

Chandi Kumar Sarkar Vs. Probhat Kumar Biswas

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Court : Kolkata

Decided On : Sep-12-1966

Reported in : AIR1968Cal216,1968CriLJ600

Judge : T.P. Mukherji, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145(1), 146B, 146(1B), 146(1D) and 439; [Constitution of India](#) - Article 226

Appeal No. : Criminal Revn. No. 814 of 1966

Appellant : Chandi Kumar Sarkar

Respondent : Probhat Kumar Biswas

Advocate for Def. : Nalin Chandra Banerjee, ;Bimal Chandra Chatterjee and ;Arun Kumar Matilal, Advs. (for Nos. 1 to 3) and ;Lila Prokas Bhattacharjee and ;Paresh Chandra Chatterjee, Advs. (for No. 4)

Advocate for Pet/Ap. : S.S. Mukherjee and ;Dwijendra Narayan Ghosh, Advs.

Disposition : Revision dismissed

Judgement :

ORDER

T.P. Mukherji, J.

1. The petitioner who was the first party in a proceeding under Section 145 Cr. P C. obtained this Rule against the learned Magistrate's order passed under Section 146 (IB) of the Code declaring the opposite party to be entitled to possession of the land concerned and restraining the first party from disturbing such possession except in due course of law.

2. On January 7, 1964, the first party applied to the sub-Divisional Magistrate of Barrackpore under Section 144 Cr. P C. The application was sent to the police for enquiry and report and on receipt of the police report the learned Magistrate on being satisfied that there is a dispute concerning land which is likely to cause a breach of peace drew up proceeding under Section 145 of the Code. That was on February 17, 1964. After the parties had filed written statements, documents and affidavits the learned Magistrate considered the matter and came to the finding that he was unable to decide as to which of the parties was in possession of the subject of the dispute. Thereupon he drew up a statement of the facts of the case and forwarded the record of the proceeding to the civil court under Sub-section (1) of Section 146

3. The learned munsif of Sealdah on receipt of the reference examined witnesses and decided the question of possession in favour of the second party and the Magistrate on receipt of the finding of the civil Court disposed of the proceeding in conformity with that decision as required under Sub-section (1B) of Section 146 it is the order of the learned Magistrate disposing of the proceeding which is the subject matter of the present Rule.

4. Mr. Mukherjee appearing in support of the Rule raised 4 objections against the legality of the order passed in the proceeding and they are--

1. That the order passed by the learned Magistrate is bad in law inasmuch as no notice was served on the parties before recording the same.

2. That the finding of the civil Court is vitiated by the fact that the relevant date with reference to which possession of the parties, was to be determined and has been determined is incorrect and that as such the Magistrate's order passed in conformity with that decision is bad in law.

3. That the proceeding is further vitiated by the fact that possession has been declared also in favour of opposite party No 4 who was not a party to the preliminary order under Section 145 of the Code.

4. That the order is bad in law as it carries no finding as to which of the opposite parties is in possession of which portion of the disputed property.

5. The record with the finding of the civil court was received back by the learned Magistrate on July 16, 1966 and on the same date without hearing the parties, the learned Magistrate passed the final order in the proceeding in conformity with the finding of the civil court. According to Mr. Mukherjee, this has entailed a denial of natural justice to his client, the first party. The argument advanced in this regard is that when an order is going to be passed against a particular party, natural justice demands that he be given an opportunity of being heard and that an adverse decision made behind the back of a party and without giving him that opportunity, implies a denial of natural justice and must as such be struck down. In this connection reference is made to Sub-section (4) of Section 145 which requires the parties to be heard before a finding as to possession is arrived at. Mr. Mukherjee also refers to certain decisions which have taken the view that even in cases where the law does not require the parties to be heard before making an order, a proper exercise of discretion would demand that a party should be heard in a proceeding wherein the decision may go against him.

