
(1959) 05 P&H CK 0020
In the Punjab And Haryana At Chandigarh
Case No : Criminal Revision No. 1592 of 1958

Tara Singh and Another	Vs	APPELLANT
Gurdial Singh and Another		RESPONDENT

Date of Decision : 06-05-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35
Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : AIR 1959 P&H 518 : (1959) CriLJ 1212

Hon'ble Judges : Harbans Singh, J

Bench : Single Bench

Advocate : H.L. Sarin, K.S. Kwatra, for the Appellant; G.C. Mittal, for the Respondent

Final Decision : Allowed

Judgement

Harbans Singh, J.—The facts giving rise to this criminal revision may be slated in some detail for the pro-per understanding of the point involved. Gurdial Singh and his three brothers -- Harbans Singh Sohan Singh and Sewa Singh -- together with Dal Singh purchased one-third share in an area mea-suring 588 kanals and 15 marlas comprised in khe-wat No. 52, khatauni No. 53 of the jamabandi of 1951-52 of village Bahri, Tehsil Thanesar, District Karnal, by a sale deed registered on 20-12-1955, for a sum of Rs. 3,000/-.

This sale was pre-empted by Tara Singh by a suit dated 18-12-1956, which was decreed on 11-12-1957, on payment of Rs. 4,300/-. This amount was finally paid on 9-1-1958, within the time allowed by the decree. No appeal was filed against this decree and thus, the decree for possession by preemption of one-third share in the land detailed above became final.

On 15-1-1958, an application for execution was filed and warrants for possession were issued by the civil Court concerned on 11-3-1958. The Girdawar went to the spot on 16-4-1958, for the execution of these warrants. In the presence of Wadhawa Ram, member Panchayat, Sohan Singh Chaukidar and one Gian Singh,

the judgment-debtors were summoned.

Out of them, Gurdial Singh, Sewa Singh and Dal Singh appeared at the spot and they raised objection that out of the judgment-debtors Harbans Singh and Sohan Singh had not been informed of this execution of the warrants because Harbans Singh was employed in Malaya State and Sohan Singh was employed in the army and was posted in Mathura.

This objection was noted, but as this was no impediment against the delivery of the possession, the Girdawar gave malkana possession of one-third share of 588 kanals and to marlas, by pointing out all the khasra numbers at the spot, to Gian Singh son of the decree-holder who was his mukhtiar in the village. The report. Exhibit P. A. (on the civil file) was signed by Gurdial Singh and thumb-marked by Sewa Singh and Dal Singh judgment-debtors who were present. It was also attested by the other witnesses present. On receipt of this formal report of the execution of warrants, the execution was filed as fully satisfied on 4-6-1958.

2. Later on, when Tara Singh decree-holder tried to plough the land. Gurdial Singh and Sewa Singh, out of the erstwhile judgment-debtors, tried to interfere and on this, a report was lodged by Tara Singh on 5-6-1958, at Police Station Thanesar, that he feared breach of peace at the hands of the aforesaid Gurdial Singh and Sewa Singh and proceedings were consequently taken against both the parties under Sections 107/151. Criminal Procedure Code.

On 22-7-1958, Gurdial Singh made an application before S. Sher Singh, Magistrate 1st Class, before whom proceedings under Sections 107/151 were pending, that the police had prevented Gurdial Singh and Sewa Singh on 21st July 1958, from cultivating the land, and prayed that the police should be directed not to interfere in their cultivation of the land. After inviting a report from the Station House Officer, Thanesar, the learned Magistrate ordered that the land be attached forthwith and parties be directed to file their claims on 12-8-1958.

This order was duly got served on the parties and the land remained attached thereafter. Affidavits were filed on both sides. On the side of Gurdial Singh affidavits were filed only by the two persons concerned, and in these affidavits they had stated that they had never been dispossessed of the land by the Girdawar Qanungo and that they had been "in possession since long".

On the other side, Dal Singh, one of the judgment-debtors in the original pre-emption case, who had one-half share in the land in dispute, stated that the land at the time of execution of the warrants of possession was lying vacant and that he had given over the possession of his share to the decree-holder and that the possession over the remaining share of the other judgment-debtors was also taken over by the decree-holder who had continued to be in possession thereof.

To the same effect were the affidavits of Tara Singh, his son Gian Singh and Wadhawa Ram, member Panchayat, who was one of the attesting witnesses of

the report, Exhibit P. A. The Girdawar Qanungo was the only witness examined by the learned trial Court. He fully supported the affidavits filed by Tara Singh and his son.

