

GAHC010035292017



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL
PRADESH)**

Case No. : Crl.Pet./670/2017

BIRENDRA NATH DAS
S/O LT. TIKHARU DAS R/O VIL- BHATANTA MOBITARA, P.S.
PATACHARKUCHI DIST. BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM AND 7 ORS
Represented By PP, Assam

2:SRI KANDARPA DAS
S/OLT. TIKHARU DAS

3:SRI HIREN DAS
S/O LT. KESHAB DAS

4:SRI PRASANNA DAS
S/O LT. KESHAB DAS

5:SANJAY SAUD
S/O RAMESWAR SAUD

6:SRI ANANTA TALUKDAR
S/O BIREN TALUKDAR

7:SRI BASANTA KALITA
S/O ABHAY KALITA

8:SRI DIPAK BARMAN

S/O MANIK BARMAN ALL ARE RESIDENT OF VILL- BHATANKANTA
MAHITARA P.S. PATACHARKUCHI
DIST. BAREPTA
ASSAM
PIN - 781029

Advocate for the Petitioner : MR.D BANERJEE

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

JUDGMENT

Date : 03-05-2023

1. Heard Mr. K. Bhattacharjee, learned counsel appearing on behalf of the petitioner as well as Mr. B.B. Gogoi, learned Addl. P.P. appearing for the State respondent no. 1. Also heard Mr. K.R. Patgiri, learned counsel appearing for the respondent nos. 3 to 7.
2. The petitioner Sri Birendra Nath Das has filed this application under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C for short) read with Article 227 of the Constitution of India with prayer for quashing the proceeding of C.R. case No. 806/2016, under Section 133 Cr.P.C and the order of remand for further enquiry passed by the learned Additional Sessions Judge Bajali dated 30.06.2017.
3. The respondents filed a petition under Section 133 Cr.P.C in the Court of the Sub-Divisional Magistrate, Bajali and the petitioner was arrayed as a second party in the proceeding.
4. The genesis of the case was that there was a public path from 152 National Highway to the paddy field through which the respondent and the public used to take their cattle to the paddy field. The petitioner was the

owner of the scheduled land and subsequently, he sold the land to Mr. Mahendra Nath Sarma but the public path leading to the paddy field was not sold out. The public road was over the land belonging to Jagadish Kalita and the present petitioner, Birendra Nath Das had no right, title and possession over the said public path. It is alleged that the petitioner, despite having no right, title and interest over the public path, to encroach the land forcefully, erected the bamboo fence over the path.

5. The villagers then approached the SDO on 18th April, 2016 and the Revenue staff of the SDC office demarcated the land on 22.04.2016 and thereafter, the present petitioner removed the bamboo fence and constructed a pakka (concrete) wall. This impelled the respondents to file an application for dawning up a proceeding under Section 133 Cr.P.C. and they have prayed for investigation about the matter through the concerned police station and they have also prayed for removal of the obstruction.

6. During the inquiry, the learned SDJM, Bajali issued show-cause notice to the petitioner and vide order dated 20.12.2016, the learned SDJM passed an interim order to remove the obstruction. A notice was issued to the petitioner to show-cause as to why the interim order should not be made absolute against him under Section 133 Cr.P.C. The case was next fixed on 09.01.2017 and thereafter on 15.02.2017 a written statement was submitted and the case was fixed for orders on 20.02.2017. The order is reproduced herein below:-

“Date

20.02.2017

ORDER

Considering all documents submitted to this Court and arguments made by both parties with open mind and on their

merit I am satisfied that removal of encroachment on the pathway used by public by Shri Birendra Nath Das is urgently necessary lest it will adversely effect the lives of people using it. Hence, I hereby make Order No. 2 dated 20.12.2016 absolute against Shri Birendra Nath Das.

However, since an injunction was passed by Munsiff Court, Bajali that Bars Shri Birendra Nath to enter the suit land till the disposal of the case.