6. Reference is made in this connection to an English decision in *Thorburn v. Barnes*, (1866) 2 C. P. 384. There in an arbitration proceeding, the arbitrators without giving one of the parties an opportunity of being heard gave their award on the basis of certain papers accepted from the other party and it was held that the omission to give the party an opportunity of being heard was a misconduct on the part of the arbitrators which vitiated the award.

7. Another case referred to by Mr. Mukherjee is *Hari Dass Sanyal v. Saritul-la* (1888) ILR 15 Cal 608 (FB) The case held that though Section 437 Cr P. Code (now Section 436 Cr. P. C.) does not require any notice to be served on the accused, as a matter of discretion it is proper that such notice be given. Another case referred to is that of *Ajodhyalal v. Paryag Narain*, (1903) 7 Cal. WN 114

which also held as above in connection with a proceeding under Section 528 Cr. P. C. which does not provide for notice to the opposite party before disposing of the application.

8. The principle enunciated in the above cases and certain other cases to the same effect which were also referred to by Mr. Mukherjee is the very wellknown principle that before a party is adversely affected by an order that may be passed, natural justice as well as judicial exercise of discretion would demand that he be heard and that any order made against a party without giving him an opportunity of being heard is bad in law. So far however as the present proceeding is concerned that principle in my opinion would not apply in view of the very scheme of Section 146 of the Code.

9. Under that section if the learned Magistrate is unable to decide the question of possession on a consideration of the materials placed before him in pursuance of an order under Section 145 (1) of the Code he refers the matter to a civil court of competent jurisdiction. That court on receipt of the reference considers the evidence on record and takes such further evidence as may be adduced by the parties. He hears both parties and gives his decision on the question of possession. Sub-section (1B) of Section 146 requires that the referring Magistrate on receipt of the finding of the civil court will dispose of the proceeding in conformity with that decision. He is left with no discretion in the matter and is not entitled to make the slightest variation from the civil court's finding on the question of possession. What he is to do is to pass an order in terms of Section 145 (6) in strict conformity with the decision of the civil court. The parties had been heard twice once by the Magistrate and again fully and finally by the civil court and as the civil court cannot dispose of the proceeding under Section 145 which is pending in the file of the Magistrate, what the Magistrate is required to do is simply to record the final order in the proceeding in conformity with the finding of the civil court as to possession which finding has been arrived at after hearing both the parties to the dispute. Considering the very limited scope of the Magistrate's duty in the matter of the order that is to be passed by him under Sub-section (1B) of Section 146 of the Code neither the principle of natural justice nor exercise of judicial discretion which again has no play in the matter, would demand that the parties be

heard over again. Even if the parties be heard by the Learned Magistrate before disposing of the proceedings above, the party affected by the finding of the civil court can only challenge that finding and ask the magistrate not to act in conformity therewith, but that would be only asking him to act against the law. In my view, the parties are not required to be heard by the Magistrate before passing the final order in the proceeding under Section 146 (1B) of the Code. The responsibility for that order is that of the Magistrate only nominally. The primary responsibility for the same is of the civil court and the civil court's finding which is the foundation of the order that is to be passed by the Magistrate is final and not liable to be challenged by way of appeal, review or revision.

10. The second contention raised in the case relates to the correctness of the finding of the civil court and this contention rests on the requirement of Sub-section (4) of Section 145 of the Code that the question of possession is to be decided with reference to the date of the order passed under Sub-section (1) of the section. There is no question that the relevant date with reference to which the question of possession is to be decided is the date of the preliminary order passed in the proceeding under Section 145 subject to the second proviso to Sub-section (4) of the section according to which a party dispossessed from the disputed land within two months of the date of the order is to be treated as the party in possession for the purpose of the proceeding.

