(1960) 02 GAU CK 0003

Gauhati High Court

Case No: Misc. Appeal (F) No. 5 of 1959

Brojendra Kumar Sen Gupta		APPELLANT
	Vs	
Jitendra Chandra Sen and Others		RESPONDENT

Date of Decision: Feb. 29, 1960

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2
- Criminal Procedure Code, 1898 (CrPC) - Section 144, 145, 145(4), 145(6), 146

Hon'ble Judges: C.P. Sinha, C.J; H. Deka, J; G. Mehrotra, J

Bench: Full Bench

Advocate: S.K. Ghose and U.C. Tahbildar, for the Appellant; S.C. Nath, N.M. Lahiri and S.L. Sharma, for the Respondent

Final Decision: Allowed

Judgement

C.P. Sinha, C.J.
This is an appeal by the Plaintiff whose application for an order of injunction under Order 39, Rules 1 and 2 of the Code of Civil Procedure, has been disallowed by the Court below. The points that arise for decision are:

1. Whether the provisions of Order 39, Rules 1 and 2. Code of Civil Procedure, have any application if the Defendant or Defendants has or have been declared to be deemed to be in possession under the provisions of Section 145, Criminal Procedure Code?; and

2. Whether the Appellant is entitled to an order for injunction, if the first question mentioned above is decided in his favour?

2. The facts giving rise to this appeal may be shortly stated as follows: The Plaintiff-Appellant is the son of one Satyendra Chandra Sengupta. Satyendra Chandra Sengupta had four other brothers, namely, Jitendra (Defendant No. 1), Hirendra (Defendant No. 2), Sailendra (Defendant No. 3), and Nirendra (Defendant

No. 5). The Plaintiff brought Title, Suit No. 104 of 1958 in the Court of the Subordinate Judge, Gauhati for declaration of his title and for confirmation of his possession over 2 kathas 17 lechas of land with houses thereon. Out of this property, on 15 lechas of land, there is a house with, C.I. sheet roof. In regard to this house and land, there was a proceeding u/s 145, Criminal Procedure Code in the Court of the Magistrate at Gauhati in which the Defendants Nos. 1 and 4, a tenant of the house, were the first party and the Plaintiff and Defendant No. 3, were the second party.

In that case, the proceeding u/s 145, Criminal Procedure Code, was drawn up on 18-5-1957, and it was disposed of on 5-8-1957, and the learned Magistrate in that proceeding declared the possession of Defendants Nos. 1 and 4 under the provisions of Section 145, Sub-clause (4), proviso 2, on his finding that the Plaintiff had dispossessed Defendants Nos. 1 and 4 forcibly and wrongfully within two months next before the date of the order u/s 145. Against the order of the learned Magistrate, a reference was made to this Court and on 25-11-1958, the reference was rejected. On 2-12-1958 within few days, the present suit has been filed for declaration of title, confirmation of possession and for permanent injunction against the Defendants restraining them from taking possession of the property, which is the subject-matter of the proceeding u/s 145, namely the house and land measuring 15 lechas of land.

The Plaintiff''s case is that he is the sole owner of the property in suit including the 15 lechas of land by right of inheritance from his father and that these Defendants, brothers of the Plaintiff''s father had no right of any kind in the suit property. His further case is that he is in possession of the house and the 15 lechas of land aforesaid, as the possession of the house was relinquished in his favour by Defendant No. 4, who was in possession as a tenant, on 1-5-1957. The application under Order 39, Rules 1 and 2, Code of Civil Procedure, was objected to by Defendant No. 1, Jitendra, who challenged the maintainability of the application for injunction in law as also on facts.

