

(1976) 01 BOM CK 0027
In the Bombay High Court

Laxman Bhikaji Pawar and Others

APPELLANT

Vs

Bahimkhan Balekhan Dalwai and Others

RESPONDENT

Date of Decision : 19-01-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1976) CriLJ 1492

Hon'ble Judges : Joshi, J

Bench : Single Bench

Judgement

Joshi, J.—The applicants before this Court are the original petitioners styled as party No. 1 (hereinafter referred to as "the Petitioners") by the Sub-Divisional Magistrate, Chiplun, in Miscellaneous Case No. 1 of 1975, a proceeding u/s 145, Cr. P.C. Respondents to this application are styled as Party No. 2 (hereinafter referred to as "the Respondents"). On the report of the Sub-Inspector of Police, Chiplun, proceedings u/s 145 of the Cr. P.C. were initiated and the learned Sub-Divisional Magistrate ultimately ordered that possession of the disputed lands should be handed over to the respondents and further directed that their possession should not be disturbed by Party No. 1 till they are evicted from the lands by a competent Court.

2. The facts giving rise to these proceedings, culminating in the impugned order, stated briefly, are as follows : The petitioners are 37 in number and members of Harijan community, whereas the respondents who are shown to be 35 in number, are members of Muslim community. The lands in dispute which admeasure about 100 acres in the aggregate, are situate in three villages Kaluste, Bhile and Govalkot in Taluka Chiplun of Ratnagiri District. Before the abolition of Khoti tenure somewhere in the year 1949, the respondents were Khots of these villages, whereas the petitioners claim to be tenants on these lands which were held by different respondents. On the abolition of Khoti tenure, for the first time in the year 1952-53, the record of rights were introduced in the said villages and the respondents came to be shown as occupants in respect of these lands. The

petitioners on the other hand alleged that since their forefathers they were tenants on these lands and even otherwise were cultivating these lands and were in exclusive possession of them till they were restrained from entering into the lands by the order in question. The dispute about possession, which is a turning point in these proceedings, has its roots in the long standing feud between the two parties, who appear to have raised cudgels against each other for some reason or the other. The details as to why the relations became strained between these two parties are set out in the memo of appeal and partly sustained by the evidence.

3. To narrate a few of them, in May 1974 Sakharam Pandu Sakpal, one of the petitioners, was alleged to have been assaulted and accused of theft. There were cross-complaints in respect of this occurrence and they are still pending. In December 1974, the paddy crop raised in some of these lands was reaped and heaped in suitable "udavyas" (stacks). On the point as to who should thrash them and take the produce, there were again differences for which a separate chapter case came to be instituted by the police against the respondents u/s 107 of the Cr. P.C. It appears during its pendency a compromise was arrived at and it was agreed that according to the prevailing customs the petitioners should take the produce and give to the respondents their "makta" or share in kind. Despite this agreement between the parties, there were certain other events which led to multiply the bickerings between the parties as a result of which the petitioners alleged that they were being constantly threatened that they would be forcibly dispossessed. These preludes which widened the differences between the members of these two communities which had lived harmoniously for years together, prompted these petitioners to make an application in the nature of a complaint to the police and revenue authorities of Chiplun as well as to the higher authorities about the apprehended harassment by the respondents to the petitioners at the time of transplanting operations which were in the offing in June 1975. Therefore, the petitioners made an application to the P.S.I. Chiplun that they intended to carry out these operations on 24th June 1975 in these lands which they had cultivated for a pretty long time and police protection should be given to them.

4. The Sub-Inspector of Police Mr. Hegishte, on making certain inquiries and referring, to the previous proceedings summarised in the foregoing paragraphs submitted a report to the Sub-Divisional Magistrate, Chiplun, alleging that the relations between these two parties were strained, that there was a likelihood of breach of peace and a possibility of graver offences being committed, was not ruled out and, therefore, proceedings u/s 145 of the Cr. P.C. be initiated. Along with this report he enclosed a list containing the names of members bearing allegiance to Party No. 1 or Party No. 2. This report is dated 23rd June 1975.

5. On getting this report the learned Sub-Divisional Magistrate was pleased to make a composite order on 24th June 1975. The first part refers to the making of the preliminary order u/s 145 (1) of the Cr. P.C. directing both the parties to

remain present at 11 A.M. on 27th June 1975 with their written statements and evidence as regards their possession. The latter part of the order deserves reproduction ad verbatim as its legality has been severely attacked. It runs thus:

In view of the facts that now being the season of transplantation operations of rice and as both parties are going in the field and therefore there being likelihood of riots and breach of peace I order, u/s 146 (1) of the Cr. P. Code that I have attached the lands in dispute and given them in possession of Circle Inspector Chiplun, and I am appointing the said Circle Inspector as the Receiver, I have given this order under the seal and my signature.

