

Parichhat and Others

Vs

The State of Madhya Pradesh

Criminal Appeal No. 11 of 1969

(CJI A.N. Ray, D.G. Palekar JJ)

14.10.1971

JUDGMENT

RAY, J. -

1. This is an appeal by special leave from the judgment dated August 31, 1968 of the High Court of Madhya Pradesh. The High Court dismissed the appeal of the appellant Gangu and accepted the appeal of the State against the Judgment dated March 31, 1965 of the Additional Sessions Judge, Tikamgarh. The High Court maintained the conviction of the appellant Gangu and the sentence of 7 years rigorous imprisonment passed against him under Section 304 Part I of the Indian Penal Code. The High Court set aside the acquittal of the appellants, Parichhat, Sunnu and Sitaram under Section 147 and 302 read with Section 149 and under Section 447 read with Section 149 of the Indian penal code and sentenced each of them to rigorous imprisonment for 5 years under Section 326 read with Section 34 of the Indian Penal Code.

2. Each of the appellant Parichhat, Ram Sahai, Sunnu and two other accused Sitaram and Durji was charged on three counts. First that each was member of an unlawful assembly on October 26, 1964 and in prosecution of the common object of such assembly, viz., in forcibly cutting the tilli crop of Damrual standing in the field plot 559 and in taking possession of that plot, committed the offence of rioting punishable under Section 147 of the Indian Penal Code. Secondly, each on the said date committed criminal trespass by entering into the field plot 559 of Damrual with intent to cut the tilli crop standing in the field and thereby committed an offence punishable under Section 447 of the Indian Penal Code. Thirdly, each was member of an unlawful assembly in prosecution of the common object of which, viz., in forcibly cutting the tilli crop of Damrual standing in the field plot 559, and in taking possession of that plot, one of the member Gangu committed murder by intentionally or knowingly causing the death of Kashiram and each was charged under Section 149 of the Indian Penal Code of causing the murder of Kashiram, an offence punishable under Section 302 of the Indian Penal Code.

3. The appellant Gangu was charged on three counts. The first two counts were similar to those of the other appellants. The third count was that Gangu on October 26, 1964 did commit murder by intentionally or knowingly causing the death of Kashiram, and thereby committed an offence punishable under Section 302 of the India Penal Code.

4. The prosecution case was this. The relationship between Damru and his brother Kashiram the deceased and the appellant Parichhat was stringed for some time with regard to possession of Khasra 559 of village Simra. The patta of the Khasra was given to Damru (PW 1) on October 8, 1963. Parichhat made effort to have this patta cancelled. Parichhat was unsuccessful in obtaining

cancellation of the Patta granted to Damru. Parichhat decided to cut forcibly the standing crop of tilli sown by Damru over the land, of plot 559. Parichhat went with labourers on the on October 26, 1964. Damru requested the labourer not to cut the crop. The labourers went away. Parichhat opened the attack by a lathi blow on Kashiram. Kashiram warded off on his lathi and returned the blow to Parichhat with lathi. Sitaram and Ram Sahai thereupon exhorted Gangu. Gangu thrust his ballam in the chest of Kashiram who after giving lathi blows on Sunnu and Sitaram, fell on the ground. Damru beat Sunnu and Sitaram with lathi. All the accused thereafter ran away. Kashiram died when he was taken to the police station. Damru made the First Information Report.

5. The accused pleaded not guilty to the charge. The defence of Parichhat was that he was in possession of the field and had sown tilli thereon. His further defence was that he was assaulted by lathi by Damru, Kashiram and others. Gangu Ram Sahai and Mst. Durji pleaded that they were not present at the place of occurrence. The rest of the accused pleaded that they were falsely implicated.

6. The Sessions Judge held that the land in dispute was in the possession of the appellants and Gangu had a right of private defence of property as well as of person of his father Parichhat on whose head deceased Kashiram had lifted and aimed his stick second time to strike but Gangu had exceeded his right of private defence and therefore Gangu was convicted under Section 304 Part I of the Indian Penal Code. The other 5 accused including the three appellants, Parichhat, Sunnu and Sitaram were acquitted by the Sessions Judge.