3. The Court below after hearing the parties came to the conclusion that the above mentioned application did not attract the provisions of Order 39, R. l, and so far as the application of Rule 2 was concerned, he held, following the case of Kripa Natha Chakravarty and Others Vs. Rup Chand Lunawat, that as there was an order u/s 145, Criminal Procedure Code, in favour of the opposing (Defendant, the provisions of Order 39 were ruled out. He also held that the Plaintiff having been found to have forcibly dispossessed the opposite parties, the latter must be held to be in possession in law, at the time of the suit and therefore, the possession of the Petitioner-Plaintiff being illegal in view of the aforesaid order u/s 145, Criminal Procedure Code, the question of balance of convenience in such a case did not arise and the Plaintiff was not entitled to any order of injunction.

4. The Plaintiff feeling aggrieved by the order of the learned Subordinate Judge disallowing injunction, has come up in appeal. The matter was first placed for hearing before a learned single Judge of this Court, who referred the matter to a Division Bench and the Division Bench in view of the previous decision of this Court as mentioned above, considered it desirable that the matter should be thrashed out and finally decided by a Special Bench, and hence this appeal has been heard by the Special Bench.

5. The first question that has to be tackled is whether the provisions of Order 39, Rule 1 or Rule 2, have any application in a case where there has been an order against the Plaintiff-Petitioner in a proceeding u/s 145, Sub-clause (4), proviso 2, of the Criminal Procedure Code. I should now like to read the relevant portions of Section 145, Criminal Procedure Code:

Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, ...he shall make an order in writing, ...requiring the parties concerned in such dispute to attend his Court...within a time to be fixed by such Magistrate, and to put in written statements of their respective claims...and further requiring them to put in such documents, or to adduce, by putting in affidavits, the evidence of such persons, as they rely upon in support of such claims....

4. The Magistrate shall then, without reference to the merits of 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, 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 (second proviso) further that, if it appears to the Magistrate that any party has within two months next before the 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:...

Party in possession to retain possession until legally evicted.-- (6) If the Magistrate decides that one of the parties was or should under the second proviso to Sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbances of such possession until such eviction and when he proceeds under the second proviso to Sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed....

In the present case, as I have already indicated, the Defendant No. 1 was held by the learned Magistrate to have been forcibly dispossessed by the Plaintiff within two months next before the date of the order and the learned Magistrate in the concluding part of his order, stated as follows:

On the basis of the above, I hold that the 2nd party secured forcible and wrongful possession of the subject of dispute within 2 months next before 18-5-1957....

As regards the question whether this is a fit case for applying the discretionary powers conferred by the second proviso below Sub-section (4) of Section 145, Code of Criminal Procedure., I have to take into consideration the fact that the 1st party No. 2 Jitendra Chandra Sen has been in exclusive possession of the subject of dispute at least since 1946 until dispossession and that 1st party No. 1 (Defendant No. 4) has been in possession for about 6 years since 1951. To allow such long possession to be disturbed otherwise than by the due process of law will in my view be extremely unfair. In view of this and of what is stated above, I hold that the 1st party shall be treated u/s 145(4), Code of Criminal Procedure., proviso 2, as though in possession of the subject of dispute on 18-5-1957. I decide and declare the possession of the 1st party in the subject of dispute and entitled to retain such possession until evicted by due process of law and forbid all disturbance of such possession until such eviction.

The learned Magistrate, however, failed to restore to possession the party forcibly and wrongfully dispossessed as provided for by Sub-clause (6) of the section.

6. The question that naturally arises is whether the declaration of possession in the circumstances mentioned above can debar the Plaintiff in a Civil Court from obtaining an order of injunction under the provisions of Order 39 of the Code of Civil Procedure. The fact is that the Defendant No. 1 was not in actual physical possession on the date when the proceeding u/s 145, Criminal Procedure Code was started. The Magistrate, however, was entitled in his discretion to hold the first party to the proceeding, namely Defendants Nos. 1 and 4 as being in possession, although in fact they were not in possession. Sub-section (6) of Section 145 empowers the Magistrate to "restore to possession the party forcibly and wrongfully dispossessed", if he had decided to "treat the party so dispossessed as if he had been in possession"" on the date of the proceeding. We find in this case that the learned Magistrate treated the Defendant No. 1 and Defendant No. 4, who had been dispossessed, to be deemed to be in possession. If he had so held, under Sub-section (6) of Section 145, Criminal Procedure Code, it was open to him to restore to possession the party, who had been forcibly dispossessed. He did not do so Rather, on the other hand, he said:

I decide and declare the possession of the 1st party in the subject of dispute and entitled to retain such possession until evicted by due process of law and forbid all disturbances of such possession until such eviction.

