
(1976) 11 BOM CK 0028

In the Bombay High Court

Case No : Criminal Revision Application No. 89 of 1976

Smt. S.R. Mirchandani

APPELLANT

Vs

Ramesh Harasha Kalwani

RESPONDENT

Date of Decision : 25-11-1976

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1979) 81 BOMLR 20

Hon'ble Judges : Gandhi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Gandhi, J.—This revision application arises out of the order passed by the Additional Sessions Judge, Greater Bombay in Criminal Revision Application No. 316 of 1975 allowing revision application and setting aside the order dated August 2, 1975 passed by the Executive Magistrate, Greater Bombay in Case No, AB/MAG-SR 2 of 1974, rejecting the application made by respondent No. 1 original applicant and directing the Colaba Police Station to put the respondent No, 1-original applicant in possession forthwith. This order was passed on January 29, 1976 by the Additional Sessions Judge, Greater Bombay.

2. Briefly stated, the facts of the case are: One Mrs. S.R. Mirchandani, the petitioner before me in this revision application owned an ownership flat bearing No, 404, 4th Floor, Naigara Building, Colaba, Bombay-5, in a co-operative housing society, viz., Model Flats Co-op. Housing Society.

3. That by a leave and licence agreement dated May 11, 1972 Mrs. Mirchandani entered into an agreement with Western Outdoor Advertising Pvt. Ltd., who have their office at 16 Apollo Street, Fort, Bombay-1, and under the terms of the said agreement, which was known as leave and licence agreement, the company was paying Rs. 750 towards the compensation for the use and occupation of the flat to Mrs. Mirchandani.

4. This leave and licence agreement was entered for a period of eleven months and expired sometime in April 1973. Thereafter, it appears that Mrs. Mirchandani did not want to renew the leave and licence agreement and wanted M/s. Western Outdoor Advertising Company (herein after referred to as "the said company") to hand over back the possession of the flat to her. There was some correspondence between Mrs. Mirchandani's legal adviser and said company and their solicitors which indicated that the said company wanted to assert the rights conferred on them by the amending Rent Act, whereby they wanted to claim the tenancy of the premises.

5. It is clear from the record that from the date when this flat was taken on leave and licence basis, one Max Gonzaga, who was employed by the said Company was in occupation of this flat. That since 1972 till April 30, 1974 he continued to serve the company in Bombay. It further appears that his services were transferred to Bangalore and Max was required to go to Bangalore on April 13, 1974. It also appears that Max had put in his own furniture in the said flat and that furniture was required to be removed to Bangalore. The original application or case No. AB-MAG/SR-2 of 1974 which was filed in the Court of the Executive Magistrate, Bombay, was filed by the said company, having their address at 16 Appollo Street, Bombay, by its commercial manager one Ramesh Harsha Kalwani.

6. It was the contention of applicants the said company that on April 13, 1974 Max left for Bangalore by plane. That after Max leaving Bombay, as he had "left behind his furniture, the company arranged on April 16, 1974 to remove the furniture lying in the flat with the help of the coolies and the said furniture was transported to Bangalore in truck. It was the contention of Kalwani that when Max left the premises on April 13, 1974, he had handed over the keys to Kalwani and with the use of the said keys on April 16, 1974 Kalwani got the furniture removed through his peon though he had not personally gone to the flat on 16th and thus, according to the applicants-company, from April 13, to April 16, when the furniture was removed, the company was in possession of the flat.

7. On April 17, 1974 at about 4 p.m. one Gomes who had come in place of Max went to the flat along with a peon of the company and when Gomes attempted to apply the same keys which was applied on the previous day for removing the furniture, he could not open the lock. Therefore, he returned back to the office and complained to Kalwani. It is further contended by Kalwani in the said application that he suspected some mischief from the side of Mrs. Mirchandani; that she had changed or tampered with the lock and, therefore, on the 17th he put on another lock on the door of the flat and thereafter, it appears that he went away.

