

(1997) 09 CAL CK 0021

In the Calcutta High Court

Case No : Appeal No. 182 and 183 of 1996 and Appeal no 183 of 1996

Mahadev Alias Madhav Chandra Ghosh

APPELLANT

Vs

The Officer-in-Charge Armherst P.S.

RESPONDENT

Date of Decision : 11-09-1997

Acts Referred:

Constitution of India, 1950 — Article 226

West Bengal Premises Tenancy Act, 1956 — Section 17(2)(a), 17(2)(b)

Citation : (1999) 1 ILR (Cal) 397

Hon'ble Judges : Ruma Pal, J;Devendra Kumar Jain, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ruma Pal, J.—This judgment disposes of two appeals. The first appeal has been filed against an ex parte order dated November 25, 1994 dismissing a writ application filed by the appellants with certain observations. The second appeal has been preferred from an order dated June 14, 1995 dismissing for default, the application for recalling the order dated November 25, 1994.

2. A decision in the first appeal would render the second appeal infructuous. Although a number of points have arisen for decision, the basic question involved in the first appeal is whether the police authorities have the power to dispossess a person without any order of Court.

3. The dispute relates to premises consisting of two shop rooms, one on the ground floor of premises No. 72/3, Patuatolla Lane, Calcutta (referred to as the first room) and the other in a "tin shed varanda" on the ground floor of Premises No. 71/1/A, Patuatolla Lane, Calcutta (referred to as the second room). The tenant in respect of both the rooms was one Madhav Chandra Ghose, the appellant No. 1. Naba Kumar, the Appellant No. 2, is his son.

4. The case in the writ petition was that Madhab had for a long time carried on business of selling sweetmeats at the said rooms under the name of M/s.

Satyanarayan Mistanna Bhandar. In 1990 Madhav entered into a deed of partnership with Naba Kumar, his son and one Mukunda Ghosh, the Respondent No. 3. According to the Appellants this partnership was dissolved on March 27, 1991. Despite such dissolution Mukunda refused to vacate the premises. Madhab and Nabakumar filed a suit in this Court against Mukunda being Suit No. 734 of 1991. On an application for interim relief an order was passed on October 10, 1991 restraining Mukunda from selling, transferring or in any way encumbering the sweetmeat shop. Mr. S. Deb, an Advocate, was appointed as Receiver for making an inventory of the goods and assets in the premises. The interim application was disposed of on December 9, 1991 by the following order:

This application was moved by Mr. Ajoy Mitter and this Court appointed Mr. Sunrit Deb as the Receiver to make an inventory in respect of the properties of the partner which stood dismissed by an agreement by and between the parties nobody appears on behalf of the Respondents to oppose this application.

Under these circumstances, this Court confirms the appointment of Mr. Sunrit Deb as the Receiver. There will be an order of injunction in terms of prayer (b). Receiver will take formal possession but will not disturb the possession of the parties.

Receiver and all parties to act on a signed copy of the minutes of this order on usual undertaking.

5. Prayer (b) referred to in the order dated December 9, 1991 was in the following terms:

(b) Injunction restraining the Respondent/Defendant and his servant and/or agent, representative and/or assigns from taking with possession and/or transferring, letting out the said shop room in any manner whatsoever to any person except Plaintiff No. 1 (Madhab Chandra Ghosh).

6. The order directed the Receiver to take formal possession of the shop room but he was not to disturb the possession of the parties. This interim order is still operative as the suit is still pending.

7. In 1992 the landlord of the premises No. 72/3, Putuatolla Lane (hereafter referred to as the Tandons) filed an Ejectment Suit against Madhab in the City Civil Court at Calcutta in respect of the first room. The grounds for eviction were non payment of rent and subletting of the first room to Mukunda. The suit was contested by Madhab by filing a written statement in which it was stated that Mukunda had been taken in as a partner in Madhab's business of M/s Satyanarayan Mistanna Bhandar in 1990, that the partnership had been dissolved in 1991 but that Mukunda was illegally continuing to carry on business in the shop room to the exclusion of Madhab and Nabakumar. The fact of the filing of the suit in the Calcutta High Court was mentioned as also the making of an application under Sections 17(2)(a) and (b) of the West Bengal Premises Tenancy Act for deposit of rent in the City Civil Court suit. The written statement

was filed in June, 1993.

8. According to Madhab and Nabakumar after this the dispute between Mukunda, Madhab and Nabakumar was resolved and a fresh deed of partnership was executed between them which inter alia affirmed the tenancy of Mukunda and provided for a further contribution of capital by Nabakumar and sharing in the profit by all three.

9. At this stage, it is said by Asis Mukherjee, (a practising advocate and the Respondent No. 2 in these appeals) the Tandons sold the first shop room to him by registered deeds of conveyance dated June 25, 1993. The deeds were not produced before this Court.

10. On July 17, 1993 Asis made the following complaint to the Officer-in-Charge of the local police station:

I, Sri Asis Kumar Mukherjee bonafide owner of a room which is situated at 72/3, Potuatola Lane, P.S. Amherst Street, Calcutta 700 009.

One Mukundo Mohan Ghosh S/o. Lt. Prasad Chandra Ghosh of Belapole Junction, P.O. Belapole, P.S. Buxroh, Dist. Howrah and another Naba Kumar Ghosh S/o. Mahadeb Chandra Ghosh, v. III. + P.O. + P.S. Amta, Dist. Howrah, forcibly (sic) occupied my above said room after breaking opened (sic) the Pad - Lock on yesterday (16.7.93 at about 11.00 hours on this day 17.7.93 I found that the said two persons are inside the room.

Therefore, I am confirm (sic) that the said two persons committed criminal oust (sic) trespassers after breaking the Pad - Lock which was kept by me since October 1991.

11. The complaint was recorded as an F.I.R. against Mukundo and Nabakumar on the same date. The offence alleged to have been committed by them was under Sections 448 and 114 of the Indian Penal Code which deal with house trespass and abetment respectively.

