

**IN THE COURT OF THE SESSIONS JUDGE, KHURDA  
AT BHUBANESWAR.**

Present:

**Dr. D.P. Choudhury,**  
Sessions Judge, Khurda  
at Bhubaneswar.

*Dated, Bhubaneswar the 09<sup>th</sup> July'14.*

**Crl. Appeal No. 05 of 2011.**

(Arising out of the order dated 25.09.2010 passed by the learned Addl. D.C.P.-cum-Executive Magistrate, Bhubaneswar in CMC No.46 of 2010.)

1. Sk. Budhia, aged about 73 years,  
S/o. Late Sk. Asum.
2. Sk. Ibrail @ Raju, aged about 33 years,  
S/o. Sk. Budhia.  
Both are of Vill. - Sundarapada, P.S. - Airfield,  
Bhubaneswar, Dist. - Khurda.

... **Appellants.**

***- V e r s u s -***

1. State of Orissa.
2. Sk. Ehsan, aged about 53 years,  
S/o. Late Sk. Farid.
3. Sk. Wasim, aged about 29 years,  
S/o. Sk. Ehsan.
4. Sk. Nasim, aged about 22 years,  
S/o. Sk. Ehsan.  
All are of Vill. - Sundarapada, P.S. - Airfield,  
Bhubaneswar, Dist. - Khurda.

... **Respondents.**

**Counsel :**

For Appellants -- Mr. A.K. Mohanty & Associates.  
For Res. No.1 -- Mr. B.B. Mohanty (P.P. in charge).  
For Res. Nos.2 to 4-- Mr. J. Rehman & Associates.

Date of argument : 25.06.2014.

Date of judgment : 09.07.2014.

## **J U D G M E N T**

This appeal is directed against the order dated 25.09.2010 passed by the learned Addl. D.C.P.-cum-Executive Magistrate, Bhubaneswar in CMC No.46 of 2010 under section 107, Cr. P.C.

2. Background facts of the case of the appellants is that they are 2<sup>nd</sup> party members before the Court below. It appears from the report of S.I. of Police, Airfield Police Station that both parties claim possession over plot No.169 under khata No.745 in mouza Kapilaprasad. Due to dispute between the parties, 1<sup>st</sup> party members initiated Crl. Misc. Case No.1018 of 2009 under section 144 of the Code of Criminal Procedure (hereinafter called "the Code"). But, the learned Executive Magistrate sought for a report whether breach of peace is prevailing. The 1<sup>st</sup> party members were constructing houses on the land in dispute, which was in possession of 2<sup>nd</sup> party members. The concerned S.I. of Police, Airfield Police Station reported that the 2<sup>nd</sup> party members may take law into their hands and finding no way out he prayed that both the parties may bound down under section 116(3) of the Code to maintain peace. Basing on that report, the learned Executive Magistrate passed order on 16.01.2010 asking the 2<sup>nd</sup> party members to show cause why the order would not be passed to execute bond of Rs.5,000/- with condition to maintain

peace and good behaviour in the locality for a period of one year.

3. The order-sheets maintained in the lower Court show that the 2<sup>nd</sup> party members appeared and filed show-cause in shape of affidavit wherein it has been alleged that there was a proceeding under section 144 of the Code vide CMC No.1018 of 2009 filed by 1<sup>st</sup> party members against 2<sup>nd</sup> party No.1 and another and CMC No.170 of 2010 was started by 2<sup>nd</sup> party members against 1<sup>st</sup> party members. It is further alleged that 1<sup>st</sup> party members have no right, right and interest over the disputed land, whereas 2<sup>nd</sup> party members are in possession of the same since 1936. It is further averred that there is a Civil Suit vide No.210 of 2010 by 1<sup>st</sup> party members against 2<sup>nd</sup> party members and the same is subjudice before the learned Civil Judge (Jr. Division), Bhubaneswar. They denied of any breach of peace prevailing over the disputed land. As 2<sup>nd</sup> party members are in peaceful possession over the disputed land since there was a proceeding under section 144 of the Code and the competent Civil Court is in seisin over the matter, there is no question of asking the 2<sup>nd</sup> party members to bound down as held by the learned Executive Magistrate.

4. After receipt of show-cause, the learned Executive Magistrate proceeded to issue notice to 1<sup>st</sup> party members and, at the same time, asked for the evidence of 2<sup>nd</sup> party members. After examining the witnesses, he passed a detailed order, which has been assailed in this appeal, asking the 2<sup>nd</sup> party members to bound down.