8. On April 18, 1974, Mrs. Mirchandani wrote a registered letter addressed to the said company, who at that time had their address at Nanavati Mahalaya, Bombay-1, regarding the fact that Max for whom the flat was taken had been transferred out of Bombay and his luggage was also removed from her premises on April 16, 1974 at 3 p.m. That such removal was as per their promise. In that

very letter she thanked the company for their co-operation in the matter and as per promise, she sent along with that letter, a cheque for Rs. 1,875 being the balance out of the deposit of Rs. 2,250 less compensation for fifteen days of April 1974 and not the full month. She also requested to acknowledge the receipt of the said letter.

9. On the other hand Kalwani seems to have gone to the flat again on April 18, 1974 and thereafter lodged a complaint on April 18, 1974 with the inspector of police, Colaba Police Station and in that complaint he informed the police that on making enquiries it revealed that Mrs. Mirchandani must have unlawfully opened the lock of the premises and entered into the same and purported to take possession of the same. There were certain further allegations which are not relevant for the purpose of this case and I do not wish to refer to them as ultimately the matter is going to be decided by the civil Court and I am confining my observations, which are necessary for disposing of this revision application filed by Mrs. Mirchandani and wish to restrain myself so as not to cause any embarrassment to the civil Court, which is going to dispose of the matter after hearing both the sides. It is the case of Kalwani that on such complaint being made to the Colaba Police one of the policemen accompanying Kalwani went to the site, i.e. the flat No. 404 on the fourth floor, Naigara and it appears that Kalwani went with that policeman and found Mrs. Mirchandani present there. It appears that at the instance of the Colaba Police Station, Mrs. Mirchandani went to Colaba Police Station and whatever statement she wanted to make had been made. But the result was that the Colaba Police Station felt that it was not a case where they could interfere.

10. As to when this letter of April 18, 1974 written by Mrs. Mirchandani to the said company was received by the said company, Kalwani is silent. Not only he is silent about the receipt of this letter but the fact that the letter of the 18th was received by him wherein the contention of Mrs. Mirchandani was that as per the promise, the flat was handed over to her and the furniture was removed and as per her promise, she was refunding the moneys was also not mentioned in the application dated April 22, 1974 before the Executive Magistrate.

11. An attempt was made on behalf of Kalwani to suggest that this letter had not reached the said company when they filed the complaint through Kalwani in the Court of the Executive Magistrate. But such a suggestion cannot be accepted by me because there is on record a letter dated April 22, 1974 addressed by the attorneys M/s. Matubhai Jamietram and Madan, representing the said company, who have in their letter para, first, mentioned that they had addressed the letter on behalf of the said company, who had placed in their hands Mrs. Mirchandani's letter dated 18th inst. with instructions to reply to the same. Therefore, even this letter does not mention that on April 22, 1974, the date on which M/s. Mathubhai Jamietram and Madan replied on behalf of the said company that the letter was received only on 22nd and after the criminal application having been filed in the Court of the Executive Magistrate. In these

circumstances, I am unable to accept the suggestion made by Mr. Vashi that this letter was not received by M/s. Western Outdoor Advertising Co. Pvt. Ltd. before April 22, 1974 before the time when the application u/s 145 was, filed before the Executive Magistrate, which application was dealt with by the Executive Magistrate. I do not see any reason for the suppression of this letter in the original application filed before the Executive Magistrate. As observed before, I do not wish to make any further observations but as I have to dispose of this revision application, which has been filed by Mrs. Mirchandani, I have to mention this fact as it is, in my opinion, material for disposing of this criminal revision application before me.

12. As after April 1, 1974 the new Criminal Procedure Code came into operation, the applications u/s 145 are to be filed before the Executive Magistrate and not before the Metropolitan Magistrate as it used to be. It is pertinent to note here that there is slight amendment in the provisions of Section 145 in the old Code and the new Code. The relevant portion of the amendment requires noting. Under the original Section 145(4) the provisions were that

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, documents and affidavits, if any, so put in, hear the parties and conclude the inquiry, as far as may be practicable, within a period of two months from the date of the appearance of the parties before him and, if possible, 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:

Provided, that the Magistrate may, if he so thinks fit, summon, and examine any person whose affidavit has been put in as to the facts contained therein;

Provided further that, if it appears to the Magistrate that any party has within two months next before he 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:

Provide 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.