12. A letter was also written by one of the Tandons to the local police station on July 17, 1993. The letter which is addressed to the Officer-in-Charge, Amherst Street, P.S. Calcutta reads:

Sir,

Re.: 72/3, Patuatola Lane.

I.P.L. Tandon residing at 60A, Chowringhee Road, S.P. Bhowanipur, son of Late Brij Kishor Tandon sold my above property in the month of June, 1993 to Mr. Asish Kumar Mukherjee residing at 3/42, Viveknagar Jadavpur, Calcutta 75 and now said Mr. Asish Kumar Mukherjee is the legitimate owner of the said property. No other person has any claim in the said property. The property is measuring 2 ch. 6 sq. ft., one storied shop with three shutters on three sides and wall on the fourth side.

This is for your kind information.

Yours faithfully,

Sd/- P.L. Tandon (Pyaray Lal Tandon) 60A, Chowringhee Road, Calcutta 700020.

13. On the same date an entry was made as a Special Diary by the Inspector of Section F in Case No. 212 of the 7/1793 under, Section 448/114 Indian Penal Code in the following terms:

Complainant:

Asis Kumar Mukherjee 3/42, Viveknagar, Jadavpur, Calcutta 700075.

At the M(marginally) noted date and time the above said complainant along with one Pyaraylal tandon S/o. Briz Kishor Tandon came to this P.S. and submitted an application addressed to Officer in Charge, Amhesrst Street Police Station regarding criminal house trespassed (sic) after breaking open the pad locks.

The said P.L. Tandon disclosed his identity as landlord of the said premises and represented that the rom in question at 72/3, Patuatola Lane was sold to Sri Asis Kumar Mukherjee. Sri Asis Kumar Mukherjee is sole owner of said room. In this regard said P.L. Tandon submitted a written letter addressed to O.C. Section F to take necessary action.

Accordingly under order of the O.C. Section F recorded above noted case against (1) Mukunda Mohan Ghosh son of Late Prasad Chandra Ghosh, Belepoli, Juneter P.O. Belapole Jn., Howrah and Naba Kumar Ghosh S/o. Madhab Chandraa Ghosh VIII. + P.O. + P.S. Amta, Howrah u/s 448/114 IPC for criminal house trespassed after breaking open the padlocks of a room which situated at 72/3, Patuatola Lane, Calcutta 9.

Took on investigation into this case under of the officer in chaarge, Amherst Street P.S.

Left for investigation in to this case being accompanied by the complainant of the case and landlord P.L. Tondon for the spot i.e, 72/3, Patuatola Lane, Calcutta 9.

Arrived at the spot.

On our asrival at the spot and being identified us the premises. Found the room in question is under lock and keys.

It was found that the room in question is measuring about 2 chittakcs 6 sft. ground floor. One Stores, shop with three shutter gate on Street side and one side in Western back side is brick wall Contacted with the following person at the spot Dilip Kr. Ghosh. S/o Ashutosh Ghosh of 70A, Surya Sen Street, Samar Kumar Ghosh S/o. Ashutosh Ghosh of 72/3, Surya Sen Street and Ors.

It was learnt from them that the room in question is a disputed property of three

brothers namely (1) Hriday Narayan Tandon (2) Payrayllal Tandon and (3) Rup Narayan Tandon. All of the them staying somewhere at Chowringhee Road.

The room in question was a sweet shop styled as Satya Narayan Mistanna Bhandar and the shop was closed for some time and thereafter one Asis Mukherjee reportedly purchased the said shop room the sweet shop owner.

Some local public came forward and reported that:

the room is long standing disputed but they failed to (illegible) except name and address of men who are involved in this regards.

At the spot enquired locally (illegible) searched for the said accused persons but not found.

Reported to P.S. and discussed with officer in charge of the investigation of the case is in progress.

14. Admittedly no action was taken by the police thereafter till August 8, 1993, almost a month later. According to the police report produced before this Court by the Police authorities, on August 8, 1993:

Arrived at the spot with complainant and landlords namely, P.L. Tandon and visited the room which is in question the room in question was found under lock and keys over the three Side Shutter gates.

Examined the local public at there and record the statement which transpired that there is a long standing dispute regarding the actual ownership. Several meeting was held among the locale public and owner of said room but no decision was till date.

They further reported that one Asis Mukherjee claimed himself as sole-owner by virtue of sale deeds which executed by one P.L. Tandon and others.

No arrest was made as the room in question is under lock and keys.

At the spot asked the said complainant to produce sale/purchase deed in support of his claimed(sic).

Returned to P.S.

Investigation of the case is on progress.

15. The police records also show that on August 12, 1993 Asis Mukherjee went to the local Police Station and produced copies of conveyances and receipts of registration as evidence of his case. A seizure liltis (on production) was prepared and signed by Asis Mukherjee. On the same date a report was prepared by the Sub-Inspector of the local police station addressed to the Addl. Chief Metropolitan Magistrate for permission to further investigate the case. The report was forwarded from the local police station on August 13, 1993 and the ACMM permitted further investigation on August 13, 1993.

16. However, prior to the grant of permission on August 12, 1993 the Sub-Inspector of Police at the local Police Station took action in the matter in a manner which has been stated by him in a second report also forwarded to the ACMM the next day. This report reads:

In the Court of Ld. ACMM, Calcutta Ref.: See FC/No. 212/93 date 17.7.93 Under Section 448/114 IPC

Sir,

Beg to report before your honour Court that on 17.7.93 on the basis of letter of complaint of Asis Kumar Mukherjee of B/42 Vivek Nagar, Jadavpur, Cal. 75 against the accused persons namely, Mukunda Mohan Ghosh, Naba Kumar Ghosh for forcibly occupied (sic) the room in question breaking the pad locks on 16.7.93 at 11 Hrs.

On 12.8.93 for the purpose of investigation into this case under signed being the I.O. of the case had gone to 72/2 Potuatola Lane and found the room in question is abandoned and no man and none is present at there. Searched for the occupants and the FIR named accused but not found. Asked the local public at there but they failed to throw any light the statements that the occupants left place seeing police party.

