dispose of the revision within a period of three months from today after taking into consideration the entire evidence on the record on the question of possession including all the affidavits filed by both parties. It is made clear that no further or fresh evidence would be permitted to be filed by either of the parties-

15. This revision is accordingly allowed, The order of the Sessions Judge, Ballia dated 30-3-1973 is set aside and the case is remanded to the Sessions Judge, Ballia for a decision in the light of the observations made by me above. The record

of this case shall be despatched by the High Court office within one week from today. The Sessions judge shall after giving notices to the parties fix a date for hearing and the decision shall be given by him within three months from today. In the meantime the status quo shall be maintained and the money already deposited in court shall remain in deposit.

16. A copy of this order shall be given to counsel for both the parties on payment of usual charges within a week from today.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com