I hereby direct C.O. Bajali with O.C. Patacharkuchi in carrying out the order within 4 days from the issue of the same i.e. 24.02.2017. Also since, it has been stated by 2nd party that the boundary wall was built by him. Shri Birendra Nath Das will bear the costs.

Also if 2nd party obstructs compliance of the order he will be liable for prosecution u/s 188 IPC. Let the copy of this order be served upon both the parties free of cost.

C.O. to report compliance by 25.02.2017."

7. A Title suit was parallely proceeding in connection with the disputed land being T.S. 9/2015 in the Court of Munsiff Bajali. Sri Mahendra Nath Sarma had filed the Title Suit wherein, it has been alleged that the present petitioner had sold him a plot of land appertaining to Dag No. 333/3 covered by K.P. Patta no. 286 admeasuring 1 Bigha, 2 Katha and 10 Lechas. The plot of land is situated at the backside i.e. the western side of the land owned and possessed by the petitioner. The Title Suit was for declaration of right, title, interest and khas possession after evicting the defendants from the suit land and also for permanent injunction. Through an offshoot of the title suit being Misc. Case No. 11/2015, the petitioner

was enjoined and debarred from entering into the disputed land i.e. the path leading to the paddy field. It is submitted that the disputed land of the present case is also a part of the suit land of the T.S. No. 9/2015, which is covered by K.P. No. 286 and Dag No. 333/03.

8. It has been contended that Sri Jagadish Kalita is alleged to be the owner of the disputed land but he was not made a party in the corresponding proceeding. It is also mentioned that the Title Suit was initiated by Mahendra Nath Sarma and although the suit land also includes the disputed land of the present case, Sri Mahendra Nath Sarma was not made a party in the criminal proceeding.

9. It is contended that despite the pendency of the Title Suit relating to the same plot of land, the learned SDJM went ahead and passed the impugned order dated 20.02.2017. Against this impugned order, a criminal revision was preferred before the learned Sessions Judge, Barpeta being Criminal Revision No. 4/2017 with prayer for setting aside the order dated 20.02.2017 and also for setting aside the proceeding No. 806^M/2016. The learned Addl. Sessions Judge, Bajali, Pathsala vide order dated 30.06.2017 in Criminal Revision No. 4/2017 quashed the order of removal of the wall but remanded the matter to the SDJM, Bajali for re-enquiry into the matter. The order of injunction is marked as Annexure-4 and the copy of the judgment and order dated 30.06.2017 passed by the learned Addl. Sessions Judge, Bajali is marked as Annexure-7.

10. The learned Sessions Judge has held that:-

“ On perusal of the impugned order it appears that there is no evidence of either parties. The 2nd party/revisionist has not got opportunity to establish his case by adducing evidence. The learned Magistrate come to conclusion only upon the petition,

written reply of the 2nd party/revisionist and the documents. The vital question arises whether there is any road as well as path exists used by the public. In that regard the learned Magistrate considered the trace map along with other documents. The trace map itself does not show that the alleged path falls under Dag No. 333 of patta no. 286 of Bhotanta Mahitara Gaon under Bajali Mouza. Further in relating to that disputed path a civil suit has been pending before the Munsiff Magistrate, Bajali. The 1st party alleged that the alleged path falls under the dag no. 333 of the said patta but the report of the Circle Officer speaks that the path falls under dag nos. 345, 346, 347, 348 of patta no. 3NK, 18NK, 9NK, 13 PP. The allegation and the report in regard to the alleged path contradicts each other. It also appears that the said report has been prepared upon the note of the Lat Mandal and Supervisor Kanango of that eleka the opp. Party/respondent did not get any chance to examine them. The public petition has also not shown the schedule of the path. The learned Magistrate hold that the SP has denied the existence of pathway along its southern boundary, on the other way hold that as per report of the C.O. the 2nd party/revisionist has constructed a concrete wall encroaching 11 inches outside its southern boundary which makes it clear by the photograph. But there is no such evidence that the alleged encroached land falls under the dag no. 333 of patta no. 286. Mere photograph is not enough to come to the conclusion that the path shown in the photograph falls under the said alleged dag and patta since other documents do not support the same. Further the sale deeds with the record have not shown that there is pathway in the dag no. 333.