In the meantime local public gathered there and created a tension and even deter the police party to discharged their duty for which a case u/s 341/323/114 was recorded and investigation of the case is on progress.

Having no alternative way for safety and security of said room and to maintain law and order problem and avoid untoward incident the room in question was locked and sealed in presence of local witnesses after maintaining all formalities.

Six pairs of the keys were kept in P.S. Malkhana vide M.K. No. 1092/93 for further proceeding. Another prayer into this regard for retention the said keys is being submitted.

17. The entry in the crime register maintained by the local police station shows that the police had gone to the room on August 12, 1993, in between 12:45 Hrs. and 13:45 Hrs.

18. What galvanized the Sub-Inspector into such precipitate action even before the ACMM passed any order? The records produced may provide the answer in the form of a letter dated August 12, 1993 from Asis Mukherjee to the local police station which reads:

I, Sri Ashish Kumar Mukherjee son of Late Chittaranjan Mukherjee residing at 3/42. Viveknagar, Jadavpur, Calcutta 700 075 is (sic) the sole and absolute owner of a room which is situated at 72/3, Patuatola Lane, P.S. Amherst Stret, Calcutta 9 on this day (12.8.93) at about 13-00 hrs. while I was visiting my room which is in question and subject matter of Amherst St. Police Station, being Case No. 212, dated 17.7.93 then Sri Dwijendra Nath Bhadra, allies Khokon

Bhadra and 3(three) others assembled at there and threatened to me why police arrived at the spot, under the leadership of Khokon Bhadra they urged other public and told that I shall be victimized by them in future. Even your life will be danger in future to maintain the property there. They used also filthy languages (sic) and also addressed to Lakhi Kanta Dey, M.L.A. which not able to save me in future (sic).

While the Police Officer also investigating the case they also create disturbances at there which tantamounts to obstruction to the Police Servant to discharge his duty.

At the time of departure they also Gherawed Police Officer as well as police Vehicle, not to interfere into the subject matter of myself (sic).

Therefore, necessary action may kindly be taken against them for peaceful occupation at there (sic).

N.B. I also informed to Lakshmi Kanta Dey M.L.A and Chief Government whip and also Prabir Kumar Mitra, Secretary C.P.I.(M) District committee regarding the said room. After long discussion Lakshmi Kanta Dey and Prabir Kumar Mitra informed me that no party cader (sic) will interfere regarding my shoproom. Then Lakshmi Kanta Dey informed to the O.G. Amherst Street Police Station to take necessary action according to law. If anybody put (sic) any action, so necessary action will(sic) taken against them.

19. Even a cursory study of this material reveals that police were being prevailed upon to act in the matter through political pressure.

20. Immediately after this on August 16, 1993 Madhab and Nabakumar filed the writ application being Matter No. 1746 of 1993, in which the Officer in Charge of the Local Police Station has been named as the Respondent No. 1, challenging the action of the police authorities and asking for restoration of possession of the shop room. In the grounds it was alleged that the Petitioners had been evicted at the instance of Asis Kumar Mukherjee and Mukunda Ghosh in collusion with the local police.

21. On August 18, 1993 an ex parte order was passed to the following effect:

There will be an interim order appointing Mr. Sunhrit Deb, a member of the Bar, as Special officer to take possession of the shop rooms at premises No. 71/1A, Patuatolla Lane and 73/3, Patuatolla Lane, Calcutta forthwith.

The Respondent No. 1 is directed to remove the locks and handover possession of the shop rooms as noted above to the Special Officer appointed herein forthwith.

The Petitioners will be allowed to carry on business under the supervision of the Special Officer for the time being.

The Special Officers will make inventory of all the assets lying at the said shop

room. The Special Officer will be entitled to a remuneration of 100 gms. at the first instance to be paid by the Petitioners.

Let this matter appear in the list on 20.8.93 as Motion New. This interim order will continue till 26.8.93.

The Petitioners are directed to serve the Respondents along with this order and file an affidavit of service to that effect.

Liberty is given to the Petitioners to apply for extension of the interim order or further interim order on the returnable date.

Leave is also granted to the Respondents to apply for vacating and/or variation of this interim order upon notice to the Petitioners.

The Special Officer, and all parties concerned are to act on a signed copy of the minutes of this order on usual undertaking.

22. On the following date a further order was passed by the Court in the presence of the Advocate for Asis Mukherjee. This order reads as follows:

Mr. J.K. Gupta, the Learned Advocate appearing for the Respondent No. 2 submits that the order passed on 19th August, 1993 *ex parte* should be recalled.

It is an admitted position that the Respondent No. 2 was never in possession of the said shop room and the said order passed on 18th August, 1993, will not cause any prejudice to him, since he was not in possession.

The challans showing deposit of rents have been produced on behalf of the writ Petitioner, showing that they are the tenants of the shop room in question.

Under such circumstances the officer in charge of the concerned police station is directed to handover possession of the premises in question to the Special Officer already appointed forthwith and the Special Officer is directed to take appropriate steps in terms of the order dated 18th August, 1993.

23. When the Special officer went to implement this order on August 20, 1993 along with police personnel of Amherst P.S. keys to the padlocks put on the premises could not be produced by the police and the Special Officer armed with an order of Court with the aid of the police broke open the padlocks at the premises and took physical possession of the shop room and made over the same to Madhab. This is recorded in the minutes of the Special Officer dated August 20.1993. The minutes also records that Madhab would continue business in the said premises under the supervision of the Special Officer.

24. An appeal was preferred from the orders dated August 18 and 19, 1993. On August 30, 1993 an order was passed directing the parties to maintain status quo as on that date in respect of the possession. In other words Madhab remained in physical possession under the Special Officer. The appeal Court disposed of the stay application by confirming the order of status quo. Directions were given for filing of paper book by Asis Mukherjee.

25. In the meanwhile, in the Criminal Case started on the complaint of Asis Mukherjee, February 2, 1994 the Chief Public Prosecutor gave his opinion to the Police Station in writing that the matter was a civil dispute and the investigation may be stopped, February 22, 1994 there is an endorsement in the diary to the effect that the case may be declared civil. This was not drawn to the attention of the Appeal Court by the police officers who were parties to the appeal but appears from the records.

