
(1956) 04 AHC CK 0005
In the Allahabad High Court
Case No : Criminal Ref. No. 116 of 1955

L. Deep Chandra	Vs	APPELLANT
L. Durga Pd. and Others		RESPONDENT

Date of Decision : 09-04-1956

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 107, 145, 146, 146(1)

Citation : (1956) 26 AWR 500

Hon'ble Judges : Asthana, J

Bench : Single Bench

Advocate : Shanti Bhushan and Vishwa Mitra, for the Appellant; P.C. Chaturvedi, for Opp. Parties Nos. 1 and 2 and Nathoo Singh Singhal, for Opp. Parties No. 3, for the Respondent

Final Decision : Dismissed

Judgement

Asthana, J.—This reference and the connected criminal revision arise out of a case u/s 146 Code of Criminal Procedure.

2. It appears that one Sajjad Ali Khan was the sole proprietor of the entire khewat No. 4/1, Mahal Rustam Ali Khan, Mauza Yousufpur, in the district of Muzaffarnagar. The total area of the land comprised in this khewat was 187 bighas 15 biswas. Sajjad Ali Khan sold two of the plots comprised in this khewat (Nos. 232 and 238) to Amir Singh. Three other plots, Nos. 216, 217 and 218 were acquired by the Government for the Church Mission Society. The total area of these 5 plots was 2 bighas 10 biswas. On 7-2-1942 Sajjad Ali Khan entered into a contract for sale of his entire interest in the mahal in favour of Lala Deep Chand applicant. He did not execute a sale deed in favour of Lala Deep Chand in performance of the contract. On the contrary, he sold the property to the opposite parties Durga Prasad and Miri Mal on 4-4-1942. It may be mentioned here that prior to the execution of this sale deed Sajjad Ali Khan had executed a lease on 2-4-1942 in favour of Dhani Ram in respect of plots Nos. 183, 188 and 189 in this khewat and that these plots at the time of the execution of the lease

were in possession of other tenants. On 15-4-1942 Dhani Ram acquired lease of plots Nos. 513, 514, 518 and 525 from Durga Prasad and Miri Mal after the latter had obtained a sale deed from Nawab Sajjad Ali Khan. On 6-5-1942 Lala Deep Chand brought a suit for specific performance of the contract of sale and for possession over the property against Sajjad Ali Khan, Durga Prasad, Miri Mal, Baru Singh, Dhani Ram and Akram Khan. The last three persons were the transferees after the contract of sale with Lala Deep Chand and before the purchase made by Durga Prasad and Miri Mal. On 18-5-1942 Dhani Ram made an application u/s 53(3) of the UP Tenancy Act of 1939 for the exchange of the plots Nos. 513, 514, 518 and 525 with the plots Nos. 183, 188 and 189 which were in possession of tenants and on 30-5-1942 this exchange was allowed and Dhani Ram got possession over the plots Nos. 183, 188 and 189. The suit was dismissed by the civil judge but was decreed by this Court on 12-5-1949. In execution of this decree the Civil Judge, Meerut, executed a sale deed on behalf of Sajjad Ali Khan in favour of Lala Deep Chand on 29-5-1950. Lala Deep Chand applied for the execution of his decree for possession and possession was delivered to him through a commissioner appointed by the court on 30-5-1950 and a dakhlanama was executed in token of delivery of possession. Durga Prasad and Miri Mal filed an appeal in the Supreme Court against the appellate decree of this Court. It was dismissed on 18-11-1953 with the slight modification that the Supreme Court directed Durga Prasad and Miri Mal also to join in the conveyance which was to be executed in favour of Deep Chand. At the same time they pointed out that the modification that they had made would not affect the rights of Deep Chand under the decree except to his advantage. During the pendency of the civil suit Durga Prasad and Miri Mal obtained the surrender of 47 plots comprised in the khewat from their tenants and cultivated them as their khudkasht.

