

Pratap and anr. Vs. State of U.P. and anr.

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Court : Allahabad

Decided On : Apr-27-1982

Reported in : 1982CriLJ1834

Judge : N.N. Sharma, J.

Appellant : Pratap and anr.

Respondent : State of U.P. and anr.

Judgement :

ORDER

N.N. Sharma, J.

1. This revision is directed against order dated 13-4-1981 passed by Sri L. N. Rai, learned III Addl. Dist. & Sessions Judge, Budaun in criminal revision No. 83 of 1980 by which he allowed the revision and made conditional order dated 30-3-1978 absolute. Revisionists, who were respondents 1 and 3, were directed to remove obstruction made by them on public passage within 15 days failing which obstruction was to be got removed by Magistrate from public passage shown by letters ABCD in the site plan dated 8-3-78 prepared by the Naib Tahsildar.

2. It appears that these proceedings were initiated on the application of one Rameshwar Dayal dated 27-6-75 in the Court of S. D. M. Budaun by which it was urged that respondents Pratap and Nathu, who are father and son, obstructed

public passage by constructing a platform and a wall thereon. There existed a public passage in the west of his house running from the road towards West in the abadi of the village Sakari Jangal, police station Ujhani district Budaun. This passage was used by inhabitants of the village for going to the roads and to the fields and for fetching water from the well adjoining the road. It was 7 feet wide and about 50 yards long. The respondents, who are revisionists now, about 14/15 days prior to this application started obstruction to the passage despite protests of the villagers. So, there was a prayer to get the obstruction removed.

3. On this application learned S.D.M. invited report from S. O. Ujhani, who supported the contention of applicant. A conditional order was drawn by learned S.D.M. on 14-7-75 directing respondents (revisionists) to remove obstruction from public passage or to show cause as to why the above order be not made absolute. Aforesaid conditional order was served upon the revisionists, who appeared before learned S.D.M. and denied existence of public right. They also denied existence of public passage at the place where they raised construction. They also filed written statement in support of their denial.

4. Learned Magistrate embarked on an enquiry. Revisionists examined Pratap (DW 1), Balwant (DW 2) and Mathuri (DW 3) in support of the denial while applicants examined (exhibited?) copy of Khasra and map of 1330 P and copy of earlier report dated 6-9-76.

5. Learned S.D.M. found that there existed a public passage (sic) which had been absolute by him and revisionists were directed to remove obstruction within 15 days of his order dated 11-5-1977. Aggrieved revisionists carried the matter in Criminal Revision No. 22 of 1977 to the Court of Sessions Judge, who after perusal of the record, allowed the revision and set aside the order of the learned Magistrate dated 11-5-77 and sent the case back to learned Magistrate with the direction to pass fresh specific conditional order and then to dispose of the case after giving the parties opportunity to adduce evidence.

6. Learned S.D.M. again invited report from Tehsildar concerned along with a map of the locality. Naib Tehsildar submitted his report and map on 9-3-78 on which revisionists were again directed to remove obstruction from public passage or to

show cause against the order. Respondents (revisionists) again appeared and filed written statements On 14-4-78 denying existence of public right and making any obstruction over public passage. According to them, the passage was not public and it was simply private land of revisionists. They also assailed accuracy of report of Naib Tehsildar. On this objection, learned S.D.M. invited report of Tehsildar regarding local position. Naib Tehsildar filed his report and map on 13-5-80 and also examined a witness and opined that the alleged passage was not a public way. So, after hearing the parties and perusal of record, learned S.D.M. found that there was no public passage which had been obstructed by revisionists. In the result, the proceedings were dropped,

7. Aggrieved by this order, applicants carried the matter in Criminal Revision No. 83 of 1980 to the Court of learned Sessions Judge, Budaun, who recorded the impugned order dated 13-4-1981. It is against this order that revision has been filed.

8. I have heard Sri G.C. Saxena, learned advocate for revisionists and Sri Keshaw Sahai, learned advocate for opposite parties and Sri Rameshwar Nath learned State counsel.

9. The grievance of the revisionists was that in order to attract Section 133 of Criminal P.C. it must have been established by applicants that there has been an obstruction caused to a public thoroughfare. There is no cogent documentary evidence on record to show that any public way existed at the site of construction on the disputed land which are fairly old now. According to the report of Tehsildar dated 13-5-80 land in dispute was not a public passage. This report was accepted by learned S.D.M., who dropped the proceedings. After this report no fresh evidence was adduced by parties and it was not open to learned Sessions Judge to make earlier preliminary order dated 30-3-78 absolute without affording opportunity to the revisionists to controvert such observations of learned trial Magistrate. Learned counsel for applicants-opposite parties pointed out that earlier evidence which was on record was usable by learned Sessions Judge in revision and there was nothing wrong if learned Sessions Judge acted upon that evidence.

10. A perusal of Sections 133 and 138 of Criminal P. C, discloses that it is the function of the Magistrate to conduct an enquiry and to decide as to whether there was reliable evidence or not to come to the conclusion. When learned Magistrate after full enquiry found that the correct position was that the way alleged by applicants was not a public way, it was not for learned Sessions Judge to interfere vide (1946) 47 Cri LJ 320 : AIR 1946 Cal 302.

11. I have carefully perused oral and documentary evidence on record which is not sufficient to justify the conclusion that there existed a public way in between the house of Shambhoo and Pratap, as shown in site plan paper No. A 83/2 dated 13-5-80. There is also statement of Wahid Ali, which shows that some land was lying open towards North of the house of Pratap and so persons began to pass and re-pass on this land. Obviously, such user of open land could not amount to public way, as was stated by Wahid Ali before Naib Tehsildar concerned. The best criterion to see whether it is a public (right) vested in an unascertainable number of persons so as to make them a community or class.

12. The evidence on record does not disclose any glaring defect in the finding recorded by learned trial Magistrate by which proceedings were dropped, which was so lightly set aside by learned Sessions Judge in exercise of the revisional powers under Section 397, Criminal P.C.

13. The revisional Court must not have interfered unless substantial injustice had been done by the Magistrate or the Magistrate had taken a perverse view of the evidence or when there was no evidence to justify the finding of the Magistrate. There is ample evidence on record, as discussed above, in support of denial of public way.

14. The law requires that (1) the party denying such right would appear before the Magistrate and deny existence of public right in question (2) that he shall produce some reliable evidence and (3) that such evidence shall be legal evidence and shall support the denial. All these three conditions have been satisfied in this case by the revisionists which were sufficient to oust the jurisdiction of the Magistrate and it remained now for the Civil Courts to decide the question involved. On such evidence the learned Magistrate was fully justified in dropping the proceedings.

Had the learned Sessions Judge chosen to make the order absolute, he must have afforded sufficient opportunity to revisionists to controvert his findings. That has not been done. So, the order of learned Magistrate was wrongly set aside by learned Sessions Judge in revision.

15. In the result, revision is allowed. Impugned order dated 13-4-81 is set aside and order of learned S.D.M. dated 11-6-80 dropping the proceedings under Section 133 of Criminal P.C. is restored.

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