(1872) 06 CAL CK 0003

Calcutta High Court

Case No: Miscellaneous Criminal Cases, Nos. 50 and 51 of 1872

In re. J.D. Sutherland and Another — APPELLANT

Vs

RESPONDENT

Date of Decision: June 3, 1872

Judgement

Sir Richard Couch Kt. CJ.

1. In the first of these, cases, an application was made to the Court to set aside an order which had been made by the Magistrate of Monghyr under s. 282 of the Code of Criminal Procedure. The order was dated the 6th of February 1872, and ordered the applicants Harda Narayan and Sutherland to enter into recognisances to keep the peace for six months. It appeared that Sutherland was the manager for Harda Narayan, and it was objected that there was no reason for Harda Narayan being compelled to enter into recognisances. Certainly, there does not seem to be any reason that the order should extend to him, and we may say at once that, as regards him, it is one which the Magistrate was not authorized to make; and that portion of it must be set aside. We have then to consider the order as it applies to Sutherland. It was objected by the Advocate General, who appeared for him, that no evidence was taken by the Magistrate, and that consequently the order was not authorised by the Code of Criminal Procedure, and ought to be set aside. Now the order is stated by the Magistrate to be founded upon the statements which were made before him by Sutherland, the petitioner, and by Crowdy, the opposite party, both of whom had been summoned to appear before him. These statements must be regarded as evidence upon which the Magistrate might act if he thought it sufficient. They Were admissions, I will not call them confessions, but admissions made by the parties who had been summoned to appear; and if upon their own statements there appeared to be sufficient grounds for the order being made, it would be superfluous for the Magistrate to take further evidence upon that subject. The Magistrate states that his order was founded upon these statements. (His Lordship read the portion of the Magistrate''s order gives above and continued):--It is not for us, as we often have to state in cases of this kind, to consider whether the Magistrate Was right or

not in being satisfied with this evidence. The only question is, was there before him evidence upon which he might be satisfied? We think that there was. If he came to the conclusion, upon the parties being summoned before him and making their statements, that it was necessary for the preservation of the peace to take a bond from them, he had full authority to do so, and there is nothing which would authorise or justify this Court in setting aside that order. So that, with regard to Sutherland, the order of the Magistrate will remain in force. The second of these cases is also an application on behalf of Sutherland to set aside an order of the same Magistrate, dated the 15th of February, and made under s. 318 of the Criminal Procedure Code, and it was objected by the Advocate-General first that it was improper that an order should be made under this section, as well as an order, under s. 282. With regard to this objection, I see no reason that, if the Magistrate is satisfied that the circumstances require it, he should not make an order under both sections. There may be cases in which it would be necessary to do so. In this case, if the Magistrate thought that the circumstances required it, he was justified in doing it. But the principal question which was discussed was whether the decision of the Magistrate that the possession of one of the plots, namely, the plot marked C. on the plan, the principal one in dispute, was to remain with Crowdy, was one which could, in point of law, be supported, or whether the facts were not such that the Magistrate had exceeded his power, or made an error for which this Court ought to set aside his order. Now the circumstances with regard to the land, the possession of which is in dispute, and which dispute was considered by the Magistrate to be likely be lead to a breach of the peaces are stated in his finding, which we must take to be correct, and which appears to be supported by the evidence before him. The principal plot of land O. is said to have been up to the present time, or, rather, when this matter was before the Magistrate, cultivated by Pochan Rai, an Islampore ryot, whose evidence was taken in the case, and he stated that "the land where Crowdy''s tent is now standing is mine. It is three bigas in four plots and after giving the boundaries, he said:--''I have had this land from ray father''s time, 25 years ago. I pay rent since 1274 (1866-67) to Ram Charan Bhagat and Jola Bhagat, Katki Nadars of Islampore. Before 1274, I paid to Majhole koti'' (office), and then he gave other particulars as to his getting receipts for the rent which are not material. The other plots A. and B. appear by the evidence to have been taken possession of by Crowdy, shortly before the matter came before the Magistrate for decision, under sub-leases from ryots of Komalpore; the sub-lease of A. being made on the 27th of January, and the sub-lease of B. on the 29th of January. The Magistrate has found and I think correctly, that the mere putting up a tent by Crowdy on the land, which was what he was shown to have done, was not a possession within s. 318. He says that the possession must be substantial and practical, but then he holds, upon the evidence, that, as to A. and B., Crowdy was in possession, having obtained the sub-leases from the ryots, and having taken possession under them, although a very short time before the matter came before him for decision. With regard to the plot C., which is, as I understand, the piece of land really in dispute between the parties, the Magistrate says that be accepts the account which was given by Pochan Rai as being the correct statement of the facts of the case and upon that he considered that Crowdy was in possession; and