3. On 16-7-1950 Lala Deep Chand made an application to the police u/s 107 Code of Criminal Procedure complaining that when he went to cultivate the plots over which he had obtained possession under the dakhlanama in execution of his decree for possession, Durga Prasad, Miri Mal and others objected to it and there was a danger of the breach of the peace. It was on this application that the police made inquiry into the matter and reported that there was a dispute between the parties and there was an apprehension of breach of the peace. On this report the learned Magistrate passed a preliminary order u/s 145 Code of Criminal Procedure on 18-7-1950 directing the plots in dispute to be attached. Sri Jagat Prakash, pleader, was appointed the Receiver of the plots. It may be mentioned here that besides the khudkasht plots of Dhani Ram the plots Nos. 183, 188 and 189 were also attached. These plots were claimed by Dhani Ram. Written statements were filed by the various parties concerned. Durga Prasad and Miri Mal claimed that the plots in dispute, except the plots Nos. 183, 188 and 189, were their khudkast plots; that they were in possession of them and that Lala Deep Chand had not obtained actual possession over them nor he was in possession of them on the date of the preliminary order. Dhani Ram contended

that the plots Nos. 183, 188 and 189 which he had obtained under the deed of exchange were in his possession. Lala Deep Chand on the other hand claimed that he was in actual possession of these plots and the opposite parties had no concern with them.

4. The learned Magistrate after a consideration of the evidence on the record was of the opinion that in execution of the civil court decree Lala Deep Chand obtained only proprietary possession over the disputed property and that the actual possession remained with Durga Prasad, Miri Mal and Dhani Ram. He, therefore, ordered that possession over the khudkasht plots might be delivered to Durga Prasad and Miri Mal, and over the plots Nos. 183, 188 and 189 to Dhani Ram and that Lala Deep Chand was not to interfere with their possession until they were evicted under any decree of the competent court. Against this order Lala Deep Chand filed a revision before the learned Sessions Judge. The learned Sessions Judge was of the opinion that Lala Deep Chand had obtained actual possession over the khudkasht plots in execution of the decree of the civil court on 30-5-1950, within 2 months of the preliminary order, and he was, therefore, entitled to possession over these plots. He has, therefore, made a recommendation that the order of the learned Magistrate with regard to the khudkasht plots might be set aside and that possession over them might be delivered to Lala Deep Chand instead of to Durga Prasad and Miri Mal. As regards the plots Nos. 183, 188 and 189, he was of the opinion that Dhani Ram was in possession of them and the learned Magistrate had rightly ordered that possession over them might be delivered to him. Cr. Revision No. 436 of 1955 has been filed by Lala Deep Chand against the order of the learned Sessions Judge directing the delivery of possession of the aforesaid three plots to Lala Dhani Ram.

5. The only question for consideration before me is which party was in actual possession of the disputed plots on the date of the preliminary order or within two months preceding it. It has been contended before me on behalf of Lala Deep Chand that in execution of his decree for possession he obtained actual possession over the plots in dispute and as such he will be deemed to be in possession on the date of the preliminary order even if it was held that he was subsequently dispossessed by the opposite parties, namely, Durga Prasad, Miri Mal and others. On the other hand it was contended that Lala Deep Chand in his suit for specific performance of contract of sale and for possession had claimed only proprietary possession over the property comprised in the khewat and as such he could not be given a decree for actual possession nor he could obtain actual possession over the disputed property. It was also contended that the decree for possession mentioned only the proprietary share in the khewat and not specific plots and in the circumstances it was not possible that actual possession was delivered to Lala Deep Chand. It was also argued that from the report of the commissioner who went to deliver possession over the property in dispute, it appeared that he had adopted the procedure laid down under Order XXI, Rule 36, CPC which procedure provided for symbolical delivery of possession

and not for actual delivery of possession. It, however, appears from the commissioner's report as well as from the dakhnama that actual possession was delivered to Lala Deep Chand over the plots in dispute and that at the time of the delivery of possession none of the judgment-debtors was present at the fields and so a proclamation was made on the spot by beat of drums and also by affixation that possession had been delivered to the decree-holder.