7. The High Court held that the possession of the land in dispute was with Damru who had sown and grown the crop. Even if Damru's title over the field was not established by the prosecution because the patta was not validly granted Damru stood in a better position than Parichhat by virtue of his cultivation over the field. The High Court held that the cultivation would establish Damru's possession and on that reasoning Damru would resist Parichhat and his party. Therefore, the High Court held that the accused being aggressors, they had no right of private defence.

8. The High Court therefore maintained the conviction of the appellant Gangu to rigorous imprisonment for 7 years under Section 304 Part I of the Indian Penal Code and set aside the acquittal of the appellants Parichhat, Sunnu and Sitaram and convicted them under Section 326 read with Section 34 of the Indian Penal Code and sentenced each of them to rigorous imprisonment for 5 years.

9. Counsel on behalf of the appellant raised these contentions. The High Court was wrong in setting aside the acquittal of the appellants Parichhat, Sunnu and Sitaram without evidence and without giving consideration to reasons for acquittal given by the Session Judge. The High Court misread the documentary and the oral evidence and thereby failed to appreciate the plea of private defence. The High Court acted illegally in applying Section 34 of the Indian Penal Code to the appellants Parichhat, Sunnu and Sitaram. Gangu was convicted without considering his right the private defence and since Gangu was 19 year in age Section 6(1) of the Probation of Offenders Act should have been applied.

10. The sessions Judge held that there was no reliable evidence on record to hold that Damru, PW 1 was in possession on the date of occurrence and Parichhat and others had rightfully entered the field in question and thus committed no offence punishable under Section 447 of the Indian Penal Code. The Sessions Judge also held that the prosecution failed to prove that the accused had formed an unlawful assembly. The High Court on the contrary arrived at these findings. The possession of field 559 was handed over to Damru in 1963 and the Patta in favour of Damru was not cancelled. The

land belonged to Government and Parichhat was a trespasser. There were orders for evicting Parichhat. Parichhat was evicted from the land. Ex. D-14 would show that Parichhat was evicted and fined. Ex.P.10 dated October 28, 1964 would show possession of Damru on the land in dispute and that tilli crop was sown by him on the land.

11. The most important question is therefore to find out what the evidence was as to who was in possession of plot 559 on the date of occurrence, viz., October 26, 1964. It will appear from Ex. D-15 dated September 8, 1962 that Parichhat and Shyam Sunder, son of Sitaram, were in possession of the disputed land. The khasra entry dated September 8, 1962, also showed that the Naib Tehsildar had on August 17, 1962 ordered the dispossession of Parichhat and Shyam Sunder and fined them Rs. 100 each. On January 23, 1963 there was an order of the sub-Divisional Officer in appeal 14 of 1962-63 setting aside the order of the Naib Tehsildar dated August 17, 1962 of the imposition of fine of Rs. 100 each and dispossession of Shyam Sunder and Parichhat. On May 9, 1963 Babu Lal Patwari, PW 11 reported to the Sub-Divisional Officer as will appear from Ex. D-14 that Parichhat and Shyam Sunder were still in possession and they had not obeyed the order of the Naib Tehsildar for dispossession. On September 22, 1963 there was a receipt Ex. D-16 given by Babu Lal Patwari, Pw 11 for Rs. 54-58 as land revenue for the disputed land received from Shyam Sunder and Parichhat. On October 8, 1963 the Naib Tehsildar in Ex. P-1 made an order granting patta of the disputed land in favour of Damru (PW 1) on the basis of a note of the Collector dated August 24, 1963 treating the same as an order by the Collector under Section 162 of the Madhya Pradesh Land Revenue Code, 1959. On February 1, 1964 the Collector in Ex. D-1 held that his not dated August 24, 1963 was only a comment in an Administrative matter and was not an order under the Madhya Pradesh Land Revenue code and the Naib Tehsildar had no authority to grant patta on the basis thereof and only the Tehsildar was empowered to grant patta and the order of the Naib Tehsildar sated October 8, 1963 in Ex. P-1 was declared a nullity. On February 22, 1964 the Sub-Divisional Officer in Ex. P-2 in ignorance of the order of the Collector dated February 1, 1964, held in appeal, that the Naib Tehsildar had passed orders on the basis of the Collector's note dated August 24, 1963 and the Sub-Divisional Officer had no jurisdiction to hear appeal from and set aside the order of the Collector dated August 24, 1963. On July 4, 1964 there was an order of the Sub Divisional Officer in Ex. D-2 that the order of the Collector dated February 1, 1964 in Ex. D-1 declaring that the patta Ex. P-1 was a nullity had not been brought to his notice and in view of the order of the Collector the Naib Tehsildar had no power to grant patta and therefore his own previous order dated February 22, 1964 became invalid in view of the Collector's order dated February 1, 1964.