13. Now, this provision of Section 145 has been replaced by the provision of Section 145(4) which reads as follows:

The Magistrate shall then, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under Sub-section (1), in possession of the subject of dispute:

14. As regards the proviso, there is more or less a similar provision but I have been asked to consider the new provisions by Mr. Vashi, it is better to mention

that proviso also, which reads as under:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed, within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under Sub-section (1), he may treat the party so dispossessed as if that party had, been in possession on the date of his order under Sub-section (1).

15. After the application was filed by the said company through Kalwani, the commercial manager, the learned Executive Magistrate issued a show cause notice to both the parties and statements were filed. In reply to the application, which reply is at exh. 9 on p. 15 of the added paper book, after stating the circumstances under which the agreement of leave and licence was entered into and contending that the flat was taken from Max, in para. 3 Mrs. Mirchandani stated as follows:

At the request of Mr. Gonzago who was to leave Bombay on 13th April 1974, I received the vacant possession of the premises in question from him and on the 16th April 1974, the complete vacant possession of the premises was taken over by me in the presence of the panchas.

In para. 5, she stated as follows:

I submit that Mr. Gonzago while vacating the premises handed over the key given to him back to me.

Thus, it appears that the case of Mrs. Mirchandani was that the keys of the flat which were in duplicate and one of the keys which was given to Max was handed over back to her while Max was living in Bombay. It appears from her reply-affidavit that from April 13, 1974 onwards she had the possession of the flat, but as some of the furniture of Max was lying in the flat, she permitted some furniture as per the arrangement with Max to remove it to Bangalore, where Max had gone. It appears that it is her case that Max for whom the flat was taken by the company had given her back the keys of the flat. These are the rival contentions before the learned Magistrate. As per the provisions of law, a preliminary order was required to be passed. I am told that though the application was entertained on April 22, 1974, the preliminary order was not passed by the learned Magistrate till June 7, 1974 and it was communicated by June 18, 1974 by a separate notice. After the pleadings were completed, the learned Magistrate heard the parties and allowed such evidence, which was led before him. The applicants before him led evidence of five witnesses, who were examined and cross-examined by the parties. Though the first preliminary order was required u/s 145(1) was passed, the learned Magistrate, at no stage passed any other order of either sealing the premises or removing Mrs. Mirchandani. It is apparent from records that inspite of the fact that the applicants had examined Kalwani as well as Max to refute the case of Mrs. Mirchandani that Max had handed over the keys to her on April 13, 1974, Mrs. Mirchandani did not think it

advisable either to examine herself as a witness or to lead any other evidence. As observed before, I would have gone into the evidence if I had come to the conclusion that it is necessary for me to go into the evidence to dispose of this application. Both the sides have strenuously urged and pointed out certain portions of the evidence of these witnesses and laid stress on certain part as they thought it desirable. But in my opinion, the main question which arises in this criminal revision application is whether the learned Sessions Judge was justified in interfering with the final order passed by the learned Magistrate exercising his revisional jurisdiction under the Criminal Procedure Code. (2) Whether in exercise of the criminal revisional jurisdiction, the learned Additional Sessions Judge has committed any error so apparent on the face of the record that I should intervene in the revision application, set aside the order of the learned Additional Sessions Judge who set aside the original order of the learned Executive Magistrate.

16. That inspite of the fact that Mrs. Mirchandani had led no evidence and inspite of the fact that Kalwani and Max had repeated their case in the application, the learned Magistrate came to the conclusion that it is not established by the applicants before him that they were in possession between April 13, 1974 to April 17, 1974. Having come to the conclusion he felt that the applicants have failed to establish the requisite condition for his interference and therefore, he dismissed the application.