26. While the appeal was pending there was another development. On July 11, 1996 at the instance of Asis Mukherjee he was added as a Plaintiff in the City Civil Court suit being Ejectment Suit No. 432 of 1992 and the names of the Tandons were deleted. It does not appear from the records that these amendments were carried out upon notice to Madhab nor was this fact drawn to the notice of the Appeal Court.

27. On July 12, 1994 the appeal filed by Asis Mukherjee in the High Court was disposed of by requesting the Trial Court to dispose of the writ application expeditiously. On August 5, 1994 an application was made by Asis Mukherjee for review of the order dated July 12, 1994. This was disposed of by expediting hearing of the writ application by the Trial Court.

28. In his affidavit in opposition to the writ application affirmed on August 18, 1994 Asis Mukherjee did not mention that his name had been substituted as Plaintiff in the ejectment suit. He merely says that the orders dated August 18 and 19, 1993 had rendered the City Civil Court suit infructuous. He has therefore pleaded in the affidavit in opposition that status quo which prevailed before August 18, 1993 should be restored with respect to the shop room in question. He stated that on January 10, 1991 Mukunda had handed over possession of the premises to him and that on August 11, 1993 the writ Petitioners being accompanied by anti socials, armed with deadly weapons attacked the Petitioner at the said premises and tried to take forcible possession of the said shop room.

29. There is an evident contradiction relating to the date on which Asis Mukherjee claims to have been dispossessed. The records clearly show that his complaint to the police was that he had been dispossessed on July 16, 1993.

30. On November 25, 1994 the matter was listed before Sree Rang Misra J. It appears from the order that the application was called on twice. The Advocate for Asis Mukherjee however was present. The order which was passed on that day disposing of the application which reads as follows:

Second call-Persued the petition. Essentially it is a dispute in respect of a property between the Petitioner and private Respondents for which remedy is the regular Court. The Petitioner has already filed a suit which is pending. As such no interference is called for in the writ jurisdiction it is open for the Petitioner to approach the civil Court for the redress of his grievance in the said suit.

In view of this petition fails and dismissed in the light of observation made

above. The stay order is discharged. The Receiver who was appointed by this Court who had taken possession of the property in dispute will hand over the said property to the person from whom he had received. The Receiver will afford opportunity to the Petitioner and the private Respondents as well as thereafter he will issue necessary direction in this regard.

31. Although the Advocate for Mahadeb and Naba-kumar was not present when the writ application was called on twice, he was present at the meeting held at 5 p.m. on the very same date by the Special officer. At that meeting the Receiver requested Asis Mukherjee to seek direction for police help which might be necessary for handing over possession. However, it is recorded that Madhab and Nabakumar's the then Advocate stated that they may prefer an appeal from the said order dated November 25, 1994 but at that moment he had no instruction in the matter. In terms of this order dated November 25, 1994 the Receiver who had taken possession of the property from the police, should have handed over possession to the police. But, presumably, Asis Mukherjee had mentioned the matter earlier for police help. This is evident from the order dated December 21, 1994 what is not evident is whether notice of this had been given to the Appellants.

32. The matter was again mentioned on December 21, 1994 by the Special Officer in the presence of only the Advocate of Asis Mukherjee police help. It does not appear from the records that notice of mentioning was given to Madhab or Nabakumar or their Advocate by the Special Officer.

33. On December 21, 1994 the Hon''ble Justice Sree Rang Misra passed the following order:

In a pending proceeding before this Court a Receiver was appointed who has taken possession of the property in dispute. The petition was disposed on 25.11.94 with the direction to the Receiver to handover the said property to the'' person from who he has received. A mention has been made in this regard earlier that to deliver peaceful possession, police help may be provided to the Receiver. An observation was made by this Court that let the Receiver take steps for delivery of possession and if there is any disturbance in the same, it will be open for the Receiver to bring to the notice of this Court. Today Receiver has approached before the Court and he has pointed out that in the process of delivery of possession, obstruction was made by the son of the Petitioner and he had lodged a first information report in this regard. As such he needs police protection regarding delivery of possession of the property in dispute. In view of this, let the Officer in Charge of the concerned police station provide necessary assistance of the property in dispute as and when approached by the Receiver in this regard.

34. Apparently neither Asis Mukherjee nor the Special officer draw the attention of the Court to the fact that the Special Officer had taken possession of the two rooms from the police on August 18, 1993. Had that been done there would be

no question of the Court directing police help being given to the Special Officer.

35. On December 23, 1994 the Special Officer of the local Police Station at 4.45 p.m. arrived at the premises to deliver possession of Sastyanarayan Misttana Bhandar to the Respondent No. 2. The shutters were put down and padlocked by the police officer. The key was handed over to Asis Mukherjee, Respondent No. 2 and thus possession was handed over by the Special Officer.

36. The High Court was closed for the winter vacation thereafter.

37. The ejectment suit was heard and decreed ex parte on January 17, 1995 only Asis Mukherjee was examined. The decree reads as under:

Perused the evidence of P.W. 1 and the documents on record. The registered sale deed proved the title of the Plaintiff in respects of the suit premises. The Exits 2, 3, 4 and 5 prove the service of notice. P.W. 1 has stated in his evidence that the Defendant was defaulter and sublet the premises without consent of the landlord, the case is, therefore, proved. The Plaintiff is entitled to get the decree as prayed for.

38. According to the Appellants they were not aware of the listing of the suit or of the decree. An application has been made, for setting aside the decree which at the hearing of this appeal, was still pending.

