

(1933) 02 CAL CK 0028
In the Calcutta High Court

Mehr Ali Mia and Others

APPELLANT

Vs

Bidyut Baran Mukherjee and Another

RESPONDENT

Date of Decision : 24-02-1933

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 145(4)

Citation : AIR 1933 Cal 424

Hon'ble Judges : Patterson, J;Panckridge, J

Bench : Full Bench

Judgement

Patterson, J.—This Rule is directed against an order by a Deputy Magistrate of Alipore u/s 145, Criminal P.C., declaring the opposite party to be in possession of certain immovable property and forbidding all disturbance of such possession. The Rule has already been discharged by us, and it only remains to indicate our reasons for discharging it. The property which forms the subject-matter of the proceedings out of which the Rule arises is known as the Tushkhali Abad and consists of a large block of land situated in the Sunderbans and measuring about 5,000 bighas in area. The petitioners are the successors-in-interest of the original lessees of this plot of land and the opposite parties are the auction purchasers at a recent revenue sale. The sale was held under the provisions of Section 6, Act of 1859 and took place on 8th January 1932. After an unsuccessful appeal to the Commissioner on 16th May 1932 the petitioners filed a civil suit with the object of having the sale set aside, and this suit is still pending.

2. They also obtained certain temporary injunctions from the civil Court prohibiting the auction purchasers from taking possession but these injunctions were ultimately withdrawn and on 25th June 1932 the opposite party obtained delivery of possession from the Collector. It has been suggested on behalf of the petitioners that there was no real delivery of possession, and that on 25th June 1932 all that actually took place was that the transfer to the opposite party was notified by proclamation under the provisions of Section 28 of the Act. It appears however that the order that was published in the locality on 25th June 1932

purported to be an order u/s 29, under which section the Collector is authorized to deliver possession to an auction purchaser. The Magistrate has found that possession was duly delivered to the opposite party on 25th June 1932, and there can be no manner of doubt that delivery of possession took place on that date under the provisions of Section 29 of the Act. It has further been suggested on behalf of the petitioners that even if possession u/s 29 was delivered to the opposite party on 25th June 1932, the only effect of such delivery of possession was to give them the right to possess and that they were not placed in actual possession of the property. It has also been pointed out on behalf of the petitioners that the Magistrate has found that even after the delivery of possession on 25th June 1932, the opposite party were unable to exercise their full rights of possession and that the petitioners remained in actual possession of the abad and were collecting rents from the tenants. It is contended that, in view of this finding, the Magistrate ought to have found that the petitioners were in possession of the abad on the date on which the proceedings were drawn up and ought to have made an order confirming their possession.

3. As regards the petitioners contention that the Collector did not deliver actual possession to the opposite party, and that the so-called delivery of possession merely gave them the right to possess the property, it is a sufficient answer to this contention to quote the words of Rankin, C J., in the case of Agni Kumar Das Vs. Mantazaddin and Another, :

On the other hand, it is true that, if on a given date the plaintiff has been put into possession by the civil Court however inefficiently, or irregularly, then on that date, the plaintiff got possession as against this defendant. The defendant's actual possession has been broken as a matter of fact even if only for a moment. This is as true of symbolical possession, improperly so called, as of any other possession, though what happened at the time of delivery may well be important on the question whether the plaintiff continued in possession, very long or was ousted in the following week. Still it is an error to hold in such cases that the decree-holder was never in possession, or to ignore the delivery to him.

4. These remarks, in my opinion, apply with equal force to the present case, and it must therefore be held that the opposite party on 25th June 1932 were in actual possession of the property in dispute. Then as regards the petitioner's contention that, as has been found by the Magistrate, the petitioners remained in actual possession of the property even after possession had been delivered to the opposite party, it is only necessary to refer to the, first proviso to Sub-section (4), Section 145, Criminal, P.C., which runs as follows:

If it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed he may treat the party so dispossessed as if he had been in possession at such date.

5. Now, the proceedings were drawn up on 13th August 1932, and the findings of the Magistrate amount to this: that the opposite party were in possession on

25th June 1932, and that at some time between that date and the date of the proceedings the petitioners forcibly and wrongfully dispossessed the opposite party from the land in dispute. In these circumstances the Magistrate was clearly right in declaring the opposite party to be in possession on the date on which the proceedings were drawn up and in forbidding all disturbance of their possession. The precise manner in which the opposite party will, under the order that has been made in their favour, be entitled to exercise possession in the various portions of the disputed property, for example, whether they will be entitled to take khas possession or whether they will only be liable to exercise their possession by realisation of rent, this is not a matter which can be determined in the present proceedings. It may be that if the opposite party claim to be entitled to khas possession, they will have to take proceedings u/s 37 of the Act, for the annulment of any encumbrances that may exist on the land before they can actually enter on the land, and that further proceedings u/s 145, Criminal P.C., will be necessary in respect of the portions of land of which the petitioners or some of them claim to be in possession as under-tenants. Be that as it may, it is not in my opinion possible to decide these questions in the present proceedings. As has been pointed out by Mukerjee, J., in the case of *Mir Waziruddin v. Deoki Nandan* (1907) 6 CLJ. 472

the effect of the delivery of symbolical possession is to transfer to the purchasers the possession which was in the proprietors.

6. It is not however possible in these proceedings to determine precisely what possession was in the former proprietors or what possession the auction purchasers are entitled to.

Panckridge, J.

7. I agree with the reasons given for discharging the Rule.