made an order that he should be retained in it.

2. Now, there appear to have been several decision of this Court which it is necessary to notice. In Dewan Elahee Newoz Khan v. Suburunnissa 5 W.R., Cr., 14, a question of this kind came before a Court composed of three Judges, and Phear, J., said (Glover, J., having previously given his judgment):--"Had it not been for the strongly expressed opinion of Glover, J., I certainly should have been disposed to think that the "pos-session of land, &c., contemplated in s. 318 of the Criminal Procedure Code was (as the section itself expresses it) "actual" possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immoveable property described; and had I been unassisted, I should have considered that the primary sense of the words employed supported that View and no other." But the learned Judge; in the following paragraph says that, whatever might be the conclusion to which farther and mature consideration might lead him on this point, he thinks the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto and the case was decided upon that point. This opinion that the section must mean actual possession, and not constructive possession was therefore not necessary for the decision of the case, and it appears to me, from the learned Judge"s own words, to have been one which he thought might be altered by further and mature consideration. It was also opposed to the opinion of Glover, J., in the same case. Now, when we look at the terms of s. 318, it appears that actual possession there was not so much intended to mean manual possession, or, as Phear, J., seems to consider, as excluding a possession by the receipt of rent, but rather seems to have been used as distinguished from the right of possession. The Magistrate is to see who is the party in actual possession of the subject in dispute as distinguished from the person in whom the property or right to recover possession may be. The question is, what is to be considered as meant in this section by possession? I think that it cannot mean only the actual or bodily possession. There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. There is the case of a servant being in possession, and it may be said that, when the servant is in possession, it is the possession of the master. So, also, if an occupier is paying rent, that is, the possession of the landlord to whom he pays the rent. For some purposes, the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation, but, still, his possession is the possession of him by whose permission either given by a lease or any other mode of letting he holds the land and to whom he pays the rent. And this view of what is meant by possession and the construction to be pat upon it in this section is supported by a passage in Domat"s Civil Law where possession is treated of: it is in Bk. III, Tit. 7, and there, after quoting several authorities from the Institutes, the author says:--"From all which it is necessary to conclude that the true possession is, properly speaking only that of the master; and that, although others, besides the master, may have a right to detain the thing, such as the tenant the farmer,

the usufructuary, who, having a right to enjoy, ought by consequence to have the detention of the thing; "which in them is only a borrowed possession, or rather the master"s own possession who possesses through them, because the right of possession cannot be separated from the property." Here are three classes--the tenant, the farmer, and the usufructuary. Although they have what the author calls a borrowed possession, it is rather the possession of the master than their own; and it appears to me that the proper construction of this section is that, by "actual possession" is meant the possession of a master by his servant, the possession of a landlord by his immediate tenant the person who pays rent to him, the possession of the person who has the property in the land by the usufructuary. These cases appear to me to come fairly within the meaning of the word "possession" in this section, and, with every respect to the opinion of Phear, J., it appears to me that this is the construction which should be put upon it, rather than to limit it to cases of bodily possession.