6. The question for consideration is whether the possession which was delivered to the applicant Lala Deep Chand was actual possession as contemplated in Section 145 Code of Criminal Procedure or was merely symbolical possession and the actual possession remained with the judgment-debtors. It is true that in the suit which was filed by Lala Deep Chand he did not claim possession over the specific plots but he claimed possession over the entire khewat and the property comprised in it. It appears from the report of the commissioner that possession was delivered over specific plots mentioned in the report by means of proclamation by beat of drum and affixation. There can be no doubt that actual possession over the fields which were lying vacant at the time of delivery of possession could not be delivered otherwise than in the manner adopted by the commissioner, particularly when the judgment-debtors were not present at the spot at the time of delivery of possession. Learned Counsel for the applicant has relied on several decisions in support of his contention that the possession which was delivered in execution of the decree of the civil court was actual possession within the meaning of Section 145 Code of Criminal Procedure.

7. In *Behari Gir v. Bhubaneshwari Koer* AIR 1920 Pat. 633 it was held that possession delivered under Order XXI, Rule 35 CPC was actual possession and not symbolical or formal possession. It was further held that where in execution of a decree possession of property was delivered to the decree-holder under Order 21, Rule 35, CPC the property could not form the subject of proceedings u/s 145 Code of Criminal Procedure at the instance of the judgment-debtor, inasmuch as the dispute between the parties had been adjudged, and a Magistrate who started such proceedings was acting illegally and without jurisdiction. In this case the Petitioner Behari Gir in execution of his mortgage decree purchased the holdings of the tenants who were the judgment-debtors and after purchasing them applied for delivery of possession which was given to them according to Order 35, Rule 1, Code of Civil Procedure. It was contended on behalf of the judgment-debtors that the possession was only symbolical or formal and not actual. This contention was not accepted and it was found that the possession was actual as contemplated in Section 145 Code of Criminal Procedure.

8. In *Rajendra Narayan Bhanja Deo Vs. Cahudhuri Chintamani Mahapatra*, it was held that where symbolical possession of the judgment-debtor's zamindari property was given to the decree-holder who afterwards found that his possession was being interfered with by the judgment-debtor and initiated proceedings u/s 145 Code of Criminal Procedure for retaining possession, the

Magistrate could not refuse to entertain the proceedings on the ground that the decree-holder had not got actual possession from the Civil Court. It was further held that once delivery of possession was proved then it must be taken as an indisputable fact that on the day of the delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ; that the Magistrate must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary was established; and that the judgment-debtor could only succeed if he established beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute. It was pointed out in this case that the distinction between "actual possession" and "symbolical possession" was a distinction without difference when the question arose between the parties to the delivery of possession and this distinction had absolutely no place in the Code of Civil Procedure; that the Code prescribed two kinds of delivery of possession according to the nature of the possession of the judgment-debtor, one under Order 21, Rule 36 or 95 and the other under Order 21, Rule 36 or 96; that thus the manner of the delivery of possession was according to the nature of the possession of the man who was to be dispossessed and not that its effect in law was different as against the judgment-debtor; that even if the property was in direct possession of the judgment-debtor the mode of delivery would naturally vary according to the nature of the property as mode of possession of different properties vary; that if the property was in actual physical possession of the judgment-debtor, for instance, if the property was a house and the judgment-debtor was residing in it he must be dispossessed of it by being bodily removed from it and by putting the decree-holder or auction purchaser in physical occupation of it; but if the property was zamindari or a tank or mineral rights in indirect possession of the judgment-debtor, though the delivery of possession would be by ousting the judgment-debtor from it, it was obvious that the judgment-debtor could not be physically removed from it and the decree-holder or auction-purchaser put in physical occupation of it; that the delivery of possession in such case was by proclaiming that decree-holder had been put in possession, and that this delivery of possession was not symbolical but actual and was as effective against the judgment-debtor as his physical removal from a house.