12. The documentary evidence points to one conclusion that the appellant Parichhat was in possession of the land and the grant of patta in favour of Damru was declared by the collector to be a nullity. The High Court completely ignored these documents. The incident occurred on October 26, 1964. There is a significant piece of documentary evidence dated October 28, 1964. The High Court relied on that document. That is Khasra entry drawn by Babu Lal Patwari, PW 11 after the incident showing Damru complainant as pattadar tenant. This is directly opposed to the Collector's order dated February 1, 1964. Khasra entry dated October 28, 1964 further shows that Damru had sown tilli crop on the land. Babu Lal Patwari, PW 11, in his oral evidence said that the order of Naib Tehsildar dated August 17, 1962 ordering dispossession of Parichhat and Shyam Sunder, son of Sitaram, from the property in question amounted to dispossession of Parichhat. Babu Lal Patwari's evidence is contrary to the order of the Sub-Divisional Officer dated January 23, 1963 setting aside the order of the Naib Tehsildar dated August 17, 1962 and also the order of the Naib Tehsildar himself dated October 8, 1963 granting a patta of the land to Damru which order was declared unauthorised and nullity by the Collector's order Dated February 1, 1964. The High Court did not notice these pieces of documentary evidence.

13. The other documents which the High Court did not notice are Ex. D-14, dated May 9, 1963 which was a report by Babu Lal Patwari, PW 11 that Parichhat and others had taken unlawful possession and had not vacated possession Ex. D-16 dated September 22, 1963 being receipt of revenue paid by Parichhat. Ex. D-3 dated April 26, 1964 was also not noticed by the High Court. That exhibit relates to information of non-cognizable offence by the police. The date of information is April 26, 1964. Parichhat was the complainant. Damru and his son Mukundi were the alleged co-accused. The information given by Parichhat was that Damru and his son Mukundi arrived on the field with lathis. Parichhat was grazing buffaloes on the field. Parichhat prevented Damru and his son who broke the fence of the hut. This was the gist of the information. These documents indicate that Parichhat was in possession.

14. Babu Lal Patwari in his oral evidenced said that Parichhat had possession over the land till Samvat 2017-18 and that the possession was unauthorised. Babu Lal Patwari further said that Parichhat and Shyam Sunder were dispossessed from the land in Samvat 2018 and samvat 2019 and the land was then lying vacant. In Samvat 2020 the land was allotted to Damru. The High court relied on the oral evidence of Babu Lal Patwari which was contrary to all documentary evidence. The order of the Naib Tehsildar dated August 17, 1962 ordering dispossession of Parichhat which was relied on by the High Court to support the finding of possession of land by Damru was set aside by the Sub-Divisional Officer on January 23, 1963 as will appear from Ex. D-26. Again, the order of the Naib Tehsildar dated September 8, 1962 granting patta of the land of Damru was also declared a nullity by the collector's order dated February 1, 1964. Entry dated October 28, 1964 which was relied on by the High Court showing possession of land by Damru came into existence two days after the date of occurrence. It was written by Babu Lal Patwari who supported Damru. Therefore the entry dated October 28, 1964 is precarious and unworthy in character.