11. It is argued on behalf of the petitioner that although the preliminary order in the proceeding under Section 145 Cr. P.C. In this case was made on 17-2-1964, the learned munsif has taken the date of the filing of the application under Section 144 which is 7-1-1964 as the relevant date for the purpose of a finding as to possession by him. The basis for his argument is the statement appearing on page 2 of the certified copy of the order of civil court where a reference is made to the date of filing of the proceeding under Section 144 Cr. P. C. In a manner which, according to the petitioner, would indicate that that is the relevant date for the purpose of the finding as to possession. The observation of the court was made in connection with a recital of the cases of the respective parties as made out in the application of the first party under Section 144 and in the written statement of the opposite parties respectively. The recitals and with following observation--

'This petitioner under Section 144 Cr. P C. was filed on 7-1-1964. So, the only point for determination is whether the petitioner or the opposite parties were in possession of the disputed plots at the relevant period.'

The finding of the learned munsif is to the following effect.

'I hold that the disputed plots were being possessed by the O. p. s. at the relevant time and that the petitioner had no possession in any portion of these plots at that time.'

12. From the above observation and finding it is difficult to hold that the relevant date accepted by the civil court was 7-1-1964 and not 17-2-1964 which is the date of the preliminary order under Section 145 or that the relevant period was two months preceding 7-1-1964. The date 7-1-1964 which appears in the order of the learned mun-sif only at one place is mentioned, in my view, simply as a statement of fact relating to the filing of the petition under Section 144 and has nothing whatsoever to do with the relevant date under Section 145 (4) for the purpose of a finding on the question of possession.

13. Even if the learned munsif had made a mistake in the matter, which in my view, he has not, the question would arise whether this court would be competent to interfere with the order passed in the proceeding in view of Sub-section (1D) of Section 146. Interference with the order passed in the proceeding on the ground on which Mr. Mukherjee asks me to interfere would mean interference with the finding of the civil Court and that is exactly what is prohibited by Sub-section (1D) above. Reference is made on behalf of the petitioner to two cases, *Raja Singh v. Mahendra Singh* : AIR1963 Pat243 (FB) and *Mt. Sudamawati Kuer v. Ram Chandra Singh* : AIR1963 Pat320 . In the former case the majority decision favoured the view that in appropriate cases the High Court can interfere with the finding of the civil court if they are in flagrant violation of the well recognised principles of law, in the latter case also it was held that if the finding of the civil court has been acted upon by the Magistrate and an order passed in conformity with that order it can be challenged under Section 435 or Section 439 of the Code. For the purpose of this decision the court relied on the Full Bench decision referred to above.

14. This Court, however, has disfavoured the view taken by the Patna High Court, in the unreported Bench decision in the case Radha Govind Pal v Nalini Bala Mondal which was decided on 16-9-1964 (Criminal Revn No. 311 of 1963) (Cal). The learned Judges in that case considered the Full Bench decision of the Patna High Court mentioned above, but found themselves unable to agree therewith. They reviewed the Allahabad decision in the case Taashuq Hussain v State : AIR1959 All568 the decision of the Madras High Court in the case Muthu Sethurayar v Lourduswami Odayar : AIR1959 Mad111 and to a single Bench decision of this Court in the case Ramnarayan v. Biswanath : AIR1959 Cal366 and held that the finding of the civil court cannot be revised by this court under Sections 435 and 439 after final order has been made by the Magistrate in conformity with that finding.

15. If it is open to the High Court to revise the order of the Magistrate passed under Section 146 (1B) of the Cr. P. C on the ground that the finding of the civil court is incorrect that would mean assuming jurisdiction in a matter in the face of a statutory denial of that jurisdiction. The finding of the civil court might be wrong but even if it is so, that finding does not carry any finality in the matter of the dispute and can always be set aside by way of a suit. Sections 145 and 146 of the Code have prescribed only a summary remedy and the proceeding virtually terminates with the finding of the civil court and if the law says that the dispute should not be protracted thereafter in that proceeding by taking an appeal, review or revision against the finding of a civil court, there is no reason why this court should assume jurisdiction in the matter by interfering with that finding indirectly when direct interference is not permissible. I find therefore that even if the civil court had gone wrong in the matter of the relevant date for the purpose of the question of possession the finding of that court is not liable to be challenged excepting by way of a regular suit in the proper forum. So far as this case is concerned, however, the Munsif, in my opinion, cannot be said to have gone wrong in the manner contended on behalf of the petitioner.