5. Learned counsel appearing for the appellants submitted that the learned Executive Magistrate commenced inquiry and examined two witnesses from the side of the respondents and one witness from the side of the appellants; but the finding of the learned Executive Magistrate is wrong, illegal and against the weight of evidence on record. He forcefully submitted that in view of pendency of the civil suit and in the absence of allegation as to apprehension of breach of peace, the learned Executive Magistrate lacks jurisdiction to pass such order directing the appellant-2<sup>nd</sup> party members to execute a bond for good behaviour and he ought to have dropped the proceeding.

6. On the other hand, learned counsel appearing for the respondents submitted that 2<sup>nd</sup> party members having created disturbance in the peaceful possession of 1<sup>st</sup> party members over the disputed land should be restrained from creating disturbance, for which the learned Executive Magistrate has rightly passed the order. He supports the order passed by the learned Executive Magistrate.

7. Since this is a proceeding under section 107 of the Code, the sole point for consideration in this case is whether the learned Executive Magistrate has held the inquiry, as required under the law, and found that there was apprehension of breach of peace for which he was compelled to ask the 2<sup>nd</sup> party members to execute bond for keeping the peace and maintaining good behaviour for a period of one year.

8. I went through the lower Court record, including

the evidence on record recorded by the learned Executive Magistrate. Here, the evidence of S.I. of Police is relevant, as he is the person on whose report the proceeding was initiated. He has been examined as P.W.1. His evidence shows that on the report by Sk. Ibrail @ Raju to the effect that Sk. Ehsan is putting the plan lay out to construct a new building over the disputed land, there was altercation of words. On inquiry, he found the construction over the disputed land. Further, he found that there is a proceeding under section 144 of the Code between the parties over the disputed land and also a civil suit over the subject matter of dispute. But, in cross-examination, he has stated that he was not present at the time of quarrel between the parties and he came to know about it after recording the written statement of 2<sup>nd</sup> party members. He also admitted that he is not aware about pendency of any civil suit before the Civil Court. When he has no knowledge about pendency of civil suit and the occurrence of any sort of altercation between the parties, his evidence is not worthy of credit to find out that he was apprehending breach of peace over the disputed land between the parties. Moreover, P.W.1 has not whispered that there was apprehension of breach of peace between the parties.

9. P.W.2, who is one of the 1<sup>st</sup> party members, stated that only after filing of the civil suit, the 2<sup>nd</sup> party members are creating disturbance. But, in cross-examination, he stated that he has no knowledge basing on which application this proceeding was initiated. So, he has not proved any apprehension of breach

of peace created by 2<sup>nd</sup> party members. It is needless to say that D.W.1, who is one of the 2<sup>nd</sup> party members, simply stated that the 1<sup>st</sup> party members threatened to do away their lives. When there was breach of peace, police filed P.R. He has admitted that he is a peace loving person. There is no cross-examination. When he has not been cross-examined, the unrebutted evidence of D.W.1 proves that the 1<sup>st</sup> party members were creating disturbance for which P.R. was filed. When the I.O. has failed to prove the apprehension of breach of peace and D.W.1 has proved that he is there in peace, I do not concur with the finding of the learned lower Court that apprehension of breach of peace was prevailing between the parties. Even such prevailing situation was not brought in the evidence of the I.O. and the 2<sup>nd</sup> party members that the 1<sup>st</sup> party members were creating disturbance. At any rate, the finding of the learned Court below that apprehension of breach of peace was prevailing between the parties and 2<sup>nd</sup> party members were creating disturbance over the disputed land is impeachable. Thus, I do not agree with the finding of the learned Court below. Hence, the order dated 25.09.2010 is liable to be set aside. Moreover, the order for execution of bond for one year has already expired. Either way, the impugned order is not sustainable in the eye of law. Hence ordered :

### **O R D E R**

The appeal is allowed, but in the circumstances without cost. The order dated 25.09.2010 passed by the learned

Addl. D.C.P.-cum-Executive Magistrate, Bhubaneswar in CMC  
No.46 of 2010 is hereby set aside.

**Sessions Judge, Khurda  
at Bhubaneswar.**

09.07.2014.

Dictated, corrected by me and pronounced in the open Court this  
day the 09<sup>th</sup> July, 2014.

**Sessions Judge, Khurda  
at Bhubaneswar.**

09.07.2014.