6. Pausing for a while, may it be mentioned here, to this order there was a challenge by the petitioners in Criminal Revision Application No. 262 of 1975, but my learned brother Naik, J. rejected it on a preliminary ground that u/s 397 Sub-section (2), Cr. P.C., 1973, the powers of revision cannot be exercised in relation to any interlocutory order passed in any appeal, enquiry, trial or other proceeding.

7. Now, the point raised by Mr. Kamble for the petitioners and supported by Mr. Kamat for the State, is that the procedure prescribed by Section 145 (1) of the Cr. P.C. was not adhered to. The order regarding attachment of property and appointment of a receiver was simultaneously made without applying the mind. The law contemplates that the executive Magistrate should state in his order to be made in writing the grounds on which he is satisfied that the dispute was likely to cause a breach of the peace. After being so satisfied he has to issue an order calling upon the parties to appear before him on a specified date and to put in written statements with respect to the fact of actual possession of the subject of dispute. It is only after such subjective satisfaction attachment of the property and appointment of a receiver could be made. To substantiate this initial attack which according to Mr. Kamble has vitiated the whole proceeding, my attention has been drawn to the record. Some of the parties were not at all served till 26th June 1975. It appears that the petitioners were served on the 24th night. Some of the respondents received the notice on the same day, but the rest on the 26th. No roznama from 24th to 26th is written by the Sub-Divisional Magistrate and the roznama begins from 27th June 1975. Service of notices on the parties apart, it is required to be served also by affixing a copy thereof in a conspicuous part of the property and in the chavdi or the village revenue officers' office. To appreciate these initial objections reference would be necessary to the relevant provisions contained in the two sections.

8. Section 145 (1) of the Code of Criminal Procedure, 1898, was somewhat differently worded and I am making a passing reference for the sake of comparison. Under Sub-section (1) under the old Code (meaning thereby the Code of 1898) the Sub-Divisional Magistrate, on being satisfied from a police report or other information that a dispute was likely to cause a breach of the peace, was required to issue notices to the parties concerned requiring them to put in their statements and documents, or to adduce evidence by way of

affidavits which they intended to rely upon in support of their claims. Sub-section (2) is not of much importance. Sub-section (3) further laid down the mode of service. The service was to be effected on the parties in the manner in which a summons under the Code is served and at least one copy was required to be published by affixing to some conspicuous place at or near the subject of dispute. Sub-section (4) envisaged an enquiry as to possession. The very opening words were.

The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject.

The expression "then" used at the opening indicated that after observance of the procedure prescribed for the service of notice he was supposed to proceed with the enquiry and that he was expected to make the order on perusing the evidence adduced by both the sides. To this sub-section there were three provisos and Proviso 3 reads thus:

Provided also that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

This proviso casts a duty upon the Magistrate to find out as a matter of fact whether the emergency really existed requiring him to take a stringent action attaching the property. Sub-section (5) dealt with the Magistrate's powers to cancel the order in given cases. Sub-section (6) was equally important inasmuch as the Magistrate was empowered to decide who was in possession and if he found a particular party in possession it was his duty to allow the possession to continue with the said party until legally evicted. The rest of the sub-sections are not very material.

9. Sub-section (1) of Section 146 of the old Act dealt with powers to attach the subject-matter in dispute. It contemplated two eventualities; firstly, if the Magistrate was of opinion that none of the parties was then in such possession, or was unable to decide as to which of them was then in such possession of the subject of dispute, he had the power to attach it. This attachment contemplated under Sub-section (1) of Section 146 is outside the scope of the emergency referred to under Sub-section (4) of Section 145. Sub-section (1A) spoke of a reference to the Civil Court when the Magistrate was unable to decide the issues contemplated by Sub-section (1) of Section 146. The remaining sub-sections of Section 146 of the old Act are not material, but Sub-section (2) is important for the present enquiry and it reads thus:

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the

Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure.