17. It is pertinent to note that after filing this criminal application before the learned Magistrate on April 22, 1974 on the very next day on April 23, 1974, the Western Outdoor Advertising Pvt. Ltd. through Kalwani filed a declaratory suit being civil suit No. 899/3032 of 1974 in the Small Causes Court at Bombay. Though these proceedings are not before me, but in my opinion, they are very relevant. I called upon Mr. Vashi to disclose only what were the prayers in that suit. Mr. Vashi after obtaining instructions from his client stated that it was a suit for a declaration that the Western Outdoor Advertising Pvt. Ltd. were the lawful tenants of the suit premises, No. 404 on the fourth floor of Naigara Building, that it was a suit for obtaining back the possession from Mrs. Mirchandani; that besides this declaration and the main prayer for getting back the possession, there were interim prayers and those interim prayers were two; viz., (1) to restrain Mrs. Mirchandani from parting with the possession of the premises and letting in any third party in the suit premises; (2) an interim relief that she should be directed to hand over the possession of the premises during the pendency of that suit, i.e. by a mandatory order dispossess her and put the plaintiff in possession. The Small Causes Court, after hearing the notice of motion for interim reliefs chose to grant relief in favour of the plaintiffs, i.e. the Western Outdoor Advertising Pvt. Ltd. and restraining Mrs. Mirchandani from transferring it or letting out to any third party the possession of the suit premises. But, at the same time, the Small Causes Court was not prepared dealing with the interim relief, to grant d mandatory injunction against Mrs. Mirchandani to hand over the possession to the plaintiffs, pending the hearing

and final disposal of the suit.

18. The learned Additional Sessions Judge, when the Criminal Revision Application was filed before him, considering that the learned Magistrate has apparently erred in ignoring the provisions of Section 145(4) of the Criminal Procedure Code, which was the most relevant provision to be taken into consideration and merely coming to the conclusion that the petitioners before him were not in possession between April 13 and 18, 1974, thus disbelieving the contentions raised by the applicant, could not have disposed of the matter in the manner it was done and the error was so apparent that on reading the provisions of law and applying his mind, thought it fit to interfere with the order passed by the Executive Magistrate and he set aside the order of the Executive Magistrate by his order on January 29, 1976. In this connection it is pertinent to note that in the paper book there is an endorsement by the learned Additional Sessions Judge to the following effect under dated January 30, 1976, i.e. one day after he delivered the judgment on January 29, 1976. On that day, i.e. on January 29, 1976 it is an admitted fact that nobody was present representing Mrs. Mirchandani and he heard only the petitioners in the Criminal Revision Application before him and decided the matter on January 29, 1976. It is pointed out to me that the Public Prosecutor was however present when the Additional Sessions Judge heard the revision application and the observations under date January 30, 1976 are as follows:

Mr. Shirodkar now appears for the respondent. He was absent when the matter was heard and disposed of by judgment. The only application made by him is that the execution of the order be stayed for a period of two weeks from today. On his application the execution of the order is stayed for a period of two weeks from today.

Now, the learned Additional Sessions Judge, while disposing of the Criminal Revision Application No. 316 of 1975 set aside the order of the learned Magistrate observed that the learned Executive Magistrate was in patent error that he has not considered the provisions of Section 145(4) along with the proviso contained therein. I have already quoted the proviso before. Besides deciding the matter in the absence of the vital party concerned, the learned Additional Sessions Judge, whose attention was directly drawn to the provisions of Section 145(4) and who felt that it required the consideration of Section 145(4) and its proviso, because that was ignored by the Executive Magistrate, in my opinion, going through the judgment of the learned Additional Sessions Judge, it appears very clearly that he himself has also not read the proviso wholly. On p. 20 of the paper book, the learned Additional Sessions Judge has observed as follows:

In view of this circumstantial evidence there is no doubt that the petitioners were dispossessed wrongfully. The question is who dispossessed them? On the respondent's own showing it is she who received possession. Since it is not established that the possession was not handed over by Gonzago or the

petitioners the receipt of such possession is in my opinion wrongful. All these facts clearly establish that the respondent has played a trick on the petitioners who were licensees and taken possession by wrongful methods by changing the lock in a clandestine manner.

Thus the learned Additional Sessions Judge having come to the conclusion that the Executive Magistrate has patently erred in ignoring some provisions of law which were required to be considered before passing the order u/s 145(4) of the new Code, thought it fit to interfere but interpreted and appreciated the evidence on his own in the absence of any representative of Mrs. Mirchandani, who was a vital party concerned.

