

Dhani Dibya Vs. Kasinath Nanda

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Court : Orissa

Decided On : Aug-30-1979

Reported in : 48(1979)CLT519; 1979CriLJ1297

Judge : S. Acharya, J.

Appellant : Dhani Dibya

Respondent : Kasinath Nanda

Judgement :

S. Acharya, J.

1. This is an appeal against the order of acquittal passed by the Assistant Sessions Judge, Puri, in Criminal Appeal No. 31/9 of 1976.
2. The accused, respondent herein, had been convicted by the trial court for an offence Under Section 448 I.P.C. and was sentenced thereunder to pay a fine of Rs. 50/-, in default to undergo S. I. for one week. On appeal by the accused, the appellate court has acquitted him of the said offence.
3. The accused-respondent is the brother of the complainant-appellant in this appeal.
4. The prosecution case, in short, is that the complainant (P. W. 1) a widow, in execution of a decree in her favour in Execution Case No. 25/69 of the Court of

the Munsif, Puri, got delivery of possession of her house in Harachandi Sahi in Puri town in the afternoon of 30-7-1971. After receiving delivery of possession she resided in that house, but in the early morning of 31-7-1971, the accused forcibly entered into the said house by assaulting her with an iron rod and causing bleeding injury on her head. Thereafter the accused physically and forcibly drove away the complainant out of the said house and remained in forcible possession of the same.

5. The accused, in his statement Under Section 313 Cr. P.C. took the plea of denial, but his witness D.W. 1 has testified to the fact that the accused has been residing in that house and he had never been evicted therefrom.

6. The accused was tried for offences under Sections 323 and 448 I.P.C. The trial court on a lengthy discussion and consideration of the evidence on record arrived at the finding that the charge against the accused Under Section 448 I.P.C. was established beyond all reasonable doubt, but the other charge Under Section 323 I.P.C. could not be established as the Medical Officer who granted the medical certificate, filed in this case by the complainant in support of the injuries sustained by her in course of the said occurrence, has not been examined in the case.

7. The appellate court on its own appreciation of the evidence on record has held that the trial court was not justified in convicting the appellant for the offence Under Section 448 I.P.C. On a perusal of the impugned judgment I am firmly of the opinion that the order of acquittal has been recorded without taking into account the salient and important features of the case and without assessing the evidence on record in the correct- and proper manner.

8. The most important feature of the case is that the complainant, a widow, in execution of a Civil Court decree in her favour obtained possession of the house in question on 30-7-1971, which fact has been established beyond reasonable doubt on the evidence of P. W. 3, the process server of the Puri Civil Court, who has not been given due weight, and consideration by the court below. P. W. 3 testified to the fact that he with police help delivered possession of one pucca house and one thatched house on plot No. 103 of Khata No. 110 and plot No. 120 under Khata No. 110 of Harachandi Sahi, Puri Town, to the complainant on the afternoon of 30-

7-1971 as per the order of the Munsif, Puri in Execution Case No. 25/69. He has further stated that the accused and one Lokanath Nanda and Sari Dei were evicted from that house in execution of the said decree. He has proved his report Ext. 1 submitted to the Civil Court on affidavit after executing the writ of delivery of possession issued by the Civil Court. It is very clearly stated therein that possession of the said two houses was delivered to the complainant on 30-7-1971 after evicting the above-named judgment debtors therefrom with the help of the police, and the judgment debtors left that house with all their belongings. The warrant of delivery of possession bearing the said report (Ex. 1) clearly shows that the decree holder in that case was the complainant and the judgment debtors were Kasinath Nanda (the accused), his wife Sashi Dibya, and his brother Lokanath Nanda. The said warrant authorised the process server (P. W. 3) to put the complainant, the plaintiff in that case, in possession of the above-mentioned property by removing the above-named judgment debtors from the said premises. P. W. 3, apart from solemnly affirming the truth of the facts stated in his said report Ext. 1, has also pledged his oath in the trial court that in execution of the said decree he evicted the above-named 3 persons from the said house with police help and put the decree holder (the complainant) in possession of the said premises. The court below has not; attached any importance to this fact and has rather referred to it with a scant attention and indifferent attitude. The above evidence has not been weakened in any manner by cross' examination and it is properly corroborated by P. W. 1. On the above oral and documentary evidence on record one has to proceed on the basis that the complainant was in possession of the house when the occurrence took place. The court below has certainly gone wrong in not attaching any importance to this fact and in not appreciating the evidence on record in the context and perspective of the same.