16. The third contention is that the learned munsif was not entitled to decide the question of possession involving opposite party No. 4 when that opposite party was not a party to the preliminary order passed under Section 145 of the Code it

appears from the record that opposite party No. 4 the Life Insurance Corporation of India was brought on record on their petition dated 4-4-1964. The matter was heard in presence of both parties on 29-9-64 and the prayer having been allowed a fresh notice on O. P. 4 directing them to show cause in the proceeding was issued. O. P. 4 filed a petition showing cause thereafter on 23-11-1964 and the enquiry was started long thereafter. Section 145 of the Code requires that all parties concerned in a dispute relating to the concerned land are to be parties of the proceeding. If, therefore, after the preliminary order is passed it appears to the Magistrate that another party not named in the application is concerned in the dispute I see no reason why that party cannot be impleaded in the proceeding and if that party is given the opportunity to put in written statements and documents and affidavits in support of his claim and the requirements of the law are satisfied so far as it is concerned the preliminary order may be treated as having been modified so far as that party is concerned. In my view the order of the Magistrate bringing opposite party No. 4 on record makes him a party to the proceeding from the date of the preliminary order. It appears besides from the record that opposite party No. 1 Probhat Kumar Biswas looked after the disputed land on behalf of the Life Insurance Corporation of India although he is an officer of the firm Ramani Mohan Industries Ltd whereof opposite party No. 2 was the Managing Director and opposite party No. 3 was an employee. Breach of peace if any is apprehended neither from a Corporation nor a limited company but from person who might be connected therewith. If, therefore, opposite party No. 1 who was caretaker of the Life Insurance Corporation of India so far as the disputed property is concerned was a party to the proceeding from its inception, bringing Life Insurance Corporation on record as party was more or less a formal affair.

17. The last contention relates to the absence of any finding as to which of the 4 opposite parties is in possession of which portion of the disputed property. The disputed property in this case comprises C. S. plots 622, 624, 627. The first party claimed possession in all these plots. The Life Insurance Corporation claimed possession in plots 622 and 627 as owner and opposite parties 2 and 3, representing the Ramani Mohan Industries Limited claimed possession in plot No. 624. The learned Munsif did not deal separately with the separate possession claimed by the two sets of opposite parties and the question before the civil court

was whether the first party who claimed possession in all the three plots or the second party members who claimed possession therein were in possession on the relevant date or during the relevant period Reference was made on behalf of the petitioner in this connection to the case *Munia Servai v. Thangaray* 50 Cri. L.J. 253 : (ATR 1949 Mad 226) on the basis of the decision wherein it was urged that it is necessary that the finding as to possession relates to the possession of individual parties to the dispute in the separate plots concerned in that case the first party comprising 34 persons claimed separate possession in individual plots. The finding did not state as to which of these persons was in possession of which individual plot, but it was held that when members of one party have the same source and nature of possession a finding in favour of their joint possession is not irregular.

18. In the present case the finding of the civil court is that the first party has no possession in the disputed plots which are possessed by the members of the second party The separate possession of the second party members in the individual plots was in the circumstances of the case not a question which falls for decision and the failure of the learned munsif in that regard is not a matter which might affect the validity of the finding.

19. Considering all that I have stated above I am of the view that there are no grounds whatsoever for interfering with the order passed by the learned Magistrate in the case. The Rule accordingly stands discharged.

On verbal prayer let the operation of the order be stayed for two weeks.

Let the operation of the order passed on 12th September 1966 be stayed till the 4th day of October, 1966 as prayed for by the Learned Advocates for the parties. There will be no further extension of time.