19. Mr. Gumaste appearing for the petitioner in the Criminal Revision Application very strenuously urged that the learned Additional Sessions Judge was entirely in error in re-appreciating the evidence which has been thoroughly done by the Executive Magistrate, who had the benefit of seeing the witnesses before him and to observe their demeanour. In support of his proposition, Mr. Gumaste cited before me a decision of the Supreme Court in *Khetrabasi Samual etc. Vs. The State of Orissa*, and relied upon the observations in head-note B. The observations are to the following effect:

The powers of the High Court u/s 439, Cr. P. C., although wide are subject to certain limitations. Section 439(4) expressly provides that the section shall not be deemed to authorise the High Court to convert a finding of acquittal into one of conviction. The High Court judgment does not show that the Trial Court shut out any evidence which the prosecution wanted to produce or admitted any inadmissible evidence or over-looked any material evidence. The High Court proceeded to re-appraise the evidence of the witnesses and upset the finding of the Magistrate thereon on the ground that he "had not taken the trouble of sifting the grain from the chaff." Clearly such a course is not permissible u/s 439, Cr. P-C. The facts and circumstances of this case do not warrant the ordering of a re-trial by the High Court if it felt disposed to exercise powers u/s 423, Cr. P.C. expressly included in Section 439(1).

20. Mr. Gumaste submitted that if u/s 439 the powers of the High Court are limited, it cannot be suggested that the powers of the Additional Sessions Judge can be greater than those of the High Court, as observed by the Supreme Court. He wanted to press into service the observations made in this judgment and asked me to hold that because of these observations found in this judgment, the learned Additional Sessions Judge was in error in appreciating the evidence by himself and reversing the findings of the lower Court. I have given careful consideration to the arguments submitted by Mr. Gumaste and the observations in *Khetrabasi Samual Etc. v. State of Orissa* but I am unable to accept the submissions made by Mr. Gumaste. The observations in that case are confined to the provisions of Section 439(4) which prevented the High Court, from converting the order of acquittal into conviction by re-appraising the evidence. As far as I can see, there is no bar against the High Court or the Court exercising

the revisional jurisdiction to consider the evidence afresh under any circumstances. In my opinion, if a patent error of the learned Magistrate is found from the record and if it can be shown to the revisional Court that the lower Court was in error in ignoring the provisions of the law, it would be open to the revisional Court to consider for itself whether the order should be set aside merely because the provisions of law were ignored or on considering the facts before it, to come to its own conclusion. In these circumstances, I cannot accept the submission of Mr. Gumaste that the learned Additional Sessions Judge had exceeded his jurisdiction in trying to re-appraise the evidence, when he definitely came to the conclusion that the trial Court had ignored the provisions of Section 145(4) of the Criminal Procedure Code and its proviso. I have given careful consideration to the submissions made by Mr. Gumaste and I have gone through the judgment of the trial Court and the relevant provisions read out by Mr. Gumaste and it is clear to me that the trial Court was all along considering the question, as to whether the applicants have established that between April 13 and 17, 1974, they were in possession or not, and at least disbelieving the applicants on that score, the trial Court has come to the conclusion that Mrs. Mirchandani has possibly obtained possession from Max and, therefore, it was not required for him to interfere or pass any orders u/s 145 of the Code to dispossess her and give back the possession to the applicants.

21. It is apparent if one were to read the trial Court's order that the provisions of Section 145(4) or the proviso therein were not considered by the trial Court. In these circumstances, if the learned Additional Sessions Judge felt that in order that an application u/s 145 may succeed, it is not only required to prove that he was in possession at the date when he alleges that he was dispossessed, but u/s 145 even if he is in possession for the time within two months prior to the date of the application and he has been forcibly and wrongfully dispossessed, under these provisions he can be deemed to be in possession even though he was not in actual possession, as the law makes it Very clear. Thus, the learned Additional Sessions Judge was right in coming to the conclusion that the trial Court had ignored certain provisions of law. Having come to the conclusion that the trial Court had erred in not applying the provisions of Section 145(4) and the proviso therein, as the facts would reveal and as I have already pointed out from the judgment of the learned Additional Sessions Judge, the observations on p. 20, show that some how or the other, the learned Additional Sessions Judge fell into the same error and did not consider all the provisions of Section 145(4) along with the proviso. The proviso is very clear and in unmistakable term it provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under Sub-section (1) he may treat the party so dispossessed as if that party had been in possession on the date of his order under Sub-section (1). I have carefully gone through the judgment of the learned Additional Sessions Judge. He has nowhere considered