39. During the pendency of these appeals as disclosed by Asis Mukherjee in his affidavit-in-opposition filed in the stay application, a writ for delivery of possession was issued on September 8, 1995 in Ejectment Execution Case No. 27 of 1995 at the instance of Asis Mukherjee. The Bailiff submitted a report on September 12, 1995 which reads as follows:

I beg to report that on 12.9.95 at about 1.30 p.m. I along with the D.hr. Shri Asis Kumar Mukherjee went to the Premises No. 72/3, Patua Tolla lane, P.S. Amherst Street, Calcutta. On reaching there they said D.hr. identified the decretal brick built shop room measuring 9" x 10.8" having two frontage, one facing Surya Sen Street and the other facing Potuatolta Lane, Calcutta as per Schedule of this writ of possession. I found the J Drs. absent. The said decretal shop room was open and vacant. I found nothing in the said shop room I then delivered vacant khas and peaceful possession of the said shop room as per schedule of the writ to the said D.hr. Shri Asis Kumar Mukherjee who obtained possession and furnishes a report of obtaining possession. Above witnesses were present there but they refused to sign.

40. An endorsement was also made by Asis Mukherjee in the following language:

Identified by me I obtained vacant, khas and peaceful possession of the decretal property as per schedule of this writ of possession.

41. The matter was placed before the Registrar of the City Civil Court at Calcutta who passed an order on September 13, 1995. This order reads as follows:

D.hr. files the hazira. Writ of delivery of possession returned executed as per Nazir's report. It appears from the report that Bailiff belivered vacant khas and peaceful possession to the D.hr. and D.hr. also obtained vacant khas and peaceful possession. So the case is liable to be disposed of Hence.

Ordered

That the present execution case be and the same is hereby disposed on full satisfaction.

42. A forest of issues has grown up around the seed sown by the police on August 12, 1993. The basic issues are, however, only three, the resolution of which will-cover the diverse points raised before us. The three issues which arise for determination in this appeal are; (1) whether the action of the police on August 12, 1993 was lawful or justified? (2) If not, does the Writ Court have the jurisdiction to correct the action of the police? (3) If so, what relief could be granted in this proceeding ?

Re.: 1: Police Action.

43. This issue can be considered under three subheadings; namely (A) who was in possession of the shop room on August 12, 1993. (B) Even assuming the facts as stated by Asis Mukherjee in his complaint dated July 17, 1993 as being correct, could the police have acted in the manner they did? (C) If so, can the action of the police be challenged on any other ground such as mala fides ?

44. Asis Mukherjee claims that he was in possession of the shop room since January 10, 1991 when Mukunda handed over the shoproom to him. He has not stated in what capacity Mukunda handed over possession of the shop rooms to him in 1991. He has not claimed to have obtained possession of the shop rooms qua tenant or licensee under Mukunda.

45. There is, however, also not a shred of evidence to support the claim of Asis Mukherjee that he was in possession of the shop rooms since January 10, 1991 or at all. On the contrary, all the material on record goes to show that he was not. In the ex parte decree dated January 17, 1995 in Ejectment Suit No. 432 of 1992 which has been relied upon by Asis Mukherjee it has been recorded that Mahadev Ghosh defaulted in payment of rent since October 1991. If Asis Mukherjee was in possession of the premises since January 1991 there was no question of Mahadev paying rents to the Tandons in respect of the shop room till October 1991. The order dated August 19, 1993 passed by the Learned Single Judge records the production of challans showing deposit of rents by the appellants.

46. Furthermore in 1992, in the City Civil Court suit where Asis Mukherjee had himself substituted as the Plaintiff, the case in the plaint (which Asis Mukherjee has accepted without amendment) was that Mahadev had sub-let the shop room to Mukunda and that Mukunda was in possession of the shop room and not anyone else. Asis Mukherjee has also sought to rely upon the written statement filed by Mahadev in the Ejectment Suit to contend that it was Mahadev's case

that Mukunda was in possession of the shop room. If Mahadev's written statement is to be referred to, it is clear that at least Asis Mukherjee was not in possession as claimed by him since January 10, 1991 and certainly not in July 1993.

44. The fact that Asis Mukherjee never was in possession of the shop rooms is also suggested by the contrary statements made out by him and his conduct subsequent to the action of the police on August 12, 1993. As already noted in both the Affidavits-in-opposition filed in the stay applications in the two appeals filed before us, Asis Mukherjee has stated that he was dispossessed on August 11, 1993. He has at the same time affirmed the truth of the complaint made on July 17, 1993 to the police that he was dispossessed on July 16, 1993. It is also not believable that a person who was in possession from 1991 to July 1993 would rest content with the police putting padlocks on the shop rooms. By putting such padlocks on August 12, 1993 the police would have in fact dispossessed Asis Mukherjee" were he at all in possession and it would have been in keeping with the normal course of conduct of a man dispossessed, to have protested the dispossession. But Asis Mukherjee did nothing of the sort. On the contrary in his affidavit in opposition affirmed on August 18, 1994 he asks for the status quo which prevailed before August 18, 1993, to be restored. In other words he wanted the shop rooms to remain padlock Red by the police. It was Mahadev and Nabakumar who rushed to Court complaining of the dispossession.

45. That at least Mukunda and Nabakumar were in possession of the shop rooms on August 12, 1993 must be taken to be conclusively by Asis Mukherjee's complaint dated July 17, 1993. Asis Mukherjee claimed on July 17, 1993 that he had been dispossessed on July 16, 1993 by Nabakumar and Mukunda. It is not his case that subsequent to such alleged dispossession he regained possession of the shop rooms at all prior to August 12, 1993. Therefore, when the Police Officers went to the shop rooms on August 12, 1993 admittedly Asis Mukherjee was not in possession of the shop room but Nabakumar, Mahadev and Mukunda were.

46. The order dated August 19, 1993 passed by the learned Single Judge recording.

It is an admitted position that the Respondent No. 2 (Asis Mukherjee) was never in possession of the said shop rooms was therefore correct.

47. There can be no dispute that on August 12, 1993 it was Mahadev who was in de jure possession of the shoprooms and was entitled to such possession until his tenancy was terminated under the West Bengal Premises Tenancy Act, 1956 by passing of a decree and execution thereof was only in 1995.

48. We would therefore hold that on August 12, 1993 Mahadev, Mukunda and Nabakumar were in possession of the rooms and could not be said to be in unlawful possession thereof when they were dispossessed by the police on

August 12, 1993.