Inter alia he stated that the objections raised by Gurdial Singh and Sewa Singh were noted and one of the points urged by them was that there was some dispute still outstanding with regard to the boring charges and that for this reason possession should not be given, that symbolical possession was given of the land in suit, which was one-third share in 5S8 kanals and 15 marlas by pointing out, and that actual possession by ploughing could not be given because the warrants of possession were in respect of a share in the whole land.

Ho also confirmed that at the time of the execution of warrants, the land was lying absolutely vacant because the rabi crop had already been cut. The learned trial Magistrate declared that Gurdial Singh and Sewa Singh were in actual possession of the land, and observed as follows:

"I have found from the report that he gave malkana possession of one-third share of the fields mentioned above. There is no report to show that party No. 1, i. e., Tara Singh etc., were put in actual possession of the fields mentioned above. I being satisfied by due inquiry * * * without reference to the merits of the claim of either of the said parties to the legal right of possession and having considered Ambar Ali Vs. Piran Ali and Others, and Agni Kumar Das Vs. Mantazaddin and Another, that the claim of actual possession by Gurdial Singh and Sewa Singh is true.

I do decide and declare that they are in possession of the said field numbers which are given above and are entitled to retain such possession until ousted by due course of law * * * *."

The Station House Officer, Thanesar, was sent a copy of the order with the direction to restore possession of the attached land to Gurdial Singh and Sewa Singh. The revision filed by Tara Singh before the learned Sessions Judge was dismissed and he has come up in revision to this Court.

3. The facts established on the record and the law applicable to such facts are;

(1) That actual physical possession by ploughing was not delivered to Tara Singh because under the decree he was entitled only to one-third share in the entire area measuring 588 kanals and 15 marlas;

(2) that Gurdial Singh, Sewa Singh and others were also entitled under the sale deed to this one-third share and were not entitled to the possession of any specific numbers;

(3) that by the decree for possession by preemption Tara Singh must be deemed to have been substituted for Gurdial Singh, Sewa Singh and others and he must be deemed to have been granted the right, title and interest of the judgment-debtors in this land;

(4) that at the time of delivery of possession the land was lying vacant and no crops were standing thereupon and consequently no one was "in actual physical possession of the land" in the strict sense of the term; however, in case of vacant land, the person who has a legal title to the possession of such land must be deemed to be in actual physical possession thereof;

(5) that possession was delivered to Tara Singh by the Girdawar Qanungo of this vacant land by giving him malkana possession by pointing it out at the spot in the presence of Gurdial Singh, Sewa Singh and Dal Singh and by making a proclamation by beat of drum; and

(6) that this delivery of possession must, in the eye of law, be deemed to be as effective as if the judgment-debtors have been physically ousted from the land and after the execution of the warrants, the legal title being with Tara Singh and the land being vacant, Tara Singh must be deemed to have been in physical possession of the same.

Now, according to the affidavits filed by Gurdial Singh and Sewa Singh, they claim that they were never dispossessed by the Girdawar Qanungo and that they have been in possession of the land since long. In other words, Gurdial Singh and Sewa Singh do not claim to have regained possession of the land legally or otherwise from Tara Singh after the date of the execution of the warrants.

It is also not claimed by them that they have exercised any right over the land after the date of the execution of the warrants by actually ploughing the land or otherwise. In fact, it appears that as soon as Tara Singh tried to cultivate the land, Gurdial Singh and Sewa Singh tried to interfere, and Tara Singh immediately approached the police authorities who took proceedings under Sections 107/151," Criminal Procedure Code.

Thereafter, when Gurdial Singh and Sewa Singh tried to plough the land, they were prevented from doing so by the police and they came to the Court with their application dated 22-7-1958, mentioned above, whereupon the Magistrate attached the property.

4. Thus, the sole question for determination is as to who must be deemed to be in physical possession of the land, As already stated, on 16-4-1958, -- the date of the execution of the warrants -- the land was lying vacant and nobody was in actual physical possession thereof. Similar state of affairs seems to have continued till 5th of June when a report was lodged by Tara Singh with the police and also till 29th July, when the learned Magistrate attached the property and on 16-9-1958, when the trial Court finally passed the orders declaring Gurdial Singh and Sewa Singh to be in possession.

There can be no manner of doubt that delivery of possession, under Order 21, Rule 35 in execution of a decree, to the decree-holder as against the judgment-debtor, is as effective as actual physical possession (Mst. Mewa and Another Vs. Amar Singh and Others, Shri Radha Krishna Chanderji v. Ram Bahadur AIR 1917

PC 197; Juggobundhu Mukherjee v. Ram Chunder Bysack ILR 5 Cal 584 . This would particularly be so where under the circumstances of the case actual physical possession cannot possibly be given.