In a case like this, there is no question of retention of possession, because the man was not in possession. The learned Magistrate may have passed, as I have said above, an order under Sub-section (6) of Section 145 and may have taken steps to restore the possession to Defendants Nos. 1 and 4 who, according to him, had been

forcibly dispossessed from the land and house, which is the subject-matter of the proceeding u/s 145. He did not do so. If he had taken recourse to his powers under Sub-section (6) of Section 145, and restored to possession the Defendants Nos. 1 and 4, different considerations may have arisen. But we are not confronted with such a position. The fact remains that on the date when the proceeding terminated and on the date when the suit was filed and an application under Order 39 under the Code was made, the Plaintiff had been in possession.

The mere order of the Magistrate u/s 145, Criminal Procedure Code, that a party may be treated to be deemed to be in possession does not in any manner affect the jurisdiction of the Civil Court, if an appropriate case is made for the exercise of its discretion under Order 39 of the Code of Civil Procedure, The second proviso to Sub-section (4) of Section 145 is, in my opinion, enacted to help maintain the peace that provision had not been enacted, occasions may have arisen where the effort of one party on the other to snatch possession from the other hand caused breach of peace and breaking of heads. That, however, does not alter the position in fact as to whether one or the other party is in possession. I am confining myself to the position that the Defendant No. 1 or the tenant Defendant No. 4 was not in possession, when the proceeding u/s 145, Criminal Procedure Code, was instituted and that the Plaintiff remained in possession in spite of the order u/s 145, Criminal Procedure Code, and was in possession, when the application under Order 39 of the CPC was made.

The provisions of Section 145, Criminal Procedure Code, enable a Magistrate under that section to hold that one of the parties to the proceeding is in actual physical possession. It also enables him to hold that under certain circumstances, if one of the parties is not actually physically in possession, that party may still be held to be deemed to be in possession. We are concerned with the latter position, so far as the present case is concerned. Where there has been an order like this as in the present case, in my opinion, the Civil Court has untrammelled powers in a fit case to grant injunction restraining the Defendant from dispossessing the Plaintiff until the disposal of the suit. In (S) AIR 1955 Assam 156, which was a case u/s 147, Code of Criminal Procedure, after the orders in the Section 147 proceedings were passed, a suit had been instituted in a Civil Court and prayer for injunction made.

The fact was that the Defendants had instituted a proceeding u/s 147, Code of Criminal Procedure., in regard to the right of access over a certain pathway, which had before the proceeding been closed. The criminal Court ordered that the first party to the proceeding namely the Defendant, had the right to use the disputed strip of land as pathway and interference with the pathway was prohibited. The Plaintiff instituted a suit for permanent injunction restraining the Defendants from exercising the right of pathway over the path in question and also prayed for temporary injunction. The trial Court declined to grant the injunction holding that Order 39, Rule 1 did not apply to the facts of the case. On appeal, it was held that a

temporary injunction could issue under Order 39, Rule 2. The Defendants came up in revision to this Court and the question formulated by their lordships was as follows

The first and the most important question that arises in the case is whether it was competent to the Court acting under Order 39, Rule 2, to issue the in junction,

and in that connection it was held that:

A lawful exercise of right cannot be described as an injury. So long as the party is acting in the exercise of a right which the law recognises, it cannot be said that the party is committing any wrong leading to any injury. When as a result of the enquiry in the suit, it is found that the party has not got the particular right, the position would be different, but if on the date of the suit, the party has got the legal right to do a certain act, that act cannot be regarded as a wrong in law nor would its result be regarded as injury.