49. The action of the police on August 12, 1993 in padlocking the shop room cannot be justified on any ground. Admittedly, according to the police records the complaint of Asis Mukherjee raised a civil dispute. As such the police had no authority to interfere in any way in the matter. The Chief Public Prosecutor opined this as early as February 2, 1994 and accordingly the proceedings initiated on the basis of Asis Mukherjee's complaint were dropped. According to the report submitted by the police to this Court 24, 1997.

The present position of GR/1395/93 is that the investigation of the case has been closed and the case registered as Amherst Street P.S. Case No. 218 dated 17.7.93 u/s 448/114 I.P.C. has been declared civil in nature on 22.2.94.

It is not as if the proceeding became a civil dispute to begin with and the police had no business to act on the basis of such a complaint. Even assuming that the police action was not challenged by filling the aforesaid writ by the Appellants, the police were obliged to restore back the possession to the appellant against Mukunda and Nabakumar.

50. In the case before us the police did not padlock the shop room either for the purpose of investigation or in order to effect the discovery or arrest of offenders. In this context, the decision of the Single Judge of the Lahor High Court in *Hatha Singh v. Emperor* AIR 1915 Lah. 376, relied upon by Asis Mukherjee has no application and is clearly distinguishable. According to the police report submitted to this Court on February 24, 1997 it appears from the records that on the application of Shri Ashis Mukherjee along with relevant documents, a police force went to the premises to deliver possession to Sri Mukherjee but one Khokon Bhadra opposed the police party and Amherst Street P.S. Case No. 242 dated August 12, 1993 u/s 341/323 Indian Penal Code had to be recorded against Khokon Bhadra. Subsequently the case was filed on October 31, 1993 and investigation has been closed from that date.

51. This is a procedure unknown to law. Possession could only be delivered to a person who has been wrongfully dispossessed by the police if authorised by a Court of Law. The decision on this are myriad and it is a principle which is recognised as being basic to our legal jurisprudence. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law. (See: *Salmond on Jurisprudence* 11th Edn.).

52. In *Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy* AIR 1924 P.C. 144, the Privy Council observed:

In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court.

53. In *Yar Mohammad v. Lakshmi Dar* AIR 1959 AM. 1 the Full Bench of the Allahabad High Court observed:

Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court.

54. In *Lallu Yeswant Singh v. Rao Jagdish Singh* AIR 1968 S.C. 620 the Supreme Court held that the law on the point had been correctly stated by the Privy Council and by the Full Bench of the Allahabad High Court in the cases noted above.

55. Admittedly there was no order of any Court authorising the police to dispossess the persons in occupation of the shoprooms.

56. The illegality has been compounded in this case because by padlocking the premises, the police dispossessed the Receiver who had been appointed by the High Court to be in possession of the shop room. Admittedly, the Receiver had been appointed in the suit filed by Mahadeb and Nabakumar against mukunda (being Suit No. 734 of 1991) on December 9, 1991. However, we do not express ourselves any further on this aspect of the matter in the absence of any pleading with regard thereto in the writ petition and we do not rest our decision on this ground.

57. It is not necessary, strictly speaking, to decide whether the action of the police was actuated by malafides or based on extraneous considerations having regard to the finding that the action itself was wholly unjustified. Initially the police took no action at all on the basis of the complaint filed on July 17, 1993 by Asis Mukherjee. They investigated into the matter and found that the right to the shoprooms was in dispute. They rightly took no further action. After almost one month of the complaint being lodged, without informing the Magistrate u/s 156 of the Criminal Procedure Code, the police acted as a consequence Asis mukherjee's letter dated August 12, 1996 in which Asis Mukherjee brandished his political connections. It is to be noted that the letter records that political leaders of influence had rung up the officer in charge of the local police station to take action. The letter ends with a veiled threat albeit in questionable English "if anybody put any action, so necessary action will be taken against them. The phrase necessary action innocent by itself takes on a menacing meaning in the context. A clearer case of unwarranted action by the police would be difficult to find.

58. All the three questions formulated in this issue being answered in the affirmative it must be held in answering the first issue that the action of the police on August 12, 1993 was wrongful.

Re.2: Writ jurisdiction.

59. Asis mukherjee has claimed that the Court should not interfere in the matter under Article 226, first because Madhab and Nabakumar could pursue their alternative remedy by way of a civil suit, thirdly because the ejectment suit had already been decreed and the writ of possession executed giving him khas

possession of the shop rooms and finally because Mdadhab has since died and Nabakumar, his son has no right to the shoprooms.

60. The last two objections are considered in connection with the third issue.

61. There is no dispute of fact in this case. As already seen the only relevant fact in this proceeding is who was in possession on August 12, 1993. We have already found that there is no dispute that on that date and indeed from almost a month prior thereto admittedly Nabakumar and Mukunda were in possession of the shoprooms.

62. The wrongful action of the police like any other state action can be challenged under Article 226. The plea of alternative remedy is not a fetter on the Courts jurisdiction under Article 226 but a matter of discretion.

63. Furthermore, a plea of alternative remedy should not be entertained after the filing of affidavits. *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, more particularly when the matter went up to the Appellate Court. In our view it was an improper exercise of judicial discretion to dismiss an application on the ground of alternative remedy at that late stage.

64. Where the action of the police is patently wrong. Courts have not hesitated to entertain applications under Article 226 not only to Court but also to rectify such erroneous action. In *S.N. Sharma Vs. Bipen Kumar Tiwari and Others*, it was observed:

It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers.

65. Even when the police act pursuant to an order passed by the Executive Magistrate u/s 144 of the CPC the Supreme Court has interfered by holding that an executive order passed in performance of an executive function for preserving public peace is amenable to the writ jurisdiction, *Gulam Abbas and Others Vs. State of Uttar Pradesh and Others, Kanoria Jute and Industries Ltd. v. The Home Secretary, Government of West Bengal* 1994 (11) C.H.N. 340.