9. It was submitted by Mr. Patra, the learned Counsel for the respondent, that without independent corroboration it cannot be held only on the evidence of the process server, P. W. 3, that actual possession of the house was delivered to the complainant. In the Full Bench decision of this Court in Jayagopal Mundhra's case (1974) 40 Cut LT 213 it has been held that law is well settled that as against the judgment debtor even symbolical delivery of possession amounts, to actual delivery of possession. It has further been held that if the court simply proclaims

that the decree holder has been put in 'possession, such a delivery of possession can be binding upon those who are parties to the proceedings or on those who claim through them. In the decision reported in AIR 1923 Pat 76, followed in the above-mentioned Full Bench decision of this Court, it has been held:

XX XX XX XXWhere symbolical possession is delivered in a case where actual possession ought to have been delivered, the symbolical possession will operate as. actual possession. The delivery of symbolical possession, even erroneously, operates as actual possession against the judgment debtor and his legal representatives.

In the present case before me, P. W. 3 by executing the decree of the Civil Court actually gave delivery of possession of the house to the complainant, the decree-holder, by evicting the judgment-debtors who were in possession of the said property. This is established on the evidence of P. W. 3 and his report Ext. 1. Apart from that evidence p. W. 1 has also testified to the fact that she took possession of the house through Civil Court on 30-7-1971 and was in possession of the same till the occurrence took place. On the evidence of P. Ws. 1 and 3 and the report (Ext. I) of P. W. 3, it is established beyond reasonable doubt that the complainant received actual physical possession of the 'house in question on 3Q-7-1971. This, therefore, was a case of actual delivery of possession as per Order 21 Rule 35(1), and it cannot be said in this case that; the actual physical possession of the. house had not been given to the complainant. Moreover, law is well settled that as against the judgment-debtor even symbolical delivery of possession (even conceding such a case, though there is no basis for the same) amounts to actual delivery of possession, as has been held in the Full Bench decision of this Court in Jayagopal Mundhra's case (supra). Accordingly, the above contention of Mr. Patra is absolutely of no weight or substance.

10. With regard to the occurrence proper p. W. 1 has testified to the fact that at about 5 A. M. on the date of occurrence while she was inside the said house she heard a knocking sound on the front door of the said house, and when she opened that door, the accused, who was standing outside, assaulted her with an iron rod causing bleeding injury on her head. On receiving that blow she sat down near the

door, and the accused physically and forcibly dragged her out of the house and closed the door from inside. She has again categorically stated in her cross-examination that there was a civil suit between herself and the accused with regard to the possession of the said house, and in accordance with the decree passed in that civil suit she took delivery of possession of the said house through court, and she was in possession of the entire house at the time of the occurrence. The defence suggestion (denied by the complainant) that the complainant had adopted the accused was possibly to present a legal basis for the illegal possession of the house taken over by the accused. She has been cross-examined at length on two occasions - on the first occasion on 11-7-74 and again on 10-4-75, but her evidence regarding the occurrence proper could not be successfully assailed.

P. W. 2 belongs to the same locality and he has corroborated the evidence of P. W. 1 regarding the occurrence proper on all important and material particulars. The trial court on a cogent and convincing discussion and consideration of the relevant evidence on this aspect of the matter, arrived at the finding that the prosecution case against the accused was established against him beyond reasonable doubt. The Court below, without taking into consideration the material and important aspects of the evidence of P. W. 1 and 2 regarding the occurrence, has bestowed undue attention and importance only on certain unimportant features of the evidence, and has also committed some errors of record while discussing the depositions of the witnesses.

11. The primary considerations on which the court below has recorded the order, of acquittal are that the complainant did not examine any of the neighbours in this case; she did not disclose in the complaint petition the names of P. W. 2, the rickshaw-puller and the two other persons who, according to her, Were present near her house at the time of the occurrence; and that the complainant's statement that she raised a hullah at the time of the occurrence is not corroborated by P. W. 2; and none from the neighbourhood came to intervene when the occurrence took place.

Both P. Ws. 1 and 2 have stated that there was altercation between the accused and the complainant when the occurrence took place and the complainant cried aloud when she was assaulted and driven out of the house by the accused. From their evidence on this aspect it is quite evident that Hullah was raised at the time of the occurrence. So P. W. 1 referred to the above as a Hullah. P. W. 2's statement that the complainant did not raise any Hullah, should be read and understood in the context of his own statement to the above effect, and so read it clearly means that the complainant did not raise any shouts for help in course of the occurrence. In any view of the matter the discrepancy, if any, on that aspect of the matter is on a very unimportant aspect of the case and the court below should not have proceeded to disbelieve the prosecution case on that account, especially in view of the other important features in the case. It appears to me that the court below has picked up stray sentences here and there, torn from the text, and has tried to spin out discrepancies from the same, without taking care to understand the real meaning and implication of the said sentences. Moreover, the court below should not have entertained doubt about the prosecution case merely because the complainant omitted to state in the complaint petition the name of the rickshaw-puller, and that of P. W. 2 and Jagannath Nanda who, as she stated in her deposition, were near about the complainant's house at the time of the occurrence. The court below while acting on such frail materials on record did not care to note that the complainant was an old widow, and she had been dispossessed from her house by the accused, and only on instituting a Civil suit and executing the decree of the civil Court with police help she could get possession of the said house on the afternoon of 30-7-1971, and the occurrence took place in the early morning of the very next day. There is nothing on record to show that the complainant had anybody to support or help her. When the accused again came to the house¹ in the early hours of the very next day of the delivery of possession and assaulted the complainant and threw her out of her house she must have got nonplussed and lost her mental equilibrium and balance of mind, and could not therefore notice who actually were present in the neighbourhood at the time of the occurrence. Moreover she was not expected to know the name of the rickshaw-puller, In the facts of this case the court should not have attached so much of importance to the said omissions.