Now, a comparative reading of Sections 145 and 146 in the new Code (i.e. the Code of Criminal Procedure, 1973) would be advantageous at this stage. Section 145 (1) of the new Code practically reproduces the language of the old Code impelling the executive Magistrate to get himself satisfied from the report of the Police Officer that there was a dispute likely to cause a breach of the peace and he shall make an order in writing stating the grounds of his being so satisfied. After stating the grounds he has to call upon the parties by making an order for issuance of notices to appear before him and to file their written statements with respect to the fact of actual possession of the subject of dispute. Sub-section (2) is not of much importance. Sub-section (3) casts an imperative duty upon the executive Magistrate that the order shall be served in the manner provided by the Code for the service of a summons and at least one copy shall be published by affixing it to some conspicuous place at or near the subject to dispute. Sub-section (4) then calls upon the Magistrate to decide the question of possession, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute. Sub-section (5) needs no reference as it is not of much relevance. Sub-section (6) authorizes the Magistrate to make a declaration that a certain party was in possession and would continue in possession until evicted therefrom in due course of law. The order made under this sub-section was again to be served and published in the manner laid down in Sub-section (3). Under Sub-section (8) if the property in dispute was any crop or other produce which is subject to speedy and natural decay, the Magistrate is empowered to make an order for the proper custody or sale of such property. The remaining two sub-sections have little bearing on the point at issue.

10. A comparative reading of Section 145 of the old Act and the new Act would make it clear that proviso 3 to Sub-section (4) of Section 145 of the old Code which empowered the Magistrate in cases of emergency to attach the subject of dispute at any point of time but after the initial procedure was observed strictly, has been taken away.

11. Then comes the new Section 146. Sub-section (1) is of utmost significance and it runs thus:

If the Magistrate at any time after making the order under Sub-section (1) of Section 145 considers the case to be one of emergency, or if he decides that none of the parties was then in such possession as is referred to in Section 145, or if he is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach the subject of dispute until a competent Court has determined the rights of the parties thereto with regard to the person entitled to the possession thereof:

Provided that such Magistrate may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of breach of the peace with regard

to the subject of dispute.

Sub-section (2) which deals with the appointment of a receiver runs thus:

(2) When the Magistrate attaches the subject of dispute, he may, if no receiver in relation to such subject of dispute has been appointed by any Civil Court, make such arrangements as he considers proper for looking after the property or if he thinks fit, appoint a receiver thereof, who shall have, subject to the control of the Magistrate, all the powers of a receiver appointed under the CPC 1908;

Provided that in the event of a receiver being subsequently appointed in relation to the subject of dispute by any Civil Court, the Magistrate-

(a) shall order the receiver appointed by him to hand over the possession of the subject of dispute to the receiver appointed by the Civil Court and shall thereafter discharge the receiver appointed by him;

(b) may make such other incidental or consequential orders as may be just.

Thus, it will be clear that Sub-section (1) of Section 146 contemplates three eventualities. The first essential common to the three contingencies is the passing of an order under Sub-section (1) of Section 145. After such an order is made and served upon the parties in the manner prescribed, then it empowers the Magistrate to attach the property in three cases viz. (i) if it be one of emergency, (ii) if he is unable to decide who is in possession, or (iii) if he decides that none of the parties was in possession as is referred to in Sub-section (1) of Section 145. Then such an attachment comes after a legal and valid order is made u/s 145 and in what manner that order is to be made or passed has been already detailed in the foregoing paragraphs and in the very wording of Section 145 either of the new Code or the old Code, Sub-section (2) speaks of the appointment of a receiver, provided no receiver is appointed by the Civil Court in the meanwhile. If subsequently a receiver is appointed by the Civil Court, then the receiver appointed by the Magistrate has to hand over possession to the receiver appointed by the Civil Court. The appointment of a receiver is a sort of an interim arrangement to see that the property is not wasted or to save the loss likely to be caused to the legitimate claimants who would be entitled to possession in the long run, True it is that in either of these two sections the conditions which could be said to be precedent for the appointment of a receiver are not stated in so many words. But the context reveals that he is to be appointed in one of these eventualities envisaged by Sub-section (1) of Section 146 and secondly if the matter or enquiry is likely to engage the Magistrate or the Court for a pretty long period. On the change in the law to this extent, the initial question that falls to be answered is whether the procedure prescribed is followed and whether the order of attachment as well as of appointment of receiver could be sustained.