15. The High Court relied on Exs. D-14, D-15 and D-16 and the evidence of Babu Lal Patwari to show dispossession of Parichhat and Shyam Sunder. Ex. D-14 is the report dated May 9, 1963 by Babu Lal Patwari to the effect that in spite of the order of the Naib Tehsildar for dispossession Shyam Sunder and Parichhat were still in possession in Samvat 2017 and 2018. The report itself contains the remarks "still they have not given over possession." Ex. D-15 dated September 8, 1962 is a copy of Khasra. Five plots including plot 559 were mentioned there. Sitaram, Brindavan, father of Sitaram, Pyarelal, father of Parichhat, Parichhat, Shyam Sunder, son of Parichhat are shown to be in possession. There is a note to Ex. D-15 by Babu Lal Patwari dated September 8, 1962 to the effect that the Tehsildar a dispossessed Sitaram and Parichhat by order dated July 17, 1962 (Sic) meaning August 17, 1962 by imposing a fine and ordering payment of double land revenue. Ex. D-16 is the receipt dated September 22, 1963 of revenue from Shyam Sunder and Parichhat. These Exs. D-14, D-15 and D-16 show that land was in possession of Parichhat and not of Damru and the High Court totally misread the documents.

16. The High Court did not notice the order of the Collector dated February 1, 1964 declaring the patta in favour of Damru a nullity and the order dated July 4, 1964 of the Sub-Divisional Officer that the order of the Sub-Divisional Officer dated February 22, 1964 stood vacated in view of the order of the Collector dated February 1, 1964. These documents totally repel the erroneous reading of the evidence by the High Court that the attain favour of Damru had not been cancelled. The documents establish that Parichhat was in possession of the disputed land.

17. Ex.P.10 dated October 28, 1964 on which the High court relied in support of the finding that tilli crop had been sown and grown by Damru does not support the finding. The prosecution case was that tilli crop had not been cut on the date of the occurrence October 26, 1964. The High Court said

that if the crop had been sown and grown by Parichhat he would never have made any efforts to cut the same in green and unripe condition. The evidence of Mukundi, son of Damru, was that when Parichhat and the labourers arrived for cutting the crop on the date of the occurrence Kashiram said that the tilli crop could not be cut and Damru said that the tilli was grown and it should not be cut. It was never put to Parichhat in the statement under Section 342 of the Criminal Procedure Code whether Parichhat had cut the tilli crop in green and unripe condition. The High Court was therefore wrong in holding that Parichhat would not have cut the tilli in green and unripe condition if tilli crop had been sown by him. No such question was put to Banu Lal Patwari or to any other witness whether the tilli crop was unripe. It was never alleged in the First Information Report nor in evidence that the tilli crop on the land was unripe and that it was not mature for cutting. Therefore, as the prosecution case was not tilli crop was not cut on October 26, 1964 the date of occurrence the entry of Babu Lal Patwari on October 28, 1964 that Damru had sown and grown tilli crop had become totally unworthy. The entry made by Babu Lal Patwari on October 28, 1964 appears to be brought into existence to bolster the plea of possession of land by Damru.

18. The real importance of Section 342 of the Criminal Procedure Code is that there is a duty cast upon the courts to question the accused properly and fairly so that it is brought home to the accused in clear words the exact case that the accused will have to meet, and thereby an opportunity is given to the accused to explain any such point. The High Court being under the impression that the tilli was in green and unripe condition held that if Parichhat had sown and grown the crop he would have preserved and protected the crop and not cut the same. This finding is totally inconsistent with the other finding of the High court that Damru was in possession of the land. If Damru had been in possession Parichhat would not have sown tilli crop. If, on the other hand, Parichhat had been in possession and had sown and grown the crop it should have been clearly put to Parichhat that till crop was green and unripe. If Parichhat had sown and grown the crop, the entire prosecution case fails.

