APPELLATE CRIMINAL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

AGRA BANK, LIMITED (PETITIONER)

v.

LEISHMAN (RESPONDENT).*

1894.
July 30.
August 31.
September 7.

Criminal Procedure Code—Act X of 1882, *ss.* 145 *and* 146.

A magistrate, in making an order under Criminal Procedure Code, ss. 145 and 146, must inquire into the question which party was in actual possession at the time of the institution of the proceedings and not at the time when the order is made. In making this enquiry the Magistrate may presume that when a vendor sells part of a property he retains all that he does not sell.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Subordinate Judge (First-class Magistrate of Nilgiris, Ootacamund,) passed in miscellaneous case No. 1 of 1894.

The facts of this case appear sufficiently for the purposes of this report from the following judgment of the High Court.

Mr. *R. F. Grant* for petitioner.

Mr. *Johnstone* for respondent.

JUDGMENT.—This is a petition by the Agra Bank to revise an order of the First-class Magistrate of Ootacamund under sections 145 and 146, Criminal Procedure Code, attaching two plots of land as to which he was not able to decide whether the bank or the counter-petitioner, Mr. Leishman, was in possession. The admitted facts are that in 1885 the bank sold a portion of the Bella Vista property in Ootacamund to the Murree Brewery Company. Shortly afterwards, in 1885 or 1886, some sort of survey was made, and the Brewery Company put down demarcation stones to show the limits of their purchase and planted gum trees to mark the boundary. Matters so continued till Mr. Leishman agreed to purchase the Brewery Company at the end of 1892. He was put in possession of the machinery and buildings; but in 1893, after survey of the boundaries by a Mr. De Lima, he

* Criminal Revision Case No. 315 of 1894.

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became of opinion that the boundaries as defined by the stones put down by the Brewery Company were not in accordance with their title-deed, and that he was entitled to more land than was included within those boundaries. In order to rectify these deficiencies Mr. Leishman took upon himself to remove the boundary stones and to peg out a line and fence to show what his boundaries really were, and it is his action in this respect that led to the breach of the peace which caused the magistrate to intervene.

The magistrate held (i) that he had to determine if either of the contending parties was in possession *at the time of his writing his order*, and (ii) that there was no presumption that the bank had retained plots 1 and 2 after 1885. In consequence of his holding upon this second point, the magistrate held he had not to determine whether Mr. Leishman had obtained *de facto* and physical possession and the language used by the magistrate appears to intimate that had it not been for this opinion his decision might have been different.

We are of opinion that on both these points the magistrate was in error. There is a consensus of authority that the possession to be inquired into is the possession at the time of the institution of the proceedings—*Krishna Dhone Dutt* v. *Troilokia Nath Biswas*(1), *Bechu Sheikh* v. *Deb Kumari Dasi*(2), *In the matter of the petition of Jai Lal*(3), and *In the matter of Huchapa and Shivagangava*(4). It is obvious that the words in section 145, Criminal Procedure Code, "the fact of actual possession," must have reference to some fixed point of time. It cannot, as pointed out in the Bombay case, have reference to some date long anterior to the date of the proceedings being instituted, nor can it refer to a point of time subsequent to the commencement of the inquiry. The time to be taken is obviously the date of the magistrate being satisfied there is ground for his intervention under section 145, in other words the date of the institution of the proceedings.

Nor can we agree with the magistrate in his opinion that there is no presumption that the Agra Bank retained possession of plots 1 and 2. There is a general presumption that when a vendor sells part of a property he retains all that he does not sell. In this case it is admitted that the two plots lie outside the boundary

(1) I.L.R., 12 Calc., 539.
(2) I.L.R., 21 Calc., 404.
(3) I.L.R., 13 All., 362.
(4) I.L.R., 15 Bom., 152.

stones put down by the Murree Brewery Company. This would of itself be sufficient to throw upon Mr. Leishman the onus of proving that he was in possession. There is, however, no room for any presumption at all about the matter, for in his evidence Mr. Leishman states:—"On November 4th, 1893, I took possession of disputed block No. 2. Of land on Murree Brewery side of fence in No. 1 I took possession on 4th November 1893 and the portion of No. 1 on Bella Vista side in March 1894." There is thus a clear admission that up to these dates possession was with the Agra Bank, and the sole question for determination is whether there is evidence that the Bank has been dispossessed since those dates. . . . . .

From this it appears that no effective possession was taken by Mr. Leishman in March as he claims, and the bank still remained in possession up to May notwithstanding the trespass.

On these grounds we must set aside the order of the Magistrate attaching plots 1 and 2, declare that the Agra Bank is entitled to retain possession till evicted in due course of law, and forbid all disturbance till such eviction.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NAMASIVAYAM PILLAI (PLAINTIFF), APPELLANT,

1894. July 13, 16.

v.

NELLAYAPPA PILLAI AND OTHERS (DEFENDANTS NOS. 1 to 3), RESPONDENTS.*

Specific Relief Act—Act I of 1877, *s.* 27—*Trusts Act—Act II of* 1882, *s.* 91—*Purchaser with notice of prior contract to sell.*

In a suit for land it appeared that the plaintiff had obtained a registered sale-deed comprising the property in question from defendants Nos. 1 and 2 who had already (to the plaintiff's knowledge) contracted to sell it to another and that the plaintiff had paid no consideration for the sale-deed, which in fact represented a collusive transaction entered into to defeat the prior contract:

Held, that the plaintiff was not entitled to recover.

* Second Appeal No. 1669 of 1893.