12. I have already made a reference at the outset that the report of the Sub-Inspector of Police is dated 23rd June 1975. It bears no endorsement of the Sub-

Divisional Magistrate as to when and where it was handed over to him, what steps he took to satisfy himself about the likelihood of breach of peace. As a matter of fact on Ex. 1 viz. the report of the Police Officer there is not a word exhibiting application of the mind of the Sub-Divisional Magistrate who has hastened to take the subsequent action. Now, what the learned Sub-Divisional Magistrate has done is to issue a consolidated notice embodying his order reproduced in one of the foregoing paragraphs. The original of the order compiled on page 62 of the paper book volume 2, is not to be found in the entire record. What we come across are the cyclostyled copies of the notices meant to be served on the parties. It was submitted by Mr. Barday that the original order might have been passed by the learned Sub-Divisional Magistrate, but either it has been misplaced or his report may be called for.

13. Presented as it is, the argument is attractive no doubt, but I find the entire record, with reference to the roznama, quite intact. As a matter of fact, the very roznama commences from 27th June 1975, the date given to the parties for their first appearance. Assuming as contended by Mr. Barday, the learned Sub-Divisional Magistrate did make an order on 24th June 1975, at least there should have been a passing reference to it in the roznama. The roznama would have ordinarily been in these words: "Received the report of the P.S.I. Perused the same and notices to issue to the parties and to be served in the manner prescribed," Had there been at least some such mention in the roznama, something could have been said in favour of Mr. Barday who made the above submission. But I am afraid, in the face of the roznama no useful purpose would be served by calling for the record of the Sub-Divisional Magistrate at this stage. On the other hand, we get some clue to the manner in which the learned Sub-Divisional Magistrate reacted to the report of the P.S.I.

14. In paragraph 1 of his judgment the learned Sub-Divisional Magistrate has observed that on reading the P.S.I.'s report dated 23rd June 1975 he was satisfied that there was need to take immediate action u/s 145 (1), Cr. P.C. The next important observation runs thus: "I was present when I received the report of the P.S.I., Chiplun. Persons belonging to Party No. 2 and some Buddha labourers were working in the field. The persons belonging to Party No. 1 also wanted to cultivate the land. I am sure that unless immediate steps were taken, serious fighting would break out amongst the persons belonging to both the parties. Therefore, I issue the order u/s 145 (1) of the Cr. P.C. on 24th June 1975 requiring the parties to attend my Court on 26th June 1975." May it be noted that the lands are situate in three different villages. The learned Sub-Divisional Magistrate does not make it clear in what village he was present, what lands he visited and what satisfaction he obtained in respect of the nature of disputes between the petitioners and the respondents. The lands are scattered. They are many in number. There is no separate report kept on the record by the learned Sub-Divisional Magistrate speaking to his visit. Assuming he had visited and kept a record, his notes would not be a substitute for the statutory satisfaction contemplated by Section 145 of the Cr. P.C. Such a finding as referred to by the

learned Sub-Divisional Magistrate in the opening of the judgment would be practically based upon his personal view of the matter and not founded on the legal evidence. Certainly the Magistrate is not expected to import his own knowledge of the fact in evidence. If he does so, he would be virtually stepping into the shoes of the witness which the law forbids him from doing so. Therefore, these observations which are as vague as they could be, do not carry the case of the respondents further, nor do these observations come to the rescue of the respondents. On the other hand, they connote that the learned Sub-Divisional Magistrate by importing some information which he personally received or which he says he collected by visiting the lands (there is no specific reference to this aspect) acted contrary to the provisions of law.

15. Even assuming that the learned Sub-Divisional Magistrate had received some first hand information during his visit to the village, the law requires him to set out the grounds which led him to take this action. In given circumstances he may be satisfied, but it was open to him to record the statements of such persons who gave him this information. In the Instant case, as I have pointed out earlier, it was well-nigh impossible for this learned Magistrate to visit all the lands in all these three villages. If he had visited some, he could have referred to them specifically. This action also is not contemplated by the law, and such a practice, if followed would stand deprecated.

16. Pausing for a while here and going back to the report submitted by the S. I. of Police, I may point out that nowhere the P.S.I. makes any prayer for immediate stringent action like attachment of property and/or appointment of a receiver. What the P.S.I. submits is that action u/s 145 be taken. That action is summarised in one of the foregoing paragraphs viz. on satisfaction by the learned Magistrate about the likelihood of breach of peace, issuance of notices, chance to the parties to appear before him with their evidence and service of one copy of notice on the conspicuous part of the property. On going through the record I find that on the originals of the receipts which are supposed to be served on members of either Party No. 1 or Party No. 2, there are no reports of the process server. What the process server has done is to obtain the thumb impressions of all 38 members from Party No. 1 on a couple of sheets of paper and to make an endorsement in his own hand-writing that they were served with notices on the 24th. So far as members of Party No. 2 are concerned, some were served on the 24th and some on 26th. About the service of notice on the conspicuous part of the property and at the chavdi the record is quite clear. Those notices are served on 26th June 1975. This is made all the more clear by the panchanamas appearing from P. 231 onwards of the original record. It means that the very record reveals that the provisions contained in Sub-section (3) regarding the publication of the copy by affixing it to some conspicuous place at or near the subject of dispute are not properly followed, and this was done much after the attachment and appointment of a receiver was made. Written statements were filed on 1st July 1975 and afterwards affidavits were also produced and later on, probably by some common understanding, evidence of