8. One of the vital point is that the first party/respondent though made a statement that the alleged public road exists over the land of Sri Jagadish Kalita which means thereby it is a private dispute and on the other hand said Jagadish Kalita neither made party nor adduce his evidence. Further the sale deeds of Banajit Das and Himangsu Das and the trace map itselfs do not show existence of any public road in the alleged pathway.”

11. The case was then remanded back for recording of evidence and for re-enquiry of the matter. It is averred that the proceeding of case No. 806^M/2016 ought to be quashed and set aside instead of a re-enquiry and recording of evidence. It is apparent that there was no path over the private land of any person. Another lis being T.S. No. 9/2015 is pending relating to the land on which the existence of the village path is claimed by the respondent and the right, title to the land can be precisely decided by the Civil Court and not by the SDM.

12. The learned counsel for the respondent nos. 3 to 7 has submitted that he has no objection, if the case is remanded back and the evidence is recorded. The disputed land does not belong to the petitioner but belongs to Jagadish Kalita. I have carefully considered the submissions at the Bar. The order dated 20.02.2017 clearly reflects that after careful perusal of documents submitted by both parties and considering the argument placed by the parties, the petitioner was directed to remove the obstruction created by construction of the boundary wall and the petitioner was directed to bear the costs. Thereafter, the Addl. Sessions Judge vide judgment and order dated 30.06.2017 in Criminal Revision No. 4/2017 held that the evidence has to be recorded as the respondents have alleged that the public path falls under Dag No. 345, 346, 347, 348 of patta no. 3NK, 18NK, 9NK, 13 PP, which clearly reflects that the allegation and the report

are contradictory. The report was prepared under the note of Lat Mandal and Supervisor Kanago of the eleka. The public petition has not reflected the schedule of the land covering the public path. The documents and photographs were not sufficient to establish or to prove the existence of the public path on the disputed land. If the public path exists within the land of Jagadish Kalita as stated by the petitioner, the path cannot be considered as a public path over the private land, which is included within a plot of land belonging to a private individual and is indeed a private path. The learned Addl. Sessions Judge has spelt out sound reasonings while remanding back the case for evidence.

13. I have considered the submissions of the petitioner that the Title Suit No. 9/2015 and the Misc. Case No. 11/2015 are still pending and the Civil Court will decide the rights of the parties over the disputed land which may or may not include the public path leading from National Highway 152 to the paddy field for ingress or egress of the cattle of the local villagers to the paddy field for grazing. I could decipher no reasons why the criminal proceeding No. 806^M/2016 under Section 133 Cr.P.C has to be set aside and quashed and for that matter why the correct order passed by the learned Addl. Sessions Judge has to be set aside and quashed. The learned SDM was apprised about the civil suit being T.S. No. 9/2015 and taking note of the civil suit and the injunction in Misc. Case No. 11/2015, the learned SDM has directed the C.O to carry out the order and the petitioner was directed to remove the boundary wall, which was constructed by him by incurring the expenses of removal of the boundary wall.

14. Thereafter, vide order dated 30.06.2017, the learned Addl. Sessions Judge, remanded the case to the Executive Magistrate for disposal in accordance with law by recording evidence as the final order dated 20.02.2017 was passed sans evidence of the parties. I record my

concurrence to the decision of the learned Addl. Sessions Judge and I would not like to interfere with the order. This case does not appear to be a case to invoke the inherent jurisdiction under Section 482 Cr.P.C or extraordinary jurisdiction under Article 227 of the Constitution of India. The petition is devoid of merits and is hereby dismissed. No order as to costs.

15. Send back the LCR.

JUDGE

Comparing Assistant