9. In *Maung Kan v. Maung Po Tok* A.I.R 1939 Ran 388 it was held that if in execution of a decree against the judgment-debtor an order for delivery of possession of judgment-debtor's property to the decree-holder was made by the Court and effect was given to that order by an officer of Court executing the delivery warrant and since then the decree-holder was in possession both in fact and law of the land in question put the judgment-debtor within two months from the execution of such warrant attempted a forcible entry upon the land, and then the decree-holder filed a petition in a criminal court u/s 145 Code of Criminal Procedure, the Magistrate could not go behind the decision of the Civil Court and

could not ignore the decree. It was, further, held that it was immaterial whether the possession was actual or merely symbolical and in the inquiry u/s 145 there was only one conclusion possible for the Magistrate to arrive at with reference to the land and it was that it was in possession of the decree-holder on the date of the order passed under Sub-section (I) of Section 145; that even assuming that the decree-holder had been forcibly dispossessed at any time after the execution of the delivery warrant, provision to Sub-section (4) of Section 145 would operate in favour of the decree-holder, and (sic) in such circumstances the Magistrate passed an Order u/s 146(1) by which he referred the parties back to Civil Court for the determination of their rights, such an order was highly improper and opposed to all principles of justice.

10. In *Kedarnath Paramanik Vs. Hem Nath Karmakar*, it was held that in a proceedings u/s 145 Code of Criminal Procedure the Magistrate could not go behind the decision of the Civil Court in the matter; that it was not for the Magistrate to question the validity of a decree that had not been set aside by a competent Court; and when the decree was inter parties it was immaterial whether the delivery of possession was symbolical or not, and in disregarding this delivery of possession the Magistrate acted with gross irregularity and in a manner that was likely to cause a failure of justice.

11. In *Harpal Kurmi and Others Vs. Mohan Kurmi and Others*, it was observed by Daniels, J. that where the property from its nature was not capable of being actually delivered the mode of giving possession was by proclaiming the sale certificate and by beating the drum. In this case the Amin went to the spot and handed over possession of the disputed plots, the judgment-debtor keeping away, and as soon as the Amin and the decree-holder had gone the judgment-debtor quietly resumed possession. The *da-khalnama* which had been executed by the decree-holder disclosed that actual possession had been given to him. It was held in this case that possession which had been delivered to the decree-holder was actual possession and not symbolical possession and that it interrupted adverse possession.

12. It appears from an examination of the record that the warrant for delivery of possession was issued by the Civil Judge Under Order XXI, Rule 35, CPC I do not think that merely because the commissioner who went to deliver possession over the property in question got the proclamation made on the spot about the delivery of possession, it would make the delivery of possession as one Under Order XXI, Rule 36, CPC and not Under Order XXI, Rule 35, CPC Order XXI, Rule 36, CPC in my opinion will not be applicable to the present case. This rule provides that where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the

property. Before this rule can apply it is necessary to be proved that the property in dispute was in possession of a tenant or one who was not bound by the decree to relinquish such property. In the present case the decree for possession had been passed against the judgment-debtors, who are the opposite parties, and it cannot be said that they were not bound to deliver possession of the property under the decree. I am not satisfied that Durga Prasad and Miri Mal or Dhani Ram were in possession of the property as tenant. The sale deed in favour of Durga Prasad and Miri Mal, as well as the lease in favour of Dhani Ram, was declared void against the applicant Lala Deep Chand in the civil suit. As a result of this declaration the transfer in favour of these persons was ineffectual against Lala Deep Chand and so far as he was concerned their possession would be deemed unlawful and that of trespasser. It was contended before me on behalf of Durga Prasad and Miri Mal that after the execution of the sale deed they became ex-proprietary tenants and, as such, were entitled to remain in possession of them. In view of the fact that the transfer in favour of Durga Prasad and Miri Mal was held void by this Court in the civil suit it could not be said that they were the owners of this property and zamindars, and in the circumstances they could not acquire, any ex-proprietary right in the disputed property after the execution of the sale deed by Sajjad Ali Khan in favour of Deep Chand. In my opinion the possession of Durga Prasad and Miri Mal was that of trespasser since its inception against Lala Deep Chand.