the most important factor required to be considered, viz., whether the applicants proved that they were forcibly and wrongfully dispossessed. I have reproduced the words of the learned Additional Sessions Judge on p. 20 of the paper book, which clearly give his conclusion. I think, this error could have been avoided if the learned Additional Sessions Judge had waited for the respondent's advocate to come. This being a judgment passed ex .pane, he has done so without any assistance of the party mainly concerned, It may be that the learned Additional Sessions Judge having seen the urgency of the matter within a short time of filing of the revisional application, considered it necessary not to wait for a long time, for the party concerned, who is not vigilant enough to make his own arrangement for representation after proper service. At one point of time, it was urged on behalf of Mrs. Mirchandani that they had not received the summons of that criminal revision application filed before the learned Additional Sessions Judge. But Mr. Patel, who appeared along with Mr. Gumaste made it clear to me that that was a wrong impression and Mrs. Mirchandani was served with the summons in the Criminal Revision Application No. 316 of 1975. Now what Mr. Patel submitted before me was that the matter was entrusted to the advocate one Mr. Shirodkar and rather strangely and inexplicably that the matter was taken so quickly in the month of January, 1976 though the criminal revision application was filed in December, 1975. Mr. Vashi has, however, pointed out to me that there was nothing unfair or hasty because when the matter was admitted, the matter was expedited and the notice had indicated the date when the matter would be taken up, and though such notice was served, no appearance was filed on behalf of Mrs. Mirchandani. Now, it appears that both Mr. Patel and Mr. Vashi are right, but at the same time, if a client has received the summons and has already handed over the papers to the lawyer and if the appearance is not filed, it is very clear that it is not the fault of Mrs. Mirchandani. But we are not going into that question in any greater detail. These observations are only made because if the proper assistance were rendered to the learned Additional Sessions Judge by the party concerned, the party concerned would not have had to come and bear the expenses of coming to this Court. What Mr. Gumaste has pointed out to me here could have been pointed out to the learned Additional Sessions Judge and the learned Additional Sessions Judge might have also considered the entire proviso as required under the law.

22. Mr. Vashi for the respondent Kalwani who has all along been mentioned as commercial manager of the private limited company, submitted before me that if a party is dispossessed wrongfully or illegally, it is open to the Court to draw an inference that he has been dispossessed forcibly also. Mr. Vashi submitted that even though the applicant does not use the word "forcibly" and the application is not made on the footing that the applicants were dispossessed wrongfully and forcibly, the Court, can irrespective of any averment in that behalf, come to conclusion that misrepresentation or trick has been played for dispossessing the party, and that would be sufficient to cover the case under the provisions of Section 145(4) and the proviso. Mr. Vashi submitted before me that the words

