

CRIMINAL REVISION.*Before Teunon and Suhrawardy JJ.*

SHAHABAJ MANDAL

v.

BHAJAHARI NATH.*

1921

May 4

Dispute concerning Land—Possession on the date of the initiatory order and two months before—Symbolical possession—Decree not inter partes—Actual possession given by Civil Court—Subsequent dispossession—Criminal Procedure Code (Act V of 1898), s. 145 (4), and first proviso.

Where the decree holders, two members of the second party, had purchased the properties of the judgment-debtor, including the disputed tank and dwelling house, at an auction sale in execution, and symbolical possession of the tank was given to them in November 1918, a few days before the death of the judgment-debtor, but the Magistrate found that the first party, the son, widow and sister of the latter, had continued in actual possession of the tank and the house from the time of his death to the date of the institution of the proceedings under s. 145 of the Code.

Held, that the Magistrate should have declared the first and not the second party to have been in possession of the tank.

Where actual possession of the house was given to the auction-purchasers in May 1920, in execution proceedings to which the judgment-debtor's son and widow had been impleaded as parties :—

Held, that on the above finding of the Magistrate there must have been a dispossession of the auction-purchasers since that date, giving them a fresh cause of action, and that he should have declared the first party to be in possession.

Hazari Khan v. Nafar Chandra Pal Chowtry (1) and *Kulada Kinkar Roy v. Danesh Mir* (2) followed.

In August 1908, one Ebrahim Mandal executed a mortgage bond in respect of certain properties in favour of Bhajahari Nath and his brother Haridas.

* Criminal Revision No. 167 of 1921, against the order of G. P. Ghose, Deputy Magistrate of Jaugipur, dated Feb. 18, 1921.

(1) (1917) 22 C. W. N. 479.

(2) (1905) I. L. R. 33 Calc. 33.

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The brothers instituted a mortgage suit against Ebrahim in the Court of the Subordinate Judge of Berhampore, obtained a decree and purchased the properties, including the disputed tank called *Mirsagar* and the adjoining dwelling house, at an auction sale in 1917. On the 17th November 1918 they obtained symbolical possession of the tank from the Civil Court. Ebrahim died on 22nd November of the same year. Execution proceedings were afterwards instituted in respect of the house, the judgment-debtor's son and widow being made parties, and actual possession of the same was given to the auction-purchasers on 16th May 1920. On the 20th December following the sub-inspector of the Mirzapore police-station submitted a report to the Subdivisional Magistrate of Jangipur, in the district of Murshidabad, alleging the likelihood of a breach of the peace and praying for proceedings under s. 107 of the Criminal Procedure Code against Bhajahari and his party. On the 22nd January 1921 the Magistrate drew up proceedings under s. 145 of the Code making the petitioner Shahabaj, the son of Ebrahim Mandal, the first, and Bhajahari and others the second, parties. Manohar Bibi, the widow, and Fulman Bibi, the sister, of Ebrahim were subsequently added to the first party, and Haridas to the second party. The Magistrate found that, notwithstanding the possession given by the Civil Court to the auction-purchasers, the first party continued in actual possession of the tank and house from the time of Ebrahim's death to the date of the institution of the proceedings under s. 145; but following the decision in *Atul Hazrah v. Uma Charan Chongdar* (1) he declared the second party to be in possession.

The petitioners thereupon obtained the present Rule.

(1) (1916) 20 C. W. N. 796.

Babu Birbhusan Dutt, for the petitioners. Sections 318 of the Code of 1861 and 530 of that of 1872 did not specify any date with reference to which the Magistrate had to consider the question of actual possession. The word “*then*” was first introduced in the second paragraph of s. 145 of the Code of 1882. Under the above Codes it was held that the Magistrate acted rightly in upholding the possession given by the Civil Court. But the present s. 145 (4) and the first proviso leave no doubt that the actual possession on the date of the institution of the proceedings or, in cases coming within the proviso, within two months before, must prevail. Here the Magistrate has found the first party to have been in actual possession on such date and two months before, and he should have declared their possession. Refers to *Atul Chandra Mandal v. Srinath Laik* (1), *Hazari Khan v. Nafur Chandra Pal Chowdry* (2) and *Kulada Kinkar Roy v. Danesh Mir* (3).

Babu Santosh Kumar Bose, for the opposite party. The possession given by the Civil Court should be maintained: otherwise the successful party in the civil suit would be driven again to such Court. Refers to *Atul Hazrah v. Uma Charan Chongdar* (4).

TEUNON AND SUHRAWARDY JJ. This Rule arises out of certain proceedings instituted under the provisions of section 145, Criminal Procedure Code. These proceedings refer to a tank known as Mirsagar and to a dwelling house which, we are informed, is now more or less dilapidated. It appears that in execution of a decree obtained against the predecessor of the petitioners before us, who were the first party to the proceedings

(1) (1919) 23 C. W. N. 982.

(3) (1905) I. L. R. 33 Cal. 33.

(2) (1917) 22 C. W. N. 479.

(4) (1916) 20 C. W. N. 796.

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under section 145, these properties and other properties were sold, and were purchased by the members of the second party who are the opposite parties in this Rule. It has then been found by the trial Magistrate that on the 17th November 1918 the auction-purchasers obtained possession of the tank through the Civil Court. That possession was taken in the life-time of the judgment-debtor, who is said to have died some five days after the delivery of possession.

It has next been found that the auction-purchaser took possession of the residential house on the 16th May 1920. In the execution proceedings terminating in the delivery of possession of the house the petitioners 1 and 2, the son and widow of the original judgment-debtor, were impleaded as parties. The section 145 proceedings were instituted on the 22nd January 1921. The Magistrate's finding on the evidence is that, notwithstanding the delivery of possession taken on the occasions which we have set out, the members of the first party have continued all along to be in possession and, therefore, were in actual possession on the day on which the section 145 proceedings were instituted.

Relying however on the decision of this Court in *Atul Hazrah v. Uma Charan Chongdar* (1), the learned trying Magistrate has made his final order in favour of the second party, and the question before us is whether that order on the facts and circumstances of the present case can be supported. As we have already pointed out the heirs and representatives of the original judgment-debtor have been in possession from the date of his death sometime soon after the 17th November 1918. Their possession from that date onwards to the 22nd January 1921 in our opinion

(1) (1916) 20 C. W. N. 796.

should have been regarded as adverse to the auction-purchaser. In that view it follows that in so far as the tank is concerned the order made in favour of the second party cannot be supported.

Then with regard to the house the case of the auction-purchasers was not that they merely took formal possession, but that they took actual possession. The house, it is said, was found vacant, and the officer of the Court who delivered possession actually inducted the representatives of the auction-purchaser into the house. The finding of the Magistrate is that, on the date when the proceedings under section 145 were instituted and for more than two months preceding that date, the members of the first party have been and are in possession. It follows, therefore, that between the delivery of possession on the 16th May 1920 and the institution of the proceedings on the 22nd January 1921 there must have been dispossession of the auction-purchasers giving rise in their favour to what may be called a fresh cause of action. In that view of the matter it is clear that the Magistrate's order as regards the house is also not to be supported. In support of the view that we take we may refer to the cases of *Hazari Khan v. Nafar Chandra Pal Chowdry* (1) and *Kulada Kinkur Roy v. Danesh Mir* (2).

In the result this Rule is made absolute, and the Magistrate's order made in favour of the second party with regard to both the house and tank is set aside.

E. H. M.

Rule absolute.

(1) (1917) 22 C. W. N. 479.

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