...All wrongs covered by the expression ''tort'' would be within the scope of the expression but there has to be an injury and that injury would necessarily be a result of the wrong. It is not possible to say that a party who has secured an order in his favour u/s 147, Code of Criminal Procedure. to use a particular path or to have the right of way over it, commits any wrong or is causing any injury to any one by exercising the right which the order u/s 147 Code of Criminal Procedure recognises. The order is the result of a summary proceeding and he can be deprived of that right only by the decision of a civil court against him on the question of title. Order 39, Rule 2, there fore, would not be applicable to a case where such an order exists. The order of the learned Subordinate Judge in these circumstances is not sustainable. The Civil Court will not have jurisdiction in the circumstances of this case to grant a temporary injunction under Order 39, Rule 2 also.... If an injunction is granted under Order 39, Rule 2, the effect of the injunction would be to completely nullify the order u/s 147, Code of Criminal Procedure. The appellate order, therefore, cannot stand.

7. I have quoted these observations from the judgment of Mr. Justice Ram Labhaya with whom the learned Chief Justice agreed. In my judgment, the proposition has been too widely stated, These sections, namely, 144, 145, 146 and 147 of the Criminal Procedure Code and similar other sections are preventive sections enabling Courts of Magistrates to pass temporary orders, so that the breach of peace, if any, may be averted. They do not decide the rights of the parties except for the purpose of temporarily keeping the parties at peace. It cannot be laid down as a proposition of law that merely because an order has been passed u/s 147, Criminal Procedure Code, declaring a certain party to have the right to use a certain land as the pathway which had been closed by the other party, or declaring a party to be deemed to be in possession u/s 145, Sub-section (4), proviso 2, such an order fetters the discretion of the Civil Court under the provisions of Order 39 Rule 1 or Rule 2, as the case may

be

In the aforesaid case, the Appellants were not held by the order u/s 147, Code of Criminal Procedure., to be actually using the pathway in question. Their right to use the pathway had been declared, although that pathway had been closed for some time past before the proceeding u/s 147 had been instituted and that kind of order u/s 147, in my opinion, did not at all fetter the discretion of the" Court under Order 39 of the CPC while I concede that where an order u/s 145 has been passed to the effect that the Defendant to the suit was found in actual physical possession of the land the question of granting injunction restraining the Defendant from interfering with the possession of the Plaintiff would not arise. It is only in cases where an order is passed u/s 145(4), proviso 2, that the question of protecting the rights of the Plaintiff until decision of the suit arises, by issue of injunction restraining the Defendants from interfering with the Plaintiff''s possession. I am, therefore, of the opinion that the case reported in (S) AIR 1955 Assam 156, aforementioned was not correctly decided and I Say so with great respect to the learned Judges who decided that case.

8. No decided cases have been placed before us, which may be said to be on all fours to the facts of the present case. Mr. Ghose, the learned Counsel, for the Appellant, and Mr. Nath for the Respondent, have, however, placed before the Court several authorities and I shall only try to examine those, which may have even a remote bearing on the question at issue. I do not propose to deal with the authorities, which have no bearing at all. On behalf of the Appellant, reference is made to the case in Barkat-Un-Nissa v. Abdul Aziz ILR 22 All 214. In that case, it was held that the fact that an order u/s 145, Criminal Procedure Code had been passed, was no bar to the exercise by a Civil Court of the power conferred on it by Section 505 of the CPC to appoint a receiver in respect of the same property, and it was observed that:

...the CPC and the powers of Civil Courts under that Code are in no way fettered by any order that may be passed by a Magistrate u/s 145 of the Code of Criminal Procedure. The Magistrate''s order u/s 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be necessary for the protection of the property. In the present case, we consider it absolutely necessary for the preservation and better custody and management of the property that neither of the contending parties should be in possession of it until the dispute between them has been fully determined, and that the property should remain in the custody of a person independent of both parties,--a person moreover whose position will be that of an officer of the Court appointed by and answerable to the Court for all acts done by him during the period of his receivership.