Non-intervention of neighbours and passers-by in the occurrence is not such an unusual feature on which one can justifiably entertain doubt about the occurrence. Moreover, it has not been brought on record that any of the neighbours, who were capable of intervening in the matter, were present at the time of occurrence. Non-examination of some of the witnesses named in the complaint petition should not also have influenced the court against the prosecution, as in this case the possibility of gaining over those witnesses by the accused or their reluctance to come to court due to fear of the accused cannot be ruled out. The court, instead of attaching importance to the above-mentioned unimportant features, should have assessed the prosecution evidence in the light of the other important features of the case.

12. The court below has also lost sight of the facts that though the accused in his statement in court has denied to have forcibly entered into the house, and has merely stated the complainant instituted this false case against him on the instigation of his enemies, his witness has deposed that the accused and his sister (the complainant) were residing together in the said house and that the accused at the time of his examination in the court on 10-12-1975 was residing in that house. In his cross-examination he has admitted that there was a civil suit between the complainant and the accused, but though according to him he is a man of the same locality, he says that he does not know what happened to that suit. His statement to that effect, in the face of clear and convincing proof of delivery of possession of the house to the complainant, plainly shows that D. W. 1 came to suppress truth and perjure in favour of the accused. Apart from that his statement that the accused was all through in possession of the said house and he was in possession of the same even in Dec. 1975, viewed in the context of clear proof of delivery of possession of the house in favour of the complainant, clearly indicates that the accused has forcibly entered into that house on driving out the complainant therefrom after delivery of possession was given to the complainant through court on 30-7-1971. The prosecution case, therefore, gets support from the above statement of D. W. 1.

13. On a thorough and careful perusal of the evidence on record, I am convinced that the complainant's allegation against the accused, forming the charge against

him Under Section 448 I.P.C. is established beyond reasonable doubt, and the finding of the trial court to that effect is perfectly correct and the finding of the appellate court is perfunctory and based on unworthy and unwarranted considerations. Accordingly, the order of acquittal passed by the court below is set aside and the accused is held guilty of the charge Under Section 448 I.P.C. and he is hereby convicted of the same.

14. In an appeal from an order of acquittal if this Court finds that the acquittal was not justified and that the accused was acquitted of an offence with which he was charged, it is for this Court to order punishment to fit the crime. In a case of this nature the High Court is free to form its conclusions on the materials before it and award sentence, which the merits of the case demanded, within the limits of the trial court's jurisdiction and it would not be necessary to give the accused notice to show cause why a sentence within the competence of the trial Magistrate should not be passed. (See : 1971 CriLJ693).

As the accused committed the said offence in a very high handed manner and very soon after delivery of possession of the house in favour of the complainant was effected by the Civil Court, serious notice should be taken of his said act. Accordingly, only a sentence of fine, as imposed by the trial court, would not meet the ends of justice in this case. The accused, respondent herein, is, therefore, sentenced to undergo R. I. for one month and to pay a fine of Rs. 100/- (one hundred), for the above offence. In default of payment of the said fine he is to undergo R.I. for a further period of 15 days. Out of the fine, if realised, a sum of Rs. 50/- shall be paid to the complainant. The accused shall surrender immediately to his bail bond to undergo the said sentence of imprisonment.

15. In the facts and circumstances of this case and as forcible dispossession of the complainant from the said house by the accused is established beyond reasonable doubt, I deem it just and proper to direct restoration of possession of the said house to the complainant Under Section 456 Cr. P. Code, 1973, if the accused is still in possession of the said house. It is accordingly hereby ordered that the complainant be very soon restored to possession of the said house by evicting the accused and/or his men, agents or dependants therefrom. The trial

court shall take immediate steps in the above direction. Copy of this order be sent to that court immediately.

16. The appeal accordingly is allowed.

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