used in the proviso "forcibly and wrongfully" do not mean that the dispossession must be by use of both force and wrongful means. Merely using a trick or making a misrepresentation and obtaining possession or dispossessing somebody would amount to forcibly and wrongfully dispossessing a man. In support of this submission, Mr. Vashi first relied upon the observations made by the Division Bench of this Court, where the Division Bench of this Court in a reference made to them in V.K. Rao v. Chandappa (1974) Criminal Revision Application No. 1018 of 1973, and Criminal Revision Applications Nos. 184, 133 and 241 of 1974, decided by Hajarnavis and Aggarwal JJ., on October 17, 1974, now reported at 79 Bom. L.R. 16 observed on pp. 78 to 81 (of the unreported judgment)." In my opinion, these observations are not at all relevant as there is no consideration of Section 145(4) and the proviso thereto. On the contrary, what has been considered by the Division Bench was the main requirement of the jurisdiction of the Court, viz., whether the breach of the peace contemplated u/s 145(4) of the Code of Criminal Procedure was a breach of public peace and not a breach of private peace. As there were some judgments of this Court of a single Judge holding that when reference is as regards the breach of peace, it must be breach of public peace and if there is likelihood of breach of peace of an individual, it cannot be contemplated as breach of peace u/s 145 and it was held that the Court had no jurisdiction to decide the same. When one of the matters came up before me, I felt that there were some judgments on both the sides and I was of the opinion) that the breach of peace contemplated u/s 145 was not necessarily a breach of public peace, but it must be a breach of private peace and the matter was referred to the Division Bench and on that aspect, after considering the various authorities concerned and considering the dictionary meaning of the various words, the observations made by the Division Bench, on which reliance has been placed by Mr. Vashi are as follows:

... u/s 145, we are not concerned with every breach of the peace. We are concerned with a dispute regarding land, water etc. which is likely to cause a breach of the peace. There may be dispute regarding immovable property between two contestants without the neighbours knowing about it. Yet, they may be using violence to settle that dispute. There may be a dispute between two individuals at a distance from locality. Both of them may be using violence and that dispute may not affect the public peace or the tranquillity. Question is, will these disputes fall within the mischief of Section 145 of the Code of Criminal Procedure? It is true that Kamat J. has observed that these provisions are made in the interest of public peace, but that does not mean that he held that the dispute contemplated by Section 145 must be one which affects the public peace or public tranquillity. "Breach of the peace" has been defined in the Dictionary of English Law by Jowitt 1959, vol. 1 at .p. 276;. . .

I do not think it is necessary to cite it for the purpose of consideration of the issue before me.

23. Mr. Vashi, however, relied upon p. 80 (of the unreported judgment) upon the

expression "forcible entry" as defined in Ballentine's Law Dictionary, third edn., as under (p. 485):

An entry on real property peaceably in the possession of another, against his will, without authority of law, by actual force, or with such an array of force and apparent intent to employ it for the purpose of overcoming resistance, that the occupant, in yielding and, permitting possession to be taken from him, must be regarded as acting from a well-founded apprehension that resistance by him would be perilous or unavailing.

24. If one were to read these observations as observed by me, it is very clear that these observations were made while considering the expression "breach of peace" and when one of the definitions made a mention of "forcible entry", it has been mentioned. If one were to read the definition of the forcible entry, I am sure one cannot hesitate to come to the conclusion that Mr. Vashi's arguments cannot stand, because it very clearly states that the entry must be against his will, without authority of law, by actual force or with such an array of force and apparent intent to employ it for the purpose of overcoming resistance. This according to me, is the correct definition of the word "forcible entry" and in my opinion, it results into an apprehension in the mind of the opponent that he is likely to get injured if he resisted. x

25. Mr. Vashi also relied upon *Amritlal N. Shah v. Nageswara Rao* (1946) 48 Cri. L.J. 435 and he drew my attention to the head-note (1) which read as follows:

It is not in all cases that actual force should be used before it could be said that the eviction is a forcible one. Misrepresentation and improper threats are sufficient to constitute forcible dispossession. Where therefore, by getting the licence cancelled and by getting it issued in the name of the lessor and by having the notice issued, by the Magistrate, the servants and others were made to leave:

Held, that the preliminary order of the Magistrate saying that there was an apprehension of breach of the peace and that there was forcible dispossession was correct.

Even if one were to read this judgment while interpreting the word "forcible" what has been stated is that there must be the use of threat and the threats may be of various nature. Therefore, in my opinion, I do not think that merely wrongful possession has been taken by somebody even if it is proved, it cannot necessarily mean that it is forcibly obtained possession.

26. *R.H. Bhutani Vs. Miss Man J. Desai and Others*, and he drew my attention to the observations on p. 1449, para. 14 which read as under:

The word "dispossessed" in the second proviso means to be out of possession, removed from the premises, ousted, ejected or excluded. Even where a person has a right to possession but taking the law into his hands makes a forcible entry otherwise than in due course of law, it would be a case of both forcible and wrongful dispossession.

