BOMBAY HIGH COURT

Bai Jiba

Vs

Chandulal Ambalal

(Fawcett and Madgavkar, JJ.)

05.08.1925

JUDGMENT

Fawcett, J.

1. This case raises a dispute under Section 145 of the Criminal Procedure Code. It is eminently a beneficial section parsed with the express object of preserving the peace. But in many cases it is apt to result in the parties treating it as a sort of preliminary suit with reference to the merits of their respective claims to certain immovcable property, though both parties know that those disputes cannot finally be determined except by a civil Court. I feel, therefore, that when one yes a dispute of that nature, as we have in fact here, there is an unfortunate waste of money by the litigants, and to some degree a waste of public time, in considering detailed facts or difficult points of law, because after all the only order that can be passed by the Court is a temporary order to preserve the peace, while the civil rights of the parties to the property in dispute are being settled.

2. In the present case it appears that one Shivlal died on January 9, 1922, leaving a widow Jiba and a brother Bapalal. The widow Jiba alleges that she was in sole possession of the property after the death of her husband, and remained no with the consent of Bapalal, who was the heir to the property subject to the widow's right of maintenance. It is further alleged that the widow was the manager of the property, She brought these proceedings under Section 145, Criminal Procedure Code, against one Chandulal, alleging that Chandulal had wrongfully taken possession of the property and dispossessed her (Jiba) of that property. The learned Magistrate does not find definitely whether the act of dispossession was on November 21, 1923, or on November 22, 1923. He says if it was on November 21, then no force was used. So it was not a forcible dispossession within the meaning of the proviso to Sub-section (4) of Section 145. But if it was on November 22, then it was a forcible dispossession.

3. The ground on which the learned Magistrate came to his decision to dismiss the application

was that whether the date was the 21st or the 22nd, and whether it was a forcible entry or whether it was not, it was not a wrongful dispossession within the meaning of the above proviso, because Chandulal was then rightfully entitled to possession of the property under an agreement for sale which Bapalal the heir had entered into on September 12, 1923, and under a further document of November 21 by which Bapalal had purported to give him the possession of the property.

4. The view the learned Magistrate took of that word " wrongful " was that it involves that the dispossesor has no legal right to the possession of the property. In support of that view he referred to the possession of " wrongful gain " in Section 23 of the Indian Penal Code. Before us it has been conceded by counsel on both sides that this view of the proviso in question cannot be supported. If one considers for a moment the general principles applicable to a forcible entry into a building, one will see the reason why. One main anxiety of the law is to preserve the King's peace. Accordingly even a rightful owner, such, for instance, as a landlord who is entitled to possession in a case where his tenant is wrongfully holding over, can only take possession peaceably. If his possession is opposed however wrongfully, then the landlord has no right to break down the doors, to assault the inmates and to turn them vitamins out of the building He must go to the civil Court and get the necessary warrants or ejectment orders to enable, if necessary, the proper authorities to effect a forcible entry or a forcible ejectment according to law.

5. But, if the view of the learned Judge was to prevail, then it would not matter for the purpose of this proviso whether the landlord came with an armed force and broke down the doors and forcibly turned the inmates out or not That, I think, is not the true view of the section, I think the distinction drawn is between forcible entries which are rightful and forcible entries which are wrongful: and that that depends on whether the person entering was entitled to use force, and not merely on whether he had a legal right to possession. If, for instance, a landlord came armed with a writ or a warrant in his favour to eject his former tenant, then although force might in the end be used, it would not be a wrongful dispossession. If, on the other hand, he took the Jaw into his own hands and used force without any such legal sanction by means of a warrant as I have referred to, .then that would be an instance to my mind of where he would have forcibly and wrongfully dispossessed his former tenant,

6. I appreciate of course that the words are " forcible and wrongful." On the other hand, the construction which I prefer, receives assistance, I think, from the opening part of Sub-section (4). The proviso in question is only a proviso to that particular sub-section, and that sub-section opens by saying 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" do certain things But if the opposite construction was to prevail, then for the purposes of determining whether any particular

case came within this proviso, the Magistrate would have to determine that very thing, via., whether on the merits or on the claims put forward, A or B had a legal right to enter into possession.

7. In the view, therefore, which I take, the ground on which the learned Magistrate dismissed the application cannot be supported.