This was not a case where the issue of an injunction under Order 39, Code of Civil Procedure, had come up for discussion; but, this case does say that even though an

order u/s 145, Code of Criminal Procedure., had been passed in favour of the Defendant, that was no bar to the exercise of the power of the Civil Court in appointing a receiver of the same property. In T. Surya Rao v. Sathiraju AIR 1948 Mad 510, it was held that an order passed u/s 145(6) was not a judgment and therefore, the provisions of Sections 366 and 367 were not attracted and consequently, the action of a succeeding Magistrate in pronouncing the order of his predecessor in Court was perfectly justified. It is unnecessary for the purpose of the present case to enter into the question as to whether an order passed u/s 145, Code of Criminal Procedure is a judgment or is not a judgment.

In the case of Sewa Das v. Ram Parkash AIR 1947 Lah 173, the facts were entirely different. In a proceeding u/s 145, Criminal Procedure Code between A and B, it was declared that A was in possession of the property in dispute. B then brought a suit for declaration that he was the lawful Mahanth of the Dera in suit and as such entitled to be in possession of and manage the properly and had asked for recovery of possession of that property. He also prayed for an injunction restraining A from interfering with the properties during pendency of the suit and he claimed the right to show to the Civil Court that he was in possession at the date when the order u/s 145 was made, declaring A to be in possession.

It was held by the learned single. Judge of that Court that the finding of the Criminal Court u/s 145, Code of Criminal Procedure., to the effect that A was in possession of the property in dispute could not be questioned in a Civil Court and A must be held to be continuing in possession until he was evicted in due course of law, B was not, therefore, entitled to show that he was in possession of the property on the date of the order u/s 145. It was further held that B was not in possession on the date of the suit of the property in dispute of which he sought to recover possession and as such, no injunction could be granted in his favour. Thus, it appears that in that case the order u/s 145, Code of Criminal Procedure was not passed under Sub-section (4), proviso 2, of the section. The Magistrate did find that A was actually physically in possession. Therefore, that case also, in my opinion is not relevant.

9. Reference is also made to the case of Bhinka and Others Vs. Charan Singh, In this case also, an order was passed u/s 145 Code of Criminal Procedure., and the learned Magistrate found that the Appellants were in possession of the said lands and he declared that they were entitled to be in possession thereof until evicted therefrom in due course of law. So, on facts, that case was also different. But, their Lordships of the Supreme Court laid down as follows in regard to the effect of the order passed u/s 145, Criminal Procedure Code:

Under Section 145(6) of the Code, a Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party''s title or right-to possession of the land, but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of

the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is coterminous with the passing of a decree by a Civil Court and the moment, a Civil Court makes an order of eviction, it displaces the order of the Criminal Court.

and they approvingly quoted a passage from the decision of the Privy Council in Dinomoni Chowdhrani v. Brojo Mohini Chowdhrani 29 Ind App 24, 33 (PC), to the following effect:

These orders are merely police orders made to prevent breaches of the peace. They decide no question of title....

They ultimately decided that the provisional order of a Magistrate in regard to possession irrespective of the rights of the parties could not enable, a per son to resist the suit u/s 180 of the U.P. Tenancy Act (17 of 1939) Here again, therefore, the Magistrate took action u/s 145, Sub-section (4), and had found one of the parties to be actually in possession. In my opinion therefore, the fact that an order u/s 145 is merely a police order, does not give us much assistance in deciding the question at issue in the present case.

I should like to make it clear that if the Magistrate u/s 145, Code of Criminal Procedure., decides that one of the parties to the proceeding is actually physically in possession or that having found that that party should be deemed to be in possession within the meaning of the proviso 2 to Sub-section (4), and later puts that party in possession under Sub-section (6), there could be no question of passing an order of injunction under Order 39 in a suit brought by the unsuccessful party.