one or two witnesses on either side was led and these witnesses were cross-examined at great length, but all this procedure was adopted without following the statutory requirements at the initial stages. There is a reason why the Legislature has taken this precaution and it is, to my mind, that the party in actual possession should not be lightly dispossessed by the bare cry of one side or the other that he is in possession and if it is disturbed, it would lead to graver consequences. The Magistrate has to take some evidence into account before making such order.

17. Now, the very scheme of Sections 145 and 146 of the Cr. P.C., either old or new, is self-eloquent. The provisions contained in Section 145, Sub-clause (4) third proviso, relating to the attachment of the subject of dispute in cases of emergency, are included in Section 146 of the new Code and those steps are to be taken after making the order u/s 145 (1). A comparative reading of these two sections, either old or new, the new going a step ahead in taking out the proviso of emergency and adding it in Section 146, would make it clear that in the first instance the Magistrate is required to make an order in writing stating the grounds of his being so satisfied. The Legislature has put in the fore-front the satisfaction of the Magistrate as to the likelihood of the existence of a breach of peace. These provisions, to my mind, are mandatory. The omission to observe them vitiates the entire proceedings as they are the pre-requisites or sine qua non for instituting proceedings u/s 145 of the Cr. P.C.

18. The next stage is the service and publication of the preliminary order contemplated by Sub-sections (1) and (3). If there is no preliminary order, one fails to understand what is required to be served on the parties or at the property. Obviously, if there is no preliminary order within the contemplation of Sub-section (1) of Section 145, then the requirements of Sub-section (3) cannot be satisfied or complied with. Sub-section (3) as noted above, deals with the publication of the order made in writing stating the grounds. If in a given case no such order is made and served in accordance with the provisions of Sub-section (3) then I am afraid, the very proceedings would be without jurisdiction.

19. Coming to Sub-section (4) the Magistrate is required to decide the question not about the right to possession but about the fact of actual possession at the date of the preliminary order.

20. This brings me to the turning point in the entire case as to whether a composite order made by the learned Magistrate, without observance of the statutory requirements, could be sustained. As noted above, under the old Code, third proviso of Sub-section (4) the Magistrate is empowered to make an order of attachment, but even then it proceeded with the expression "then" which means after the compliance of the provisions contained in Sub-section (1) of Section 145 of the old Cr. P.C. Sub-section (1) of Section 146 of the new Code is quite explicit. It postulates the making of an order under Sub-section (1) of Section 145 in the first instance and thereafter giving directions such as attachment of property or appointment of a receiver. The stage to determine the factum of

possession can arise only after the parties have filed their written statements on due service of notice. No doubt, both under the old Code and the new Code the Magistrate is armed with a power to attach the property in cases of emergency; but to make out a case for emergency there must be some material before the learned Magistrate coming forth on the record from the statements of parties, documents produced by them or such other evidence as they may choose to adduce, and not upon the personal impressions carried by the learned Sub-Divisional Magistrate on lending his ears to those who are present at the village chavdi during the course of his visit. The powers conferred by Sub-section (1) of Section 146 cannot be so enlarged by the learned Magistrate as to do away with the statutory safeguards which are quite salutary.

21. However, my attention was drawn by Mr. Barday for the respondents to the ruling in Mahant Bhagwandas Vs. Suggan and Others, It was a case u/s 145 of the Cr. P.C. (old). The learned Single Judge who decided this case, observed:

In appropriate cases the Magistrate is competent to issue an order of attachment along with the preliminary order without it being first served on the parties.