8. But we then come to this difficulty which, speaking for myself, I have not been able to surmount, and that is whether facts are so found as to enable us to make a definite order on this application. In the first place, as regards the date of dispossession, arid whether it was forcible or not, there is, as I have already pointed out, no finding. The learned Magistrate says it may be one day or another day. If it is the first day no force was used. If it in the second any, there was force. We, therefore, think we must have a definite finding on that point before we can decide what is (he proper order to make having regard to our decision on the point of Jaw.

9. Speaking for myself, I also feel another difficulty, viz., what is the learned Magistrate's finding as to who was in possession of the property immediately prior to the dale on which Chandulal took possession. The finding on p. 11 of the judgment is:Thus we find that oral evidence on both the sides is almost useless for arriving at any definite conclusion about the actual possession of the dehla under dispute." It may be that the learned Magistrate is there referring to the oral evidence as opposed to some of the rest of the evidence. What I should like to have is a definite finding on all the evidence in the case as to who the learned Magistrate is of opinion was in possession at this date, viz., whether it was Jiba and Bapalal or either and which of them or how otherwise. For instance, at p. 9 of the judgment, the learned Magistrate finds out that the ownership of Bapalal was not denied by Jiba. Then he refers to certain rent-notes passed apparently in favour of both of them. He then states he believes the deposition of I he pleader entirely, who states that Bapalal told him that the whole property was in possession of Bai Jiba, Then later on the learned Magistrate says :-" The only thing that is established from the evidence of Bai Jiba and her witnesses is that the dehla under dispute was of the joint ownership of Jiba and Bapalal and that Bipalal was using it for sitting purposes whenever he was at Nadiad." But the learned Magistrate had already found, as I understand it, that the ownership as distinct from possession was in Bapalal alone. Whether thus in this last quoted passage he intended to refer to joint possession and not joint ownership I am not altogether clear. 1 merely mention these passages to show why I am unable to see clearly the conclusions of fact which the Magistrate has arrived at I of course follow that in the view he took, these points were not essential because he decided the case on the point of law. But as we are unable to take the same view on that, it necessarily follows that we must be definite on the findings of fact.

10. I would, therefore, as is suggested by the learned Government Pleader, remand this case to

the learned Magistrate for his findings on the definite issues which will be mentioned in the judgment of my learned brother.

11. Speaking for myself, I would like to add this, that one or the other of the parties had much better file a civil suit to determine their rights and then have the present proceedings stayed. Otherwise what will probably happen is that they will go back to the Magistrate and incur further expense, and come back hero with more expense, and even then the rights of the parties will not finally be determined That can only be determined in a civil Court. But of course if the parties choose to go on fighting and spending moneys in this way, I regret I do not see my way to stop them doing it.

Pratt, J.

12. The Magistrate has not found whether the opponent took possession on the 21st or 22nd.

13. If possession was taken on the 22nd he says it was forcible but not wrongful because the opponent was acting under, or under colour of, an authority signed by the owner. But this is a misconstruction of the word " wrongfully " in the first proviso to Section 145 (4). The section makes it clear that the Magistrate is not concerned with title or with claims of right. The phrase " forcibly and wrongfully " has the same meaning as forcible entry without due warrant of law under the English statute. A forcible entry must be wrongful unless it is in execution of a legal process. It was held in *Frarikum v. The Earl of Falmouth*[1] that in an action for trespass the word " wrongfully " does not put title in issue. The word "wrongfully, " therefore, means no more than "otherwise than in due course of law " in Section 9 of the Specific Relief Act. The proviso was inserted because under the Code of 1872 the Courts were embarrassed by having to recognise a forcible possession. The case of In the matter of the petition of *Mohesh Chunder Khan*[2] is an instance where the Court overcame the difficulty by declaring that the possession to be recognised must be peaceful possession.

14. On the other hand, if possession was taken on the 21st the Magistrate says the proviso does not apply as the possession was not forcibly taken-but the Magistrate found Pathans on the premises and it is not clear whether he has understood possession taken by a show of force is a forcible dispossession. The case of *Edwiolc v. Haukes*[3] is a clear exposition of the law on this point.

15. I am inclined to think that the Magistrate intended to find that the petitioner was in possession. But his judgment on this point is not very clear and I would, therefore, remand the case to the Magistrate for findings on the following issues :-

(1) Whether the possession was taken by the opponent Chandulal on November 21 or 22, 1923 ?

(2) Whether the possession was taken on either of those dates foicibly and wrongfully ?