5. Rajendra Narayan Bhanja Deo Vs. Cahudhuri Chintamani Mahapatra, was a case u/s 145, Criminal Procedure Code, and the relevant head-note runs as follows:

"Where symbolical possession of the judgment-debtor's zamindari property is given to the decree-holder who afterwards finds that his possession is being interfered with by the judgment-debtor and initiates proceedings u/s 145 for retaining possession, the Magistrate cannot refuse to entertain the proceedings on the ground that the decree-holder had not got actual possession from the Civil Court.

If, however, circumstances show that the decree-holder or auction-purchaser has slept over his right and has allowed the judgment-debtor to regain possession of the property and he is at the time of the proceeding in peaceful possession of it, the matter stands on a quite different footing. But in such cases the Magistrates must take it as an indisputable fact, once delivery of possession is proved, that on the day of the delivery of possession the party to whom possession was given was in possession as against the man who was party to that delivery of possession and was bound by the writ.

He must start with the presumption that the state of things which existed on that day continued to exist thereafter unless the contrary is established. The judgment-debtor can only succeed if he establishes beyond doubt that he had completely ousted the man who was put in possession by the Court and was in peaceful possession of the property in dispute."

While dealing with the question of actual or symbolical possession it was observed that the manner of delivery of possession is according to the nature of the possession of the man who is to be dispossessed and not that its effect in law is different as against the judgment-debtor. The relevant portion of head-note (b) then runs as follows:

"If the property is in actual physical occupation of the judgment-debtor, for instance, if the property is a house and the judgment-debtor is residing in it he must be dispossessed of it by being bodily removed from it * * * * But if the property is zamindari or a tank or mineral rights in indirect possession of the judgment-debtor, though the delivery of possession will be by ousting the judgment-debtor from it, it is obvious that the judgment-debtor cannot be physically removed from it and the decree-holder * * * put in physical occupation of it. The delivery of possession in such case is by proclaiming that decree-holder has been put into possession. This- delivery of possession is not symbolical but actual and is as effective against the judgment-debtor as his physical removal from a house.""

6. With respect, I feel that the observations of the learned Judge in the above-noted case represent the true state of law. If it were to be held otherwise, it will put at naught the formal proceedings of a Civil Court and would deprive the decree-holder of the valuable rights acquired by him under the decree and as a result of the execution of the warrants issued by the Court.

As already explained, in the present case, the judgment-debtors were in possession of a share in the area measuring 588 kanals and 15 marlas and the only way in which they could be ousted, and the other party put in possession, was by giving the decree-holder possession by pointing out and by proclamation. There might have been some difficulty if the judgment-debtors had been in actual physical possession of the land by their crops standing thereupon, but as the land was lying vacant, as already discussed, no one was in actual possession of the same,

The judgment-debtors were ousted from whatever possession they had by legal formalities carried on by the Girdawar Qanungo. After the execution of the warrants in the manner detailed above, in law the possession passed on to the decree-holder and that state of affairs must be deemed to have continued thereafter unless Gurdial Singh and Sewa Singh can show that by some definite overt act they regained the possession from the decree-holder.

7. The cases referred to by the learned trial Magistrate are clearly distinguishable. In Ambar Ali Vs. Piran Ali and Others, the property consisted of 14 bighas of land and two homesteads in occupation of the other party and the latter were not removed from the homesteads at the time the delivery of possession was given and all that the peon did was to read his writ and plant a bamboo on the agricultural land.

It is obvious that this type of delivery of pos-session was not the delivery of possession which the nature of the property was capable of. Similarly, in AIR 192 Cal 610 (page wrongly given as 614 in the trial Court's judgment), (FB), actual possession of the homestead was not given and possession of only scattered plots was given. The Full Bench merely stressed the point that even if a person is in possession of the land not under a legal title, that possession must be recognized under S, 145.

There is no dispute with this proposition of law. In the present case, as already discussed, Gurdial Singh and Sewa Singh, judgment-debtors cannot be said to have been in actual physical possession of the land after 16-4-1958. The learned trial Magistrate has been misled by the words "symbolical possession" as distinguished from "actual possession" and he failed to notice two things, first, that as between the parties to a decree symbolical possession and actual possession are equally binding, and secondly, that the land was lying vacant and by delivery of the so-called symbolical possession to the decree-holder of the vacant land, actual possession must, in law, be deemed to be with the decree-holder, who, as a result of the execution, became legally entitled to the

possession.

8. For the reasons given above, therefore, I feel that the order of the learned trial Magistrate declaring Gurdial Singh and Sewa Singh to be in possession of the land cannot be sustained and I, therefore, accept this revision, set aside the order of the Courts below and declare that the possession on the relevant date when the property was attached was with Tara Singh who is the legal owner.

I further direct that the possession be redeliver-ed to Tara Singh if the same has already been delivered to Gurdial Singh and Sewa Singh under the orders of the learned Magistrate.