66. The three decisions cited by Asis Mukherjee in support of his second submission are distinguishable.

67. In *Dr. Sk. Niamatulla v. Ashraf Ali Malik* 1993 (2) C.L.J. 416 a civil suit had already been filed and the suit was in progress. One of the parties filed an application u/s 144 of the Code of Criminal Procedure before the Executive Magistrate and thereafter filed a writ application for enforcement of the order of

the Executive Magistrate. The High Court dismissed the writ application saying.

We fail to understand how in spite of and over such a dispute the magistrate can ever assume jurisdiction u/s 144 Code of Criminal Procedure and passed the order.

68. Far from supporting the submission of Asis Mukherjee, the observation of the Court is a fortiori applicable to the action of the police. If an Executive Magistrate cannot interfere in respect of a dispute between parties to a suit, the police acting on their own certainly cannot.

69. Similarly in Mohan Pandey and Another Vs. Smt. Usha Rani Rajgaria and Others, the landlady filed a writ application claiming that the police were taking a partisan attitude against her. In that case a complaint had been made by the Appellants and the police had taken action thereon by initiating criminal proceedings. The Supreme Court held:

If the real grievance of the Respondent is against the initiation of criminal proceedings, and the orders passed and steps taken thereon, she must avail of the remedy under the general law including the Criminal Procedure Code.

70. There is no grievance relating to the initiation of any criminal proceeding before us. In fact the criminal proceedings on the basis of Asis Mukherjee's complaint has been dropped by the police themselves. The grievance relates to the action of dispossession which is not relatable to any pending proceeding at all.

71. The last case cited by Prasanna Kumar Roy Karmakar Vs. State of West Bengal and others, altogether militates against his submission. That was a case where the landlord misused the procedure provided u/s 144 of the Code of Criminal Procedure as well as the writ jurisdiction to get rid of his tenant. In the case before us Asis Mukherjee who, according to him had purchased the landlords' interest in the shop rooms, instead of continuing with the suit filed for eviction of the tenant Mahadeb, adopted an even cruder method of getting rid of the tenant. He did not bother to obtain any order from any authority. On his mere say-so he was able to persuade a compliant police force to dispossess the tenant. The Supreme Court's dictum in Prasanna Kumar Roykarmakar's case (Supra) may aptly be quoted here namely a procedure unknown to law was adopted for disposing of a landlord tenant dispute. We will have occasion to consider this case again in action in connection with the third issue.

72. This issue must for all the reasons stated be answered in the affirmative.

Re.3: Reliefs

73. For the reasons stated in answer to the issues 1 and 2 it must be held that the order dated November 25, 1994 dismissing the writ application must be set aside. In addition the order appears to have been passed on an incorrect understanding of the facts. The Learned Judge has proceeded on the basis that Mahadeb and Nabakumar and filed a suit in respect of the shop rooms against

Mukunda and Asis Mukherjee. The assumption was erroneous. The suit against Mukunda was a partnership action. No suit had been filed by Mahadeb and Nabakumar, against Asis Mukherjee at all. On the basis of this erroneous assumption the learned Single Judge refused to entertain the writ application and held it is open for the Petitioners to approach the Civil Court for their redress of grievance in the said suit.

74. Besides the action complained of in the writ application admittedly was of the police at the instance of Asis Mukherjee. This is beyond the scope of the suit filed by Mahadeb and Nabakumar against Mukunde. Neither the police nor Asis Mukherjee were nor could they indeed be made parties to the partnership action. The observation of the learned Judge is therefore erroneous in law.

75. The order also proceeds on the basis that the Receiver had been appointed in the writ proceedings. The Receiver had been appointed in the partnership action. He had been appointed in the writ proceedings as Special Officer. Apart from the question of nomenclature, the direction of the Learned Single Judge was that the Receiver (Special Officer) should hand over the shop rooms to the "person" from whom he had received it.

76. As already noted the Receiver took possession from the police who had taken possession of the shop rooms on August 12, 1993 by putting their padlocks thereon. It was therefore incumbent on the Special officer to have returned the possession to the police. This fact was not drawn to the Learned Judge's attention who proceeded on the basis that the Receiver had obtained possession of the shop rooms from the private parties to the proceedings. That is why he has stated in his order the Receiver will offer opportunity to the Petitioner and the private Respondents before issuing "necessary directions" in this regard. That is also why by the subsequent order dated December 21, 1994 the Learned Single Judge allowed the Receiver police help for giving delivery of possession of the shop rooms.

77. Incidentally, Asis Mukherjee has sought to submit that no appeal having been preferred from the order dated December 21, 1994 the Appellants were not entitled to any relief. The order dated December 21, 1994 is merely consequential to the order dated November 25, 1994. If the order dated November 25, 1994 cannot be sustained, all orders consequent thereto including the order dated December 21, 1994 must also fall. It was not necessary to file a separate appeal therefrom.

78. The final question is therefore-will the Court rest content with merely holding that the Learned Single Judge was wrong in passing the order dated November 25, 1994 by virtue of which Asis Mukherjee obtained possession of the shop rooms? The answer must be a categorical negative. As the writ application was dismissed it was incumbent on the Learned Judge to have restored the status quo prevailing immediately prior to the filing of the writ. By filing the writ the writ Petitioners could not have been put into a worse situation than the one they

had complained of when they first came to Court. *Somendra Nath Sen Gupta v. State of West Bengal* 1993 (11) C.H.N 448.

79. Even under the order of the Learned Single Judge Asis Mukherjee could not have been given possession of the shop rooms and the Special Officer was wrong in doing so. Both the Special officer and Asis Mukherjee were well aware that the Special Officer took possession from the police by breaking open the padlocks put by the police on August 12, 1993. Asis Mukherjee has failed to explain to this Court how despite this fact he claimed and received possession of the shop rooms from the Special Officer in December 1994.

80. What has been observed in the preceding paragraphs would follow had we upheld the order dismissing the writ application. But as we have already held the order of dismissal was wrong and that the writ application should have been allowed, the police were bound to make over possession of the shop rooms to the persons who were in possession on August 12, 1993 viz. Nabakumar and Mukundas.