19. The High Court convicted the appellants Parichhat, Sunnu and Sitaram under Section 326 read with Section 34 of the Indian Penal Code. The prosecution was required to prove first the common intention on the part of the appellants to cause the death of Kashiram which presupposed a pre-arranged plan and prior meeting of the minds to achieve that intention and secondly participation in action by each of the appellants for the achievement of that intention i.e., committing the murder of Kashiram. The prosecution case was this. Gangu gave a blow with the spear to Kashiram on his chest as a result of which he died. Parichhat opened the attack by wielding his lathi on Kashiram. Kashiram warded it off by taking the same on his lathi. Kashiram did not strike any blow after that. Sunnu and Sitaram instigated Gangu to use his spear on Kashiram and did nothing else. Damru said that only Parichhat gave a lathi blow. Lalnaju (PW 2) a cultivator said that before the ballam injury Kashiram had struck Parichhat alone and none of the accused has given lathi blow before the ballam injury nor had any accused beaten the Sunars after the ballam injury. By Sunars Lalnaju meant Kashiram Sunar and Damru Sunar. PW 3 Ajudhi also said that out of the Accused Gangu alone gave a spear blow.

20. The Sessions Court disbelieved that the appellants Sunnu and Sitaram had instigated the appellant Gangu to give a ballam blow to Kashiram. The appellants Parichhat, Sunnu and Sitaram did not beat or strike anyone. Common intention within the meaning of Section 34 of the Indian Penal Code implies pre-arranged plan. There being no evidence of a prior meeting of minds and any pre-arranged plan or of participation of Sunnu and Sitaram in the fight they could not be convicted with the aid of Section 34 of the Indian Penal Code. Parichhat could not be said to have common intention with Gangu to cause the death of Kashiram and Parichhat could not be convicted with the

aid of Section 34 of the Indian Penal Code. If they wanted to dispossess Damru and if they went there to dispossess Damru and if Gangu killed Kashiram the appellants Parichhat, Sunnu and Sitaram could not be brought within the common intention of killing Kashiram. No such pre-arranged plan has been proved. It has also not been proved that any criminal act has been done in concert pursuant to the pre-arranged plan. Several persons can simultaneously attack a man and each can have the same intention, namely, the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by Section 34 of the Indian Penal Code because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of murder.

21. Dharam Ballabh was the President of the Gram Sabha. Ram Lakhan Sharma (PW 15) was the Sub-Inspector and Officer-in-Charge of Police Station Prithvipur. Damru and Ram Lakhan Sharma were friends. Accused Durji was occupying a room in the house of accused as a tenant. Durji on July 21, 1964 sent a written complaint to the Superintendent of Police that when she had gone to collect gold and silver ornaments deposited by her with Dharam Ballabh the latter assaulted her and the head constable at Simra refused to record her report. Ram Lakhan Sharma was deputed by the Superintendent of Police to enquire into that matter. Ram Lakhan Sharma went to village Simra on July 30, 1964. The appellants Sitaram, Parichhat and accused sent a letter to the Superintendent of Police on August 3, 1964 narrating that Ram Lakhan Sharma the investigating officer had accepted money from Dharam Ballabh the Sabhapati of village Simra. It also transpired from the evidence that Damru and Ajudhi and Jaggu two prosecution witnesses were all tenants of Dharam Ballabh in respect of agricultural lands. Sitaram and Sunnu were agriculturists having adjoining lands. Parichhat and his son Gangu were in possession of plot 559. Dharam Ballabh recommended grant of patta in favour of Damru. It is in this context that the Sessions Court had found that the Sub-Inspector of Police with the aid of Dharam Ballabh implicated Parichhat, Sitaram and Durji so that Durji might abandon the case against Dharam Ballabh. The High Court did not consider these aspects at all. It is also in evidence that investigation was made by Ram Lakhan Sharma the Station Officer and Dharam Ballabh against whom allegations had been made by the appellants and against whom the case instituted by Durji was pending and against whom allegations were made by Parichhat and Sunnu and Sitaram was brought as a panch witness in the investigation. Apart from the inimical relations between Dharam Ballabh and Parichhat, the investigation with the aid of Dharam Ballabh as the panch witness became tainted and controversial. In a criminal trial courts have to be cautious and chary of such course of action.

