Amar Singh Vs. State of U.P.

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Court : Allahabad

Decided On : Apr-02-1980

Reported in : 1980CriLJ1350

Judge : Mahavir Singh, J.

Appellant : Amar Singh

Respondent : State of U.P.

Judgement :
ORDER

Mahavir Singh, J.

1. This is a revision arising out of proceedings under Section 133, Cr.P.C. initiated by the applicant.

2. The applicant had alleged that he owned a field No. 175 which he had purchased from one Girwar a son of Narain Singh about four years back and that the way to his field had always been through the fields of opposite parties numberings 202, 203, 224 and 225. The opposite parties, howeyer, blocked the way to his field by erecting a wall between his field and plot No. 202. The Sub-Divisional Magistrate Pratapnagar, district Tahri called for a report from the Supervisor Kanungo. Bis report favoured the allegations made by the applicant. Accordingly ha passed a preliminary order under Section 133, Cr.P.C. calling upon

the opposite parties to show cause why obstructions alleged by them may not be removed.

3. Opposite parties appeared and alleged that there was no public right of way....As the opposite parties denied the existence of public right of way through their fields, the learned Magistrate initiated proceedings under Section 137, Cr.P.C. The opposite parties examined five witnesses and also filed copies of the khasra and the eajra of the latest settlement of the village. In these khasras and sajras no way was shown through the field of opposite party nor was there any entry about any way in the khasra. The witnesses examined besides opposite party No. 1 were Fakira Singh, Dayal Singh, Kama Singh and Dhan Singh, Fakira. Singh was said to be the tenant of the previous tenure-holder of the applicant. Oayal Singh was the tenure-holder of the plots lying to the north of the plots of the opposite parties. The case of the opposite parties was that the applicant used to go to his field through the field of this Dayal Singh and not through their fields. The other two wit-nesses were cultivating the fields in the vicinity of the disputed plots. All of them supported the case of the opposite parties.

4. The learned Magistrate, however, issued local commission to the Tahsildar Pratap Nagar. The Tahsildar not only inspected the locality himself but also recorded the evidence of certain witnesses and then gave a report supporting the case of the applicant that there was public way which had been obstructed by the opposite parties.

5. The learned Magistrate did not 'believe the oral and documentary evidence led by the opposite parties in 'view of certain omissions made by the witnesses about the way of one Mahendra Singh of plot No..207 and the report of the Tahsildar. Accordingly he asked the parties to lead evidence under' Section 138, Cr.P.C. in connection with the obstruction.

6. Against this order, the opposite parties filed revision in the court of the Sessions Judge, Thehri Garhwal. The learned Sessions Judge felt that the Magistrate had not properly dealt with the evidence and that the case was such that he should himself scrutinise the 'evidence to ascertain whether the applicant proved that the way in question was a public way. Then after a perusal of the evidence on record

he held that there was no evidence that there was a public way or that there was any circumstance which might discredit the oral evidence led by the opposite parties. He also did not agree with the learned Magistrate that the report of the Tahsildar could be relied upon in evidence. Accordingly he set aside the order passed by the learned Magistrate and asked him to stay proceedings until the existence of such a right of way had been decided by a competent court as required by Section 137(2), Cr.P.C.

7. The applicant has now come to this Court in revision and contends that the learned Sessions Judge has gone beyond his jurisdiction in revaluating the evidence or in holding that there was no public way or that the report of the Tahsildar was not admissible in evidence. On the other hand, the learned Counsel for the opposite parties has contended that the learned Magistrate has also gone beyond his jurisdiction in scrutinising the evidence to find whether it was enough to prove that there was a public way. It is contended that all that he had to see was whether the evidence led by opposite parties in support of their denial was reliable. It was not for him to decide whether there existed a public way or not.

8. I have heard the learned Counsel for the parties and have given careful' consideration to the submissions made by them. I feel that both the courts below have gone beyond the limit of the jurisdiction in these proceedings. I shall first deal with the approach of the learned Sessions Judge.

9. The learned Sessions Judge after giving certain rulings felt that the revisional court was also at liberty to scrutinise the evidence. There is no doubt that the revisional court can also examine the evidence on record but he can examine the evidence not in the same way as a trial court can. He has only first to see whether the trial court in coming to the conclusion had ignored the evidence or any material part of it or had taken into consideration any inadmissible evidence or had committed some material defect of procedure. It does not give him the right to reappreciate the evidence as an appellate court. The Supreme Court in thekur Das v. State of Madh Pra : 1978 CriLJ1 while referring to the power of the revisional court in a case against acquittal had also observed that this would be applicable to a case of revision as well It Was also observed that the revisional court can

interfere with the finding recorded by the trial court only in certain compelling and exceptional circumstances which show manifest error of law in appreciating the evidence. Exclusion of material piece of evidence or taking into consideration inadmissible evidence are such examples. The learned Sessions Judge had not pointed out as to whether the Magistrate had committed such mistake, the revisional court can thereafter reappreciate the evidence.