81. As held in *Prasanna Kumar Roy Karmakar (Supra)*.

If the Appellant was ejected from the disputed premises with police help pursuant to the order which was set aside, the possession should have been restored to him with police help, if necessary. Otherwise, even after succeeding in the appeal, the Appellant will remain without remedy and out of possession as a result of the order passed by the trial Court. *Actus curiae neminem gravabit*. An act of the Court shall prejudice no man. It was the duty of the appeal Court to restore status quo ante to passing of the order on 30.8.1993.

82. In this case it is our duty to restore the status quo ante to the wrongful action of the police.

83. In the case of *Binayak Swain Vs. Ramesh Chandra Panigrahi and Another*, a money suit was decreed ex parte in favour of the Plaintiff. In execution of the decree the property of the judgment debtor was sold. The decree holder purchased the property. An appeal was preferred by the judgment debtor from the ex parte decree, the ex parte decree was set aside and the matter was remanded back to the trial Court. A second decree was passed in favour of the Plaintiff on remand. The question was whether the judgment debtor was entitled to restitution of his property which had been sold in execution of the first decree. The Supreme Court held that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution of the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from.

84. Thus apart from restoring the status quo existing prior to the unjustified dispossession it follows from the observation of the Supreme Court that Asis Mukherjee must restore possession of the shoprooms to Naba-kumar and Mukunda.

85. Asis Mukherjee then seeks to protect the possession which was unlawfully obtained by him in 1994 by relying on the ex parte decree for eviction and the execution of the writ of possession in 1995.

86. The stand is unacceptable. The statement of the bailiff in writ of possession that he had delivered possession to Asis Mukherjee is false. Asis mukherjee was, according to his own statement, put into possession by the Special officer consequent to the dismissal of the writ application. That being so, there was no question of execution of the decree against the judgment debtor. The endorsement of Asis Mukherjee on the writ that he had "obtained possession" from the Bailiff is also untrue as the bailiff has in law never executed the decree against the judgment debtor tenant. The question of execution would arise only when the tenant could be said to be in actual possession.

87. A decree of eviction without valid execution does not by itself affect possession of the premises in respect of which the decree is passed. In the case of *In re: Ganesh Trading Co. Pvt. Ltd.*, a lessee took out a distress proceeding against the sub-lessee. The distress proceeding was challenged by the sub-lessee on the ground that the lessee had suffered an order of eviction on a suit filed by the landlord. The Court held that the order of eviction did not determine the lessee's title to realise rents from the sub-lessee until actual possession in execution of the decree. Again in the case of AIR 1949 124 (Privy Council) the Privy Council held that a tenancy between A and C stood determined not by the decree for eviction obtained in 1925 against A, but by execution thereof in 1928. See also *In re: Ganesh Trading Co. Pvt. Ltd.* (Supra).

88. That being so, Asis Mukherjee cannot defeat the restoration of the status quo ante by setting up the eviction decree and must disgorge the fruits of his inequity.

89. A similar situation arose in *Samir Sobhan Sanyal Vs. Tracks Trade Pvt. Ltd.* and others, there admittedly, on a petition filed by the Appellant, the High Court had directed a Court Officer to be in possession of the property. In furtherance thereof, the Court Officer did take possession of the property. When the matter came up before the Supreme Court at the time of admission, the 1st Respondent entered appearance through the counsel and it was brought to the Supreme Court's notice that he had already come in possession of the property in execution of the decree. The Supreme Court found that without any decree or order of eviction of the Appellant from the demised premises, he had been unlawfully dispossessed from the premises without any due process of law. The Supreme Court said:

Since the letter of the law should strictly be adhered to, we find that high-handed action taken by the Respondent Nos. 1, 3 and 6 in having the Appellant

dispossessed without due process of law, cannot blink at their unlawful conduct to dispossess the Appellant from demised property and would say that the status quo be maintained.

90. Despite the decree passed in favour of the first Respondent subsequent to the dispossession the Supreme Court directed the 1st Respondent to restore possession to the Appellant in within 24 hours.

91. The submission of Asis mukherjee that there was no prayer for setting aside the writ of execution is without substance. The writ of execution is clearly erroneous in fact and law and therefore a nullity. The absence of a specific prayer cannot debar the Court from granting the relief. Syed Yakoob v. Radhakrishnan A.I. Ft. 1964 S.C. 477 and Suresh Chandra Bose v. State of West Bengal A.I. Ft. 1976 Cal. 110.

92. In any event, Asis Mukherjee has no right to remain in possession of the second room even under the decree. The suit had been filed by the Tandons only in respect of the first room. The continued possession of Asis Mukherjee in respect of the second room is therefore without any vestige of authority of law.

93. Incidentally, Asis Mukherjee sought to raise a contention that since Madhab has died after filing of the appeal no relief could be granted to Nabakumar as Appellant. The submission is rejected. The case of the Appellants was based on prior possession and not on any legal title of Nabakumar to the premises. In Prasanna Kumar Roy Karmarar (Supra) it was contended by the Respondents that the appeal was being conducted in the name of the Appellant, who in fact was not an interested party. In rejecting the contention the Supreme Court said:

We are not inclined to go into this controversy at this stage. If the Appellanta has been dispossessed by Court order which has been reversed by the Court of appeal, as is the position in this case, his possession must be restored.

94. For all these reasons we allow the appeals setting aside the order dated November 25, 1994 and all orders consequent thereupon and direct the Bailiff of this Court to handover possession from Asis Mukherjee of both the shop rooms to Nabakumar. The Bailiff of this Court is directed to execute this order as a decree and the Bailiff will be entitled to obtain police help for this purpose. The Officer-in-Charge of the local police station will grant such police help to the Bailiff as may be required by him. Asis Mukherjee will pay costs of this appeal to the Appellant assessed at 300 gms.

95. Liberty is, however, granted to the private parties to take such action as they may deem fit in their respective suits in accordance with law.

Stay prayed for but the same is refused.

Let a xerox copy of the judgment duly signed by the Assistant Registrar of this Court be given to be parties upon their undertaking to apply for certified copy of the judgment and on payment of usual charges.

Devendra Kumar Jain, J.

I agree.