This does not seem to be, with respects, a correct ratio, because in the case before the learned Magistrate there was some evidence which led to his subjective satisfaction. On the other hand, the observations in paragraph 6 of the report while dealing with the provisions of Sub-section (4) of Section 145 of the Old Act, lead to an impression that the Magistrate must also express how he considers a particular case before him to be one of emergency. The very observations read thus :

Considering the scheme of Section 145, Sub-section (4) with all Its provisos and the observations in the cases discussed above, I consider it proper to lay down that a Magistrate while passing an order of attachment, should clearly indicate how he considers a case of emergency and how he considers the emergency of such a nature that an ex parte attachment should be ordered without giving an opportunity to the other side whose interests are likely to be affected. Ordinarily, an order of attachment should be made after hearing the parties to be affected by the order of attachment and only in rare and exceptional circumstances the Magistrate should pass an order of attachment after clearly indicating how In the interest of maintenance of peace an ex parte attachment order is necessary and insistence on proper service of notice to the parties required to be dispensed with.

It is quite evident that the learned Judge was conscious of the statutory provisions and the stringency thereof. When he carves out an exception, it cannot be a rule of law, nor could it be spelt out from the very wordings of these two sections. Moreover, this was a case decided under the old Code and the learned Single Judge was dealing with the proviso to Sub-section (4) of Section 145 of the old Cr. P.C.

22. While deciding a similar Case the Madras High Court has taken the view in Laxminarayana Reddi v. Gnanaprakasa Reddi (1912) 13 Cri LJ 536 (Mad) that an

order by a Magistrate, appointing a Receiver under Clause (2) of Section 146 of the Criminal Procedure Code, before completing the inquiry u/s 145 of the Code, is ultra vires and without jurisdiction. The High Court had to deal with the appointment of a receiver under Clause (2) of Section 146 of the old Cr. P. C, and it has been made clear that such a step could be taken after the termination of the inquiry as to the possession conducted under Clause (4) of Section 145. In similar words, the judgment which is brief, lays down that not only the Magistrate should comply with the statutory provisions about his satisfaction; but he should be satisfied that the notices are properly served; thirdly, on enquiry he feels that the matter is one of emergency, or to use the language of the new Code, that he is unable to decide who is in possession, and fourthly that there are impelling reasons for the appointment of a receiver. Without there being such evidence, appointment of receiver cannot be sustained at all.

23. In the case of *Kulbans Narain Singh v. Ramsidh Singh* 21 Cr LJ 735 : AIR 1920 Pat 483, it has been pointed out that where a proceeding u/s 145 of the Criminal Procedure Code is initiated upon a police report, that report is inadmissible in evidence upon the factum of possession, which must be proved by other independent evidence. When the report made in writing by the P.S.I., which is generally made on local inquiries, is inadmissible and cannot be a substitute for substantive evidence, I find it extremely difficult to rely upon the impressions of the learned Magistrate who felt that if he were not to make such an order it would lead to serious fighting. When the written report of a competent police officer is excluded, very little weight could be attached to the observations of the learned Sub-Divisional Magistrate in such cases which are not at all founded on any written record.

24. The matters do not rest at the bare stage of attachment; immediately a receiver is appointed and orders are issued to the Circle Inspector in the first instance. As I peruse the record, that order is revised and the Additional Tahsildar is directed to work as a receiver. The appointment of a receiver should not be made so lightly because it practically uproots one side or the other who is found in possession. If the Magistrate had said in this particular case that he is unable to decide who is in possession or that the evidence discloses that the claims of both the sides are equal on the point of possession or the evidence is so balanced that it is desirable to make some interim arrangement to avoid further clashes, then something could be said in favour of the respondents. Without giving a clue as to the material on which the learned Magistrate was acting, the appointment of a receiver, to my mind, has prejudiced the party who is or would be in actual possession, it is no good ground to say that respondents are also deprived of their possession. If they were really in possession and felt so offended, I do not think they would have kept quiet on the order of appointment of a receiver, but would have rushed to the court on the very next day for cancellation of the order. Such a step was taken by the petitioners. But as observed a little earlier, my learned brother refused to interfere as it was an interlocutory order. I need not dilate upon the validity of that order or the

prejudice that is likely to be caused or whether the High Court can exercise its inherent powers in such cases. As the order of my brother Naik, J. stands, Mr. Kamble appearing for the petitioners was presented with no choice but to go to the end of the case and again rush to the High Court. When he is making a grievance of the appointment of receiver, he is feeling highly offended, because according to him he is in possession and his possession is being lost. When he makes such a submission there is some material to support his cause.

25. P.S.I, Hegishte was examined in this case and he made a statement in examination-in-chief to the following effects:

On 2-1-75 I and Taluka Ex. Magistrate went to Kaluste and effected & compromise between the two parties. It was decided as per compromise that as per their agreement the Buddhists should take their share of produce and the remaining share should be given to the landlords.