13. On behalf of Dhani Ram it was contended that in view of Section 53(3) of the U.P.T. Act of 1939 he had acquired the same rights in the plots Nos. 183, 188 and 189 which his predecessors-in-interest, who were the tenants of these plots, had in them. Section 53(3) provides that after orders have been passed under the provisions of Sub-section (2), each person shall have in respect of the land which he receives in exchange the same rights as he had in the land which he gave in exchange, and the Assistant Collector shall order that the appropriate entry might be made in the record of rights. It is, therefore, necessary to determine what rights Dhani Ram had in respect of plots Nos. 513, 514, 548 and 525 which he gave in exchange of plots Nos. 183, 183 and 189. Dhani Ram obtained a lease in respect of the aforesaid four plots on 16-4-1942 from Durga Prasad and Miri Mal. In view of the fact that the sale deed in favour of Durga Prasad and Miri Mal was void against Lala Deep Chand, any transfer made by them after the sale deed in respect of the property acquired under that sale deed will also be void against Lala Deep Chand. In this view of the matter Dhani Ram was a trespasser so far as the plots Nos. 513, 514, 518 and 525 were concerned, and, as such, he did not acquire on exchange a better right in the plots Nos. 183, 188 and 189. If Dhani Raru were the tenant of the aforesaid four plots then certainly he would have been the tenant of the aforesaid three plots which he got in exchange of them, and in that case it is possible that he would not have been liable to ejectment under the decree of the civil court.

14. It has been contended on behalf of Durga Prasad and Miri Mal that even if their possession was that of trespasser they had acquired the tenancy rights in

the disputed plots as no suit was brought against them for ejectment within 3 years u/s 180 of the UPT Act of 1939. In my opinion this contention has no force. The present suit for possession was filed against them on 6-5-42 and they obtained possession over the khudkasht plots during the pendency of this suit from the tenants who were in actual possession of these plots. It was argued that the proper forum for filing the suit for ejectment was the revenue court and not the civil court. Learned Counsel for the applicant relied on D.N. Rage v. Kazi Mohammad Haider and Anr. 1946 A.W.R. (H.C.) 403. It was held in this case that the distinction between an ordinary suit against trespasser in a civil court and a suit u/s 180 of the UPT Act, 1939, was that the Plaintiff in the first case alleged that the Defendant was setting up a title against proprietary interest, whereas in the second case the Plaintiff alleged that the Defendant was setting up a title to hold the land as a tenant; that the civil court had no jurisdiction where a claim to a tenancy had been set up before the institution of the suit and the revenue court had no jurisdiction where it had not been so set up; that Section 288, Explanation, applied to a plea of tenancy which was raised before the institution of the suit to the knowledge of the Plaintiff. In the present case Durga Prasad and Miri Mal did not plead that they were the tenants of the disputed plots but on the contrary they alleged that they had become their owners by virtue of the sale deed in their favour. In the circumstances the suit was properly filed against them in the civil court. Moreover, the suit being a suit for specific performance of the contract of sale and also for possession, it could be filed only in the civil court and not in the revenue court. In view of the fact that a suit for possession had already been filed in the civil court against Durga Prasad and Miri Mal within the statutory period of limitation, it could not be said that they had acquired any tenancy right in the plots due to lapse of time.

15. It has been contended on behalf of Durga Prasad and others that there was no satisfactory evidence on the record that on the date of the preliminary order Lala Deep Chand was in actual possession of the plots in dispute. As has already been pointed out above, if Lala Deep Chand had obtained actual possession over the disputed plots on 30-5-1950 then according to Sub-section (4) of Section 145 Code of Criminal Procedure he would be deemed to be in actual possession of the plot on the date of the preliminary order, i.e. 18-7-1950, even if he was subsequently dispossessed. It is, therefore, not very material to decide whether after 30-5-1950 Lala Deep Chand actually cultivated the plots over which he had obtained possession in execution of the decree, provided he was dispossessed of them within 2 months of the preliminary order. I have already held above that the possession which Lala Deep Chand obtained in execution of the decree of the civil court was actual possession. In the circumstances I am of opinion that the order of the learned Magistrate is not correct.

16. I, therefore, accept the reference and also the revision, set aside the order of the learned Magistrate and direct that possession over the disputed plots shall be delivered to Lala Deep Chand and the attachment shall be released in his favour. The opposite parties are forbidden to interfere with his possession till he is

evicted therefrom under any decree or order of a competent court.