BOMBAY HIGH COURT

Savlaram Sadoba Navle

Vs

Dnyaneshwar Vishnu Chinke

(John Beaumont, Kt., C.J. N Wadia, J.)

18.11.1941

JUDGMENT

John Beaumont, C.J.

1. This is an application in revision which, in substance, asks us to make an order for possession under Section 522 of the Criminal Procedure Code. Sub-section (1) of that section provides :Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation and it appears to the Court that by such force or show of force or criminal intimidation any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of the conviction, order the person dispossessed to be restored to the possession of the same.

2. Sub-section (3) provides that an order under that section may be made by any Court of appeal, confirmation, reference or revision.

3. Now, in this case on November 30, 1940, an accused person was convicted of criminal house-trespass under Section 448 of the Indian Penal Code. From the learned Magistrate's judgment there is no doubt that criminal intimidation was used; there is a clear finding to that effect. I have no doubt that had the learned Magistrate been asked to make an order under Sub-section (7) of Section 522 of the Criminal Procedure Code, he would have done so, because the evidence showed that the complainant had purchased the house property in question, which had formerly belonged to the accused, at a court-sale in 1939, and had been put into possession by the Court; he had left a watchman to look after the house in his absence, and the accusedi intimidated the watchman, and recovered possession of the house which had been given to the complainant by the Court. So that on the merits it seems to mei clearly to be a case in which an order ought to have been made under Section 522 for possession ; but unfortunately the learned Magistrate was not asked at the hearing to make an order for possession. An application, however, was made to him on January 8, 1941, and on May 26, 1941, the learned Magistrate dismissed that application

on the ground that it was not made within one month from the date of the conviction, and, therefore, he had no jurisdiction to make the order. That order is clearly right, because at the expiration of a month the Magistrate is functus officio. Then the complainant applied on July 9, 1941, to the Sessions Judge of Poona for revision of the order refusing to restore possession, and asking the Sessions Judge himself to make an order for possession. The learned Sessions Judge expressed the opinion that the application did not lie to his Court, and it was allowed to be withdrawn. The learned Sessions Judge was not a Court of revision, and I think he could not have made an order himself under Section 522(3), but he might have referred the matter to this Court, if he had thought that course desirable. However, in fact the application was withdrawn on July 10, 1941 ; and on September 3, 1941, that is, within sixty days, this application was made asking this Court to make an order for restoration of possession under the inherent jurisdiction contained in Section 561A of the Criminal Procedure Code. There is no question of inherent jurisdiction. The question is whether we have jurisdiction to make the order under Section 522(5), and we propose to treat the application as one under that Sub-section asking us in revision of the Magistrate's order refusing to make an order for possession to make an order ourselves.

4. Under the rules of this Court we do not normally entertain applications in revision, unless an application has previously been made to the Sessions Court or the District Magistrate, as the case may be. But in this case within due time an application was made to the Sessions Court, and if the Sessions Judge had dismissed the application, the applicant could have come in revision to this Court. As he withdrew his application, that course is not open. But so far as the High Court rules are concerned, I think we can take the application to the Sessions Court as sufficient compliance with the spirit of the rule, and we may, therefore, properly entertain this application in revision against the Magistrate's order.

5. The real point which arises is whether we have jurisdiction to make the order under Section 522(3). It may be said on the one hand that the reference in Sub-section (3) of Section 522 to " a Court of appeal or revision " is to a Court hearing an appeal or revision application against the accused's conviction, when, no doubt/ an order could be made under Section 522(3), and that it is illogical on an application to revise an order of the Magistrate refusing possession under Section 522 (1) to hold that the order was perfectly right, but that this Court ought nevertheless to make an order substantially in the terms of the order which the Magistrate had refused. That is the view taken by a Judge of the Peshawar Judicial Commissioner's Court in Said Umar w. Abdulkadir1. But after all legislation is not necessarily founded on logic, and it may be that the legislature intended that whilst a Magistrate must make an order within a limited time, it should be open to a Court of appeal or revision to make an order after that time, which the Magistrate himself could not have made. That is the view adopted by the Patna High Court in Fida Hussain v. Sarfaraz

Hussain2 and in Rameshwar Singh v. King-Emperor3- and by the Allahabad High Court in Emperor v. Nihal Singh4. In those cases it was held that, notwithstanding that there was not before the Court any application in appeal or revision against the conviction of the accused, and notwithstanding that the Magistrate had rightly dismissed the application for an order for possession under Section 522(1) because made more than a month after the conviction, and although that order was the only one brought up in revision, still the High Court could under Sub-section (3) of Section 522 make an order for possession in a proper case.

6. In my opinion, the view of the Patna and Allahabad High Courts is the correct one. We are hearing in this case a revision application, and, therefore, we are a Court of revision within the meaning of Section 522(3), and it seems to me, therefore, that we have jurisdiction to make an order under Section 522(1), and as we are satisfied on the merits of the case as found by the learned trial Magistrate that an order ought to be made under that section, we propose to make one.

7. We order that the, complainant be restored to possession within one month.

N.J. Wadia, J.

1. I agree.