No doubt it was elicited in the cross-examination that these terms were not reduced to writing but entries were made by him in his diary and report submitted to the superiors. A suggestion was made to this officer that the Muslims (respondents) did not give their consent to this compromise. But the next statement is equally significant. It is to the effect that thereafter "there was no complaint received from any of the parties about Malanis and therefore I did not go to the village and make inquiries thereafter."

26. Mr. Kamble appearing for the petitioners is relying upon the statement made in examination-in-chief which refers to the giving of shares as per agreement of produce to which both the sides agreed. My attention was drawn to the definition of the term "tenant" contained in Section 4 of the Bombay Tenancy and Agricultural Lands Act, 1948. Section 4 deals with persons who are deemed tenants and in particular Sub-clause (b) says that a person shall be deemed to be a tenant if he is not & servant on wages payable in cash or kind but not in crop share. In simpler words, if a person cultivates the land lawfully and the agreement is to give or take crop share, then he would be deemed to be a tenant. Mr. Kamble wants me to read in this statement that as the Buddhists (petitioners) were tenants, the compromise was arrived at in which they were allowed to take their share of the produce. If they were labourers simpliciter as now contended they would not be given the remaining portion of the share in the produce. One can understand the wages being paid in kind. For example, a personal cultivator or the landlord can tell the labourer that instead of paying him in rupees he would give him one or two kgs. of the corn. Such an agreement would put him in the category of a labourer. But if the agreement is to take a particular share in the produce and give the rest to the landlord, then certainly it would not be an agreement of employing a person on wages. There seems to be considerable substance in this line of argument advanced for the petitioners.

27. Now I may advert to the admissions on which great emphasis is laid by Mr. Barday for the respondents that this compromise is not reduced to writing, that

the diary in which it contains is not brought before the Court, that the compromise was in respect of Malanis of that particular year viz., 1974-75 etc. In support of such a line of argument my attention was drawn to the statement of one of the witnesses examined for the respondents. But there are two circumstances against the respondents. The first is the suggestion in the cross-examination. It is to the effect that the Muslims did not give consent to the compromise, the suggestion being that there was no compromise brought about as spoken to by Mr. Hegishte, the P.S.I. who with the help of the Taluka Executive Magistrate brought about this compromise and who has also made a report under consideration in June 1975. Secondly, there is another singular statement to the effect that thereafter there were no disputes. If the compromise were not a fact, then the suggestion which is made should hold the ground viz. that there was no compromise. If there was no compromise, little argument is needed to come to the conclusion that the parties would keep quiet. They were fighting tooth and nail over the share in the produce. One side or the other would have made a grievance to the Magistrate forthwith and the present proceedings would have probably found a place in the file of the learned Sub-Divisional Magistrate in January 1975. Therefore, I find little substance in the argument advanced with reference to the statements in the cross-examination or the statements made by one of the respondents.

28. I was taken through the oral evidence adduced by both the sides at great length. My attention was also drawn to the entries in the record of rights for the years 1970-71 onwards produced by each of the opponents or their constituted attorney. It was submitted for the respondents that their names have been shown not only as occupants but also in the tenant's column and the "reef shown against their names is No. 1. These entries connote that the occupants themselves were cultivating the lands personally. By personal cultivation it may mean actually engaging oneself in agricultural operations or getting the operations carried out by engaging servants or borrowing implements of agriculture and heads of cattle or in some other manner, but certainly not by leasing out the lands. Reliance was also placed on the assessment receipts evidencing the payment of land revenue and the Khata extracts. Mr. Kamble for the petitioners rejoined that the relevant record of the prior years is not brought before the Court. Those were all khoti tenures which were abolished in 1949. Record of rights were introduced somewhere in the year 1953 and the old cultivators like the petitioners continued on the lands as tenants. The respondents have come forth with a plea that in 1956 they surrendered their tenancy rights. If surrender of tenancy rights is effected in 1956, then that piece of evidence ought to have been brought before the Court. Under the amended Bombay Tenancy Act, 1956, a surrender cannot be valid unless it is evidenced by a writing and accepted by the Mamlatdar appointed under the Act on whom a heavy burden is cast to satisfy himself whether the surrender is voluntarily made or is an outcome of undue influence, fraud, coercion or exploitation of ignorance and illiteracy. The Legislature in its wisdom has put this wholesome check on the