Now reading these observation, I do not think the Supreme Court has laid down that considering the case of the applicant, who has been dispossessed, under the provisions of Section 145(4) the question of forcibly and wrongfully dispossessed means .dispossession without use of force. While I am delivering the judgment, Mr. Vashi pointed out to me that there is one more authority which he would like me to add and in order to leave no room to complain to him,--I do not wish that he should read it over to me, and whether it has any other meaning to what the Supreme Court has said or our Division Bench judgment, has said,-I allowed him to refer to the same. He has drawn my attention to Francis D'Souza Vs. Edward A.L. Gameiro, , where it is observed that a person in juridical possession of any Immovable property cannot be rightly said to be dispossessed as soon as a trespasser occupies that property. When a trespasser enters into the property in the absence of the person in possession, the latter, when he comes to know of the trespass, has still me right without recourse to a Court of law to try to secure possession back from the trespasser. In other words, a trespasser cannot merely by the act of trespass constitute himself into a person in possession. If, however, the person in juridical possession, after his physical possession, allows a sufficiently long time to pass or adopts some course such as instituting a legal action, from which an inference arises that he has mentally relinquished the possession which he had physically lost, then he can properly be held to be dispossessed. When I tried to look at these observations I have only to observe that they are of no use to Mr. Vashi at all and does not require any consideration for disposing of the issue which I am considering now.

27. Having considered all the arguments at the bar, I have come to the conclusion that the learned Additional Sessions Judge, while exercising his revisional jurisdiction, considering that the learned Magistrate has ignored certain provisions, when considering those provisions either through oversight or because of lack of any assistance from the real aggrieved party, forgot the most important word "forcible" appearing in the proviso.

28. As the case of the applicant is very clear and it is not the case made out after the applicants filed the application itself, it is her case stated in the letter dated April 18, 1974 wherein she has in so many words stated that the possession has been handed over to her by Max. Whether what Mrs. Mirchandani has instructed her attorney to write or whether what she has stated in her reply to the application u/s 145 is to be accepted or not will be a matter for the civil Court before whom the matter has already been filed and which is already having been seized of the matter, has issued an interim injunction against Mrs. Mirchandani not to part with the possession of the flat till the disposal of the suit or not to let it out to any third party.

29. As observed, I wanted to consider this and restrict my observation for consideration of the criminal revision application and I have scrupulously avoided saying anything with regard to the evidence led by the applicants or the statements made by Mrs. Mirchandani in her statement and in her notice to the

said company. Having come to this conclusion, that the learned Additional Sessions Judge while interfering with the trial Court's order has ignored the most important point and having come to the conclusion that the dispossession was forcible, I. think that he was not justified in interfering with the proceedings u/s 145 and the order passed by the Executive Magistrate.

30. In the result, this criminal revision application is bound to succeed and the order passed by the learned Additional Sessions Judge must be set aside. That will restore the original order of the Executive Magistrate. But as it has been observed before, the respondent and the original applicant u/s 145 on the very next day has filed a civil suit, I think the matter requires expeditious disposal because there is some grievance on the part of the applicant that his case may or may not fall u/s 145 of the Code, that he has been dispossessed and Mrs. Mirchandani has obtained the possession, either by some trick or by some method, which is not lawful and his legal rights have been affected by such conduct on her part. In these circumstances, I think that the civil Court, dealing with this matter should be directed that this matter should be expedited. Mr. Gumaste for the petitioner could not have any objection and did not have any objection if expeditiously the civil suit is disposed of. I think the ends of justice will be met by directing the Small Causes Court to dispose of the hearing of the suit in the Small Causes Court filed on April 23, 1974 bearing Suit No. 3859/1974. It should be expedited on priority basis. I further direct that the Small Causes Court shall take up the matter as early as possible and dispose it of before September 30, 1977.

31. Mr. Patel for the petitioner has assured this Court that the petitioner here will give the maximum co-operation in disposing of the matter in the Small Causes Court, as directed by this Court. Rule is made absolute.