(3) Whether immediately prior to such dispossession by opponent the dehla in dispute was in possession of Bai Jiba or how otherwise ?

16. Findings to be returned within two months.

17. The findings certified by the Magistrate were (1) that the possession was taken by Chandulal on November 22, 1923, (2) that the possession was taken forcibly and wrongfully, and (8) that the dehla was in Jiba's possession immediately prior to such dispossession by Chandulal.

18. Subsequently, Chandulal tiled a civil suit in the Court of First Class Subordinate Judge at Nadiad for specific performance of the agreement, and obtained an interim injunction restraining Jiba from interfering with Chandulal's possession.

19. The findings returned by the Magistrate were heard by the High Court on July 1, 1925, when their lordships (Fawcett and Madgavkar JJ.) delivered the following judgment:-

Fawcett, J.

20. The present application for revision was before this Court in December last and the case was remanded to the Magistrate, First Class, Nadiad, for findings on certain issues. It was explained in the judgment of this Court that the Magistrate had placed a wrong construction on the word "wrongfully" in the first proviso of Sub-section (4) of Section 145 of the Criminal Procedure Code, and as the exact facts were not sufficiently ascertained this remand was necessary. The result of the Magistrate's findings is that he holds that the opponent Chandulal took forcible and wrongful possession of the premises in question on November 22, 1923, from the petitioner Bai Jiba, who was in possession immediately prior thereto, He had in his previous order held that the conditions of Section 145 were satisfied and that he had jurisdiction to pass an order under that section.

21. In view of his misconstruction of the word "wrongfully," the order that he passed wan one in favour of the opponent Chandu-lal Ambalal, declaring him to be entitled to possession of the premises until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction under Section 14"?, Sub-section (6), Criminal Procedure Code. It follows from the findings of the Magistrata, and this in not disputed by Mr. Velinker for the opponent, that the applicant is entitled to have that order set aside and to have an order in her favour substituted under Sub-section (6) of Section 145, Criminal Procedure Code, unless this is prevented (as he contends it is) by certain events that have happened since the Magistrate gave his findings. These findings were given on June 13, 1925, and affidavits have been put in

yesterday that a suit was filed in the Court of the First Class Subordinate Judge, Nadiad, by the opponent against the petitioner and her brother-in-law Bapalal for specific performance of a written agreement, under which the opponent claims to be entitled to the premises in question, and that an interim injunction has been granted by the Subordinate Judge in that suit, restraining the dtfeudality from taking possession of the building or from disturbing the plaintiff or his tenants in its possession. Mr. Velinker urges that, in view of this injunction, the Court should, at any rate, not act under the hitter part of Sub-section (6), namely, exercise its power of restoring possession to the petitioner. He also urges that, in view of this injunction, the Court should refrain from passing an order even under the first part, declaring the petitioner to be entitled to possession until evicted in duo course of law and forbidding all disturbance of such possession until such eviction.

22. It is of course desirable to avoid a conflict of authority between a criminal and a civil Court, and Mr. Thakor for the petitioner does not object to the question of restoration of possession being hold over until the petitioner has had an opportunity of appearing in the injunction matter and endeavouring to get that injunction dissolved, or at any rate, not continued. That, incur opinion, is the best course to adopt. It is quite possible that, when the Subordinate Judge has considered the effect of the proceedings between the parties under Section 145, Criminal Procedure Code, he will not continue the injunction, in view of the fact that Sub-section (6) and the connected form No. 22 in Schedule V, allow a Magistrate to give directions as to possession with a legal effect that is valid until actual emotion or ouster by due course of law, But in saying this, I do not of course in any way wish to prejudge the question, which will have to be determined by the Subordinate Judge and which it is entirely for him to decide. But in regard to the other question whether we should not substitute the declaratory order that we should normally have passed for the Magistrate's order which is the subject of our revision, it seems to me clear that it would be unfair to allow the opponent all the advantage of his forcible and wrongful dispossession, merely because he has, since the Magistrate's findings, gone to the civil Court, almost at the very last minute before the matter came before us for final orders Proceedings under Section 145 are generally taken as a preliminary skirmish before the actual battle in a civil Court One side or the other generally gets some advantage out of the proceedings. But, in the present case, the advantage should, under the decision of the Magistrate as now finally settled, be given to the petitioner, and any subsequent civil suit ought to start 011 the basis of her having obtained that advantage. I am certainly against any action which would allow her to be jockeyed out of this advantage by manoeuvres of the kind that have taken place in the present case, and I think that the matter should be disposed of on the basis as if the Magistrate himself had had jurisdiction to alter his previous order on June 13, 1925, when he recorded his findings. Subject to the decision in a subsequent civil suit between the parties, lie could then have passed an order