so-called voluntary surrender which was made orally prior to 1956. The year 1956 in which the surrender is made is a mile-stone in the amendments of the Tenancy Acts on this point. The respondents were under an obligation to produce the orders of the Tahsildar evidencing surrender; otherwise, the presumption of continuity of possession would run in favour of the petitioners. Secondly, it was submitted that the extracts for the period from 1956 to 1960 are not brought before the Court. The third argument was that the petitioners are illiterate agriculturist who would hardly pay any heed as to how the revenue record is maintained unless some burden is cast upon them to pay the land revenue or to see that their names are entered. They have continued on the land under the old tenures and have cultivated the same by giving definite crop shares to the landlords, viz., the respondents. They do not even for a moment dispute the respondents being the owners of the lands at one point of time or the other. But argued Mr. Kamble further that their tenancy rights are not affected and for a suitable order u/s 70 of the Bombay Tenancy Act they have preferred applications to the Mamlatdar. The next argument advanced was that these entries have no presumptive value which speak to Reet No. 1. After all they are statements of facts and they ought to have been proved by citing the village officers who effected those entries. No such evidence is adduced. Payment of land revenue is incidental to the holding of the lands, and much would depend upon the agreement on which the parties cultivated the lands. Therefore, this is not a positive piece of evidence clinching the issue. While commenting in general on the oral evidence, it was argued at great length by Mr, Kamble that most of the respondents are outside India; four are at Bombay; five of the remaining have never cultivated the lands; three of them are disabled and practically 28 to 30 out of the 38 respondents, in the nature of things, could not cultivate the lands. Moreover, they have no implements of agriculture, nor the cattle heads nor the man power. Therefore the petitioners' oral evidence is worthy of credence taken in general.

28. Mr. Barday replied to this line of argument that one need not cultivate the lands personally by remaining at the village. Absentee landlords can cultivate the lands by entrusting the operations to their relatives or constituted attorney Those present at the village can look after their lands and get the lands cultivated by engaging labourers or others. There is no doubt considerable force in this line of argument, but if labour was hired it was not difficult for the respondents landlords to produce the relevant receipts speaking to the payment of charges for a particular operation of agriculture. The operations are "spread over throughout the year and I am told that two crops are raised. It means that there would be number of operations throughout the season and quite different in their nature. For all these operations, or for some of them labourers like the petitioners are engaged, then payments would be made to them at different points of time during the year. Certainly, the landlords, some of whom are outside India and some who are at Bombay who are more literate and sophisticated, would not have failed to take the receipts. Absence of receipts or

written record on this point is a factor which speaks against the respondents.

30. On giving my anxious consideration to all these pros and cons, I do not think it is necessary for me to pronounce on the merits because oral evidence, in the nature of things, in the proceedings is bound to support one side or the other. But when we take into account the totality of circumstances, a possibility of the petitioners being in possession of the lands on the crucial dates cannot be ruled out altogether. The enquiry u/s 145 contemplates factum of possession and not determination of rights. Therefore, I stop here with an addition that the learned Magistrate did not apply his mind from this point of view.

31. My attention was also drawn to two more circumstances which according to Mr. Barday fortify their claim for possession. It appears that the Government has given certain facilities to the landlords to improve the khar lands. Some of the lands in dispute are khar lands. Loans are advanced by the Government and they are taken by the respondents for Improving the lands. The second factor relied upon was the fixing of pumps for irrigating some of these lands. But these two factors cannot, to my mind, outweigh the evidence on the point of actual possession. When admittedly the respondents are the owners of the lands, they were bound to take advantage of these new schemes introduced by the Government. Probably the petitioners felt content with their shares of crops or it is equally probable that they had not the capacity to contribute to the improvement of khar lands or to fix up the pumps for irrigation purposes. Whatever may be the reasons, these two circumstances would at the most show that the respondents have attempted to improve the lands, but that is besides the crucial point required to be determined in these proceedings.

32. While winding up his arguments a point was made by Mr. Barday that if needs be I should order a retrial and till then status quo be maintained and the learned Sub-Divisional Magistrate be given specific directions to dispose of the case within the defined time limit and to record his finding as to whether really an emergency existed, whether attachment was justified and receiver's appointment was a must under the circumstances. When the learned Sub-Divisional Magistrate has ever looked the statutory provisions which has vitiated the entire proceedings and, to my mind, has acted without jurisdiction, I do not think this is a fit case for ordering a retrial. The equities will lie where they were and I do not de-fire to remand the matter on some such grounds as put forth by Mr. Barday at this belated stage.

33. In the result application is allowed, Rule is made absolute.