3. Then to apply it to the present case, Mr. Crowdy was not in that possession: according to the evidence on which the Magistrate founded his decision, the immediate landlords of Pochan Rai, the persons to whom he paid the rent, were the two persons whom he named. Crowdy appears to have been a superior landlord to them, but that would not come within the meaning of the section, and Crowdy could not be considered to he in possession of this land by reason of the possession of Pochan Rai, the occupier: nor was he in possession, as the Magistrate has properly found; by reason of his having put up the "tent" upon the land. I think the Magistrate was wrong in point of law in deciding that Crowdy was in possession, and ordering him to be retained in it.

4. But another objection was taken, namely, that there had not been such a proceeding recorded, stating the grounds upon which the Magistrate was satisfied that there was a dispute likely to induce a breach of the peace, as would render his proceeding legal. That a compliance with the provisions of s. 318 is requisite, and that an omission on the part of the Magistrate to record a proceeding such as is required by that section renders the proceedings illegal, was decided in Harvey v. Brice 4 W.B., Cr., 26. On this, point we have in the same case in the 5th Weekly Reporter the judgment of Phear, J. After the passage which I before quoted in which he states that he thought the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto, he says:--"It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done either of these things." In another case of Mussamut Anundee Kooer v. Ranee Soonaet Kooerthe 9 W.B., Cr., 64., same learned Judge says:-- "I take the opportunity of adding that even, if there had been a proceeding in this case, and assuming that it was confined to the statement by the Magistrate that he had been directed by the Judge to hold the investigation, it would not be sufficient to satisfy the requirements of s. 318, for it is necessary that the Magistrate himself should enquire into the likelihood of a breach of the peace happening, and should come to a judicial decision

upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative." The words of the section being that, when the Magistrate shall be satisfied that a dispute likely to induce & breach of the peace exists, he shall record a proceeding stating the grounds of his being so satisfied, the learned Judge says, in the first ease, that the Magistrate must adjudicate upon the matter, and then he seems to have gone a step further, and speaks of a judicial decision, whence it has been inferred that the Magistrate must take evidence, and proceed in the same way as in an ordinary judicial enquiry. Now I must say that I am unable to agree in this view of the requirements of s. 318, All that it requires in my opinion is that the Magistrate is to be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence taken before him. It is properly provided that he shall state the grounds of his being satisfied in order that the revising Court may be able to see that he has not arbitrarily instituted proceedings of this kind. Bat that is all that is required; and in this case the Magistrate has stated that the ground of his proceeding was the office memorandum which had been previously recorded. (His Lordship read the office memorandum and proceeded.) There is here a formal statement by the Magistrate of the grounds upon which he was satisfied that a breach of the peace was likely to be committed, and I do not think any one would say that he was not justified in coming to that conclusion. The facts were such as might fairly lead him to think that a breach of the peace was likely to ensue; and, being satisfied, and having recorded the grounds thereof, he had jurisdiction to proceed in the matter. That objection to his proceedings therefore in my opinion fails. The grounds upon which it was sought to set aside this order, as regards the whole of it, fail; but for the reason that the Magistrate has taken upon him-self erroneously to find that Crowdy was in possession, the order, so far as it relates to the piece of land C, most be set aside. As to costs we think that each party should pay his own.

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[1] S. 282.--It shall be lawful for the Magistrate of the District or other Officer exercising the powers of a Magistrate, whenever he shall recover credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon each person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into & bond to keep the peace with or without sureties, as such Magistrate shall think fit.

[2] S. 318--Whenever the Magistrate of the District of other Officer exercising the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any hand, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed be the Magistrate or other Officer as aforesaid, and to give in at written statement of their respective claims, as respects the

fact of actual possession of the subject of dispute. The Magistrate or other Officer as aforesaid shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire which party is in possession of the subject of dispute, and after satisfying him-self upon that point, shall record a proceeding declaring the party whom, he may decide to be in such possession, to be entitled to retain possession until ousted by due course of law, and forbid-ding all disturbance of possession until such time.