in favour of the petitioner just as he had passed an order in favour of the opponent in the original proceedings, Again, this Court could, in December 1924 have passed a similar order, had it not been necessary to clear up some of the facts. Therefore, in spite of the interim injunction, I think that this Court should at once pass an order substituting the petitioner for the opponent in the actual order that the Magistrate passed, that is to say, declaring that the petitioner should be treated as being in possession of the property in dispute inasmuch as she was forcibly and wrongfully dispossessed thereof by the opponent on November 22, 1923, and so entitled to retain what the law considers in the circumstances to be her actual possession, until ousted by due course of law, and strictly forbidding any disturbance of her possession in the meantime. Of course in view of the subsequent suit and the undesirability of any judicial conflict, this last prohibition is without prejudice to what may be decided in the injunction matter and what to may further order about it, when the matter comes up before us again, B. 171

23. The other question before us, namely, whether we should actually direct the Magistrate to re-tore possession to Bai Jiba, is adjourned for three weeks.

24. After hearing counsel we think that the Magistrate's order that each party should bear his own costs should also be revised and that, as the petitioner has substantially succeeded and it has been hold that she was wrongfully dispossessed by the opponent, we should substitute for that order an order that the opponent should bear the petitioner's costs incurred in the Magistrate's Court, including any costs in connection with the remand to his Court in December 1924: the Magistrate to assess the costs so recoverable by the petitioner.

25. On July 27, 1925, the Subordinate Judge dissolved the interim injunction. Cbandulal appealed to the District Court of Ahmedabad against the order.

26. The revisional application of Jiba was again heard by Fawcett and Madgavkar JJ. on August 5, 1925.

Fawcett, J.

27. The First Class Subordinate Judge of Nadiad has now passed an order on July 27,1925, dismissing the application for a temporary injunction with costs, Thin means that the interim injunction that he had granted is dissolved. That being so, there is nothing now to prevent our directing the Magistrate under Sub-section (6) of Section 145 to restore possession of the premises to the applicant Bai Jiba, who (it has been held) was forcibly and wrongfully dispossessed thereof. The only request that is made to us is that we should restrain our hands at present, on the ground that an appeal has been made to the District Judge from the Subordinate Judge's order. An affidavit has been filed which states that such an appeal has been made and

shows that the District Judge has refused to grant an interim injunction ex parts. We think that there is clearly no sufficient ground for our not now passing the order that we would have done on July 1 last, but for the impediment that existed owing to the Subordinate Judge's interim injunction. That being cleared out of the way, we do not think that there la any reason why the opponent, who resorted to the civil Court at the very last stage, should benefit by this manoeuvre. The restoration of possession, just like the injunction, will be subject to the decision of civil Courts in the matter, and, therefore, no undue hardship is caused to the opponent by giving the applicant the full benefit of the proceedings under Section 145, Criminal Procedure Code, in which the has succeeded. Accordingly, we refuse to grant a further adjournment, and now direct the President Magistrate, First Class, Nadiad, to restore possession of the premises in question to the applicant Bai Jiba, the widow of Shivlal Magankl.

28. In this case we think that costs should be allowed to the petitioner on the ordinary appellate side scale. It is no doubt true that the powers of the Civil Procedure Code as to costs cannot be imported into criminal proceedings. But in the present case the Magistrate can award costs under the express provisions of Section 148, Sub-section (3), and costs have in fact been so awarded. It is argued that we have no power in revision to pass an order for costs incurred in the hearing of the application to this Court. I think, however, that such an order is covered by the wide powers given in Section 439, Criminal Procedure Code. This refers to Section 423, and the present case can be held to foil under Clause (d) of that section. As the Magistrate has power to award costs, it is a consequential order that is just and proper to allow the applicant the costs incurred in the application to this Court, which was necessitated by a misapprehension of the Magistrate and in which she has succeeded There is also a precedent in the order passed by this Court in revisional application No. 149 of 1924, in which a similar order of costs was made. The applicant is, therefore, allowed her costs, as already mentioned.

Cases Referred.

1(1835) 2 Ad. & E1. 462
2(1878) I.L.R. 4 Cal. 417
3(1881) 18 Ch. D. 199