In the present case, however, as I have been endeavouring to show, the Defendant No. 1 was not put is possession as he may have been under Sub-section (4), proviso 2, read with Sub-section (6), the last portion, of Section 145. None of the other cases cited at the Bar, namely, Abdul Hamid Khan and Others Vs. Tridip Kumar Chanda and Another, Mt. Ladi Agarwallani v. Keolraj Sethi (S) AIR 1955 GAU 174, Krishna Gobinda v. Mt. Kishoribala Debi AIR 1930 Cal 1763, Firm of Manohar Lal Mahabir Pershad v. Firm of Jai Narain Babu Lal 55 Ind Cas 403 : AIR 1920 Lah 436 , Lila Devi and Others Vs. Bhatu Mahton and Others, , Peddinti Gopalacharyulu Vs. Rudraveeranna and Others, , Deochandra Prasad Singh Vs. Amalendu Mukherji and Others, Kandaswami Udayan v. Annamalai Pillai AIR 1949 Mad 105 , The State of Bihar Vs. Ram Naresh Pandey, , Kedar Nath Motani and Others Vs. Prahlad Rai and Others, , or AIR 1928 222 (Nagpur) , have any relevancy to the question at issue in the present case, and I do not consider it at all necessary to refer to them.

10. The other question is on the merits. The Plaintiff has brought the suit for declaration of his title and confirmation of his possession and for permanent injunction restraining the Defendants Nos. 1 and 4, from taking possession of the

disputed land, namely the land measuring 15 lechas with the house on it, out of the land in dispute. The Plaintiff''s case is that it was the self-acquired property of the father of the Plaintiff, and after his death, the entire property vested solely in the Plaintiff as heir and that none of the Respondents had or has any manner of right title, interest or possession over the same.

It is further stated that the Plaintiff''s family is now living on the suit land and that they are in occupation of the same. According to the case of the Defendant No. 1, the property including the property for which injunction is prayed for, is the exclusive property of the mother of the Defendant No. 1 and his other brothers, and that the property was acquired by the mother several years before the birth of the Appellant, and at a time when his father was a separated member of the family, and that before the alleged wrongful dispossession by the Plaintiff on 17-5-1957, the Plaintiff had no connection with the property.

It is however, admitted that for the sake of convenience, the name of the Appellant''s father was recorded in the Municipal records, but later, the names of the Defendant No. 1 as well as those of the other co-sharers have been mutated in the municipal records. It is also admitted by the Defendant No. 1 that the Plaintiff is in partial occupation of the land and the houses for which injunction is prayed for and the other portion of the suit land and houses are in occupation of Nirendra Chandra Sen. another brother of Defendant No. 1, who is Defendant No. 5 in the suit.

At the present moment, what has to be looked to is the balance of convenience. The order u/s 145, Criminal Procedure Code, mentions that the Plaintiff is in possession of the house and the land though he has taken forcible possession. The fact, however, remains that the present possession is with the Plaintiff and as the suit is pending and is likely to be disposed of soon, in. my judgment, the balance of convenience lies in favour of the Plaintiff-Appellant. The question of title has to be decided and if the Court finally comes to the conclusion that the Plaintiff is not the rightful claimant, he will have to be dispossessed in execution proceedings. In my opinion, therefore, the Plaintiff is entitled to a temporary injunction restraining Defendant No. 1 and Defendant No. 4 from disturbing the possession of the Plaintiff until the final disposal of the suit.

11. The appeal, therefore, is allowed and Defendants Nos. 1 and 4 are restrained from disturbing the possession of the Plaintiff over the house and land, 15 lechas in measurement, out of the lands in dispute until the final disposal of the suit as prayed for, by the Plaintiff-Appellant. The result is that the appeal succeeds and it is decreed with costs. The Court below is directed to see that the suit is disposed of as expeditiously as convenient.

H. Deka, J.

12. I agree.

G. Mehrotra, J.

13. I agree.