22. Section 34 will not be attracted unless first it is established that a criminal act was done by several persons, second, that there was a common intention and a pre-arranged plan to commit an offence and third that there was participation in the commission of the offence in furtherance of that common intention. The High Court was wrong in convicting the appellants Parichhat, Sunnu and Sitaram under Section 326 read with Section 34 of the Indian Penal Code. Their convictions are set aside. The High Court in seeking aside the acquittal of Parichhat, Sunnu and Sitaram should have considered the enmity between Dharam Ballabh and Parichhat, the case instituted by Durji against Dharam Ballabh, the allegations made by Parichhat against Dharam Ballabh, the hostile and unsympathetic attitude of Ram Lakhan Sharma in investigating the complaint of Durji against Dharam Ballabh. If the appellants could not be convicted under Sections 147, 447 and 302 read with Section 149 of the Indian Penal Code and they were acquitted the acquittal could not be set aside by the High Court unless the Sessions Court in acquitting the accused was palpably wrong or took an erroneous view or committed grave injustice. The setting aside of the acquittal by the High Court

was itself erroneous and wrong. The High Court was also wrong in convicting the appellants under Section 326 read with Section 34 of the Indian Penal Code. Merely remaining with Gangu at the time of cutting the crop will not justify any application of Section 34 of the Indian Penal Code with regard to the murder of Kashiram.

23. As to Gangu it was said that he defended his father Parichhat's person against the immediately impending second lathi blow by Kashiram on the head of Parichhat and that was sufficient to cause a reasonable apprehension of grievous hurt and even of the death of Parichhat. It is true that if the threat to the person or property which the accused was entitled to defend was real and immediate he was not required to weigh in golden scales the kind of instrument and the force which he used at the spur of the moment. The high Court held that no right of private defence was available to Gangu. The High Court was wrong in holding that the right of private defence was not available to Gangu. Gangu however exceeded the right of private defence. There would be no apprehension in his mind of grievous hurt because no sharp weapon was used. Secondly, there could be no reasonable apprehension of grievous hurt or death. Parichhat had only one simple injury on his head. The medical evidence was that the injury on the head of Parichhat was on the back. That would indicate that Parichhat was beaten when he had his back to Kashiram. Gangu exceeded the right of private defence and caused the death of Kashiram without pre-meditation and without any intention of doing more harm than was necessary for the purpose of defence. The conviction of Gangu under Section 304 (Part I) of the Indian Penal Code by the High Court is upheld.

24. It was contended on behalf of the appellant Gangu that he was under 21 years of age and therefore he should have the benefit of Section 6 of the Probation of Offenders Act, 1958. Section 6 of the Probation of Offenders Act is applicable where a person under 21 years of age is found guilty of having committed an offence punishable with imprisonment but not with imprisonment for life. In the present case Gangu has been found guilty under Section 304 (Part I) of the Indian Penal Code and the offence is punishable with imprisonment for life. Therefore, Section 6 of the Probation of Offenders Act is not attracted. It was then submitted that the punishment of Gangu should be under Section 304 (Part II) of the Indian Penal Code in order to attract the provisions of Section 6 of the Probation of Offenders Act. That is impermissible now. The Sessions Court passed the sentence of 7 years rigorous imprisonment in the case of Gangu. The High Court upheld the conviction and confirmed the sentence. Gangu will serve out the sentence.

25. For these reasons, the appellants Parichhat, Sunnu and Sitaram are acquitted and the conviction of Gangu is maintained.

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