

(1869) 04 CAL CK 0003

Calcutta High Court

Case No: None

In Re: Juggesh Prakash Ganguli
and Nilkamal Mookerjee

APPELLANT

Vs

RESPONDENT

Date of Decision: April 27, 1869

Judgement

@JUDGMENTTAG-ORDER

Bayley, J.

I am of opinion that this application must be rejected. It is made u/s 404 of the Code of Criminal Procedure, and we are asked to set aside the order of the Magistrate of Nowakhally, dated the 6th November, 1866, and declare that the petitioner is entitled "to resume that possession which he lost by the force and effect of the said Magistrate's order." This prayer is based on the statement that, by a judgment of his Court, dated the 19th August, 1868 it was held that the plaintiff, in his appeal No. 322 of 1867, against the present petitioner, had given no evidence whatever of his title or possession, and that the right and title to possession of the petitioner were thereby established. Now, the terms of section 404 are these:-- "The Sadder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law or that a point of law should be considered by the Sadder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sadder Court shall seem right." In the first place we are asked to exercise our extraordinary powers under the provisions of section 404 of the Criminal Procedure Code, that is to say, we are asked to declare that the Magistrate passed the order, u/s 318 of the Code of Criminal Procedure, so illegally that we should interfere u/s 404. I do not think that the Magistrate has, in any way, proceeded either without jurisdiction in this case, or illegally. I, therefore, consider that we should not admit the application u/s 404 of the Criminal Procedure Code, But, irrespective of that, I do

not see that, u/s 404, any power has been given to us to require the Magistrate to set aside his order; and by reason of the decision of this Court above cited, to allow the petitioner "to resume that possession which he lost by the force and effect of the said Magistrate's order." There is no decree in favour of the applicant which can be executed, so as to give him legal possession. There is merely a ruling by this Court that the plaintiff in that case alleged title and undisputed possession, such as no way proved this allegation. I do not think that this decision is such an order of a competent Court as would justify the Magistrate considering it as a decree for putting the appellant in possession. I reject the application with costs.

Hobhouse, J.

2. The facts on which this application, under the provisions of section 404 of the Code of Criminal Procedure, is founded, are these:--

One Nabinkishor Roy sued on the 6th October, 1866 for confirmation of his possession of, by declaration of his title to, certain lands. While this suit was pending, proceedings were taken by the said Nabinkishor Roy before the Magistrate, u/s 318 of the Code of Criminal Procedure; and on the 6th November, 1886, the Magistrate, under the provisions of the section I have quoted, gave judgment to the effect that Nabinkishor Roy was the person in possession of the property in question, and passed an order that the said Nabinkishor Roy was to be maintained in such possession, until ousted by due course of law.

3. In the suit instituted on the 6th October, 1866, the present petitioners before us were defendants, and they denied Nabinkishor Roy's right to the lands in question, and eventually, viz., on the 19th August 1868, Nabinkishor Roy's suit was dismissed in regular appeal by the High Court, on the ground that he had not established his title to the lands. It is under these circumstances that the petitioners before us ask us to set aside the Magistrate's order of the 6th November, 1866. It is not shown to us that in this decision there has been any error in point of law, but we are asked to consider a particular point of law, and pass such orders as may seem right to us. The point of law is this, viz., that when this Court has on the civil side determined that Nabinkishor Roy had no title to the lands in dispute, then the Magistrate's order of the 6th November, 1866, confirming, Nabinkishor Roy in possession of those lands, is an order which of itself falls to the ground, and should, therefore, be set aside. But the law says that the person who is confirmed in possession, under an order of this kind, shall remain in possession, until ousted by due course of law. The question, therefore, is whether Nabinkishor Roy can be said to have been ousted by due course of law, by virtue of the decision of the 19th August, 1868. It appears to me that it cannot be so said, for all that the Court said in that decision was that Nabinkishor Roy had not established his title to the land, but the fact remains that he is in possession of those lands, and it does not follow that, because he has failed in this Court to prove his title to the lands, he may, therefore, be ousted by the petitioners from them. If the lands belonging to the petitioners before us, and if

Nabinkishor Roy is actually in possession of them, without any title, then the petitioners have their remedy in a suit for possession; and if on the other hand, as a matter of fact, Nabinkishor Roy, notwithstanding the Magistrate's order of the 6th August, 1866, is not in possession, then the petitioners are not aggrieved by that order. In this view, I think that the petitioners have not made out a case for our interference under the provisions of section 404, and I therefore agree in rejecting this application.