

(1925) 02 CAL CK 0022
In the Calcutta High Court

Rash Behari Mandal and Others

APPELLANT

Vs

Hemanta Kumar Ghose and Others

RESPONDENT

Date of Decision : 16-02-1925

Acts Referred:

Citation : AIR 1925 Cal 1023

Hon'ble Judges : Mukerji, J;Greaves, J

Bench : Full Bench

Judgement

Greaves, J.—It will be convenient to deal with Appeal No. 20 of 1925 first of all.

2. This is an appeal by the decree-holders against an order of the Subordinate Judge of the 6th of December 1924, quashing the previous order that he made for possession by the decree-holders of certain land. On the 15th of May 1914, certain putni tenures were put up to sale under the Putni Regulation. Plaintiff No. 1 brought the putni at a sale and mutation was effected. On the 20th April 1921, the plaintiff sought to eject from the land which they had purchased some 400 tenants who, it is stated, were in occupation of the land as sub-tenure holders and cultivating tenants. On the 27th September 1924, a decree for ejectment was passed in favour of the plaintiffs against all the 400 tenants and the decree became final on the 12th of November 1924. On the 14th of November the decree-holders applied for delivery of possession of the land and a writ for delivery of possession was issued on that date. This being an ex parte application no notice of it was necessary to the tenant-defendants. On the 17th of November, 1924, four of the judgment-debtors, defendants Nos. 93, 97, 98 and 171 in the original suit prayed for a stay of delivery of possession as they stated that they had filed an appeal to this Court against the decree. Thereupon the learned Subordinate Judge made an order recalling the writ of delivery of possession which had already been issued and he directed that if the peon had already started the Nazir was to recall the peon by a special messenger. It appears that the peon had started previous to the passing of this order on the 17th November and on that date between 4 and 5 in the evening he gave or

purported to give possession of the land to the decree-holders. This was done before the special peon who had been deputed to stop him had been able to find him. On the 26th November, the Subordinate Judge made this further order after reading the special peon's report, namely, he allowed time to the judgment-debtors to deposit the decretal amount or bring an order of stay from the High Court and he stated in his order that after this was done he would quash the delivery of possession. On the 1st December, the judgment-debtors died a petition asking for a hearing of their petition which they had filed on the 25th November but the learned Subordinate Judge rejected this application as frivolous and mala fide. On the 2nd December, the learned Subordinate Judge allowed the judgment-debtors three days time to get a stay order from the High Court; or to deposit the decretal amount. On the 5th December a rule was obtained from this Court by the judgment-debtors for stay of proceedings. The rule was made returnable on the 22nd December and an ad interim stay was granted until the 7th of January. In spite of this the learned Subordinate Judge proceeded to pass the order of the 6th of December 1924, against which this appeal is directed, namely, to quash his previous order for delivery of possession to the appellant before us. The order of the 6th of December 1924, was, I think, clearly a wrong order in view of the stay order of this Court of the 5th of December 1924, to which I have already referred, as the Subordinate Judge had on that date no jurisdiction to further deal with the matter and, consequently, the appeal must succeed so far as the order of the 6th December 1924 is concerned. But this does not dispose of the matter because a further question is raised by reason of the other appeal which is before us numbered 435 of 1924 and the point shortly is this, namely, whether the Subordinate Judge having passed his order for the issue of the writ for delivery of possession on the 14th of November could subsequently make a further order which he has done recalling the writ for delivery of possession which he had issued. The conclusion to which we have come is that it was open to the learned Judge to review his order of the 14th November 1924, by his order of the 17th November of the same year, and to recall the writ for delivery of possession which had already been issued. Consequently, it seems to us that if in fact the peon gave delivery, as it is urged he did, then the delivery was of no effect because the order for delivery of possession which the Judge had passed on the 14th of November had subsequently been revoked by him on the 17th of the same month and as I have stated I think that it was open to the Subordinate Judge to review his order as he has done and to pass the order of the 17th November which he did. The result, therefore, is that we think that that was in effect no valid delivery of possession on the 17th November. We were referred in the course of the argument to the case of *Mian Jan v. Man Singh* (1880) 2 All. 686 where the sale of certain immovable property had been fixed for a certain date which was subsequently postponed by the Court. The sale, however, took place before the order postponing the sale had been communicated and under the circumstances it was held by the two learned Judges who decided the case that the sale could not be legally held by virtue of the order and that it made no difference if before this

order had been communicated the sale had taken place. "We think that the decision has some bearing on the point before us and that in the conclusion we have arrived at we are following the same principles as were followed in that case. We think that the best course now will be that the application of the 14th of November 1924, for possession, be reheard in the presence of the defendants who have appealed to this Court and it will be open to the Subordinate Judge on that application to make what order he thinks fit either for delivery of possession or if he thinks that possession should not be delivered on terms of security from the tenants. This order, however, does not affect those tenants who have not appealed and so far as they are concerned the order for delivery of possession stands and we are not disturbing it.

3. The fair order as regards costs will, we think, be that there will be no order as to costs in this appeal.

4. The judgment will also govern the other appeal and having regard to the decision we have arrived at no order as to costs will be necessary in this appeal also.

5. Let the record be sent down at once.

Mukerji, J.

6. I agree.