10. Then in any case it was neither a part of the duty of the Magistrate nor even of the revisional court to find out whether there was proof about existence of actual right of public way. This is a question which can only be decided by the Civil Court. In proceedings under Section 133, Cr.P.C. a Criminal Court does not go into such questions of law and fact. So even if the learned Sessions Judge was incline to do so, he could merely see whether the evidence produced by the opposite party was reliable enough to support their denial of the existence of public right of way.

11. Learned Sessions Judge has also held that the report of the Tahsildar was not admissible in evidence because it appears to have been made by him as a commission issued under Chapter 23, Cr.P.C. and that under Section 139, Cr.P.C. only local investigation can be ordered and this has not been done. Thus, according to him the commission issued to the Tahsildar was not for local investigation. The distinction drawn by the learned Sessions Judge is misconcieved. Though the learned Magistrate had used the word 'commission' but actually he meant 'local investigation', and that is what the Tahsildar had done. Under Chap. 23, Cr.P.C. a commission can be issued, not for local investigation but for recording evidence of certain witnesses. Here no witness was ordered to be examined on commission by the court. So Chapter 23 was not applicable at all. It may be that Tahsildar had recorded the statements of certain witnesses. But that was done by bam on his own and appeared to be withim the scope of local investigation. Local investigation does not merely mean one's own observation of the things but even ascertainment of facts by recording the statements of certain witnesses. So the report of the Tahsildar could not be rejected on this ground.

12. We now come to the validity of the order passed by the learned Magistrate. As already observed the scope of the inquiry under Section 137, Cr.P.C. is only to

find whether there was prima facie reliable evidence in support of the case taken by the opposite parties about denial of the existence of public way through their fields. It does not require any definite proof at that stage. As mentioned earlier the question whether there was existence of public way or not was to be decided by a competent Civil Court. It was this change in his approach that made him reject the evidence led by the opposite parties. Otherwise on the face of it, it appears to be quite reliable so far as the case of denial of public way is concerned.

13. The opposite parties had first filed copies of the khasra and the Sajra of the last settlement. I am informed at the bar by the learned Counsel for the opposite parties that the last settlement in this area was finalised sometime before 1969, that is, it was only 9 years prior to this dispute. Settlement entries are presumed to be genuine under Section 57 Land Revenue-Act unless they are rebutted. In the khasras and sajras there is no entry of any public way through the fields of the opposite parties. Of course aspointed out, it was not conclusive and could be rebutted by evidence. But at this stage with no rebutting evidence on record, it was enough to show that there was prima facie reliable evidence-about their denial of public way. Please see Satish Chandra Sen v. Krishna Kumar Das : AIR1931 Cal2 , Sita Ram Ray v. Badri Ray AIR 1935 Pat 218 (2) : 36 Cri LJ 1051 and Jai Ram Singh v. Bhuley : AIR1963 All27 .

14. The learned Magistrate had discarded this evidence by observing that it was not necessary that public record should always be correct, but as I observed earlier, it was not the stage for him to scrutinise this evidence in this way. At present he was only to see whether there was prima facie case of denial and it being a settlement entry it was certainly good reliable evidence of denial.

15. Oral evidence also comprised of good witnesses. They were four witnesses besides opposite party. Fakira Singh was cultivating the field (applicant is now cultivating), prior to the purchase by him from its previous owner. Dayal Singh had a field just to the North of the field of the opposite parties. He was thus also a very natural and probable witness. The other two witnesses were also quite natural. The learned Magistrate had held the witnesses to be partisan. He pointed out that one of them namely Dhan Singh was cousin of opposite party No. 1. This is also

wrong fact. This witness did not admit that he was cousin of opposite party No. 1. He merely admitted to be cousin by village relationship but that was no relationship. Further the evidence of this witness had been rejected by the learned Magistrate on the ground that he could not give certain information as to through which field Mahendra used to pass but that had no bearing on the point in question.

16. Apart from it there was another very important circumstance. Neither in the report with map filed by the Kanungo or even in the complaint made by the applicant, there Was any allegation that it was a public way. It was merely alleged that he had a right to pass through the fields of opposite parties to go to his field. Even, if some more persons, who had their fields near about may be passing through the field of the opposite parties and the applicant, it would not make it a thoroughfare. This aspect of the case was not considered by the learned Magistrate at all. So while I agree with the conclusion reached by the learned Sessions Judge, it is for different reasons.

17. The revision is, therefore, dismissed.