

CRIMINAL REVISION.

*Before Mr. Justice Mya Bu.*MAUNG KAN *v.* MAUNG PO TOK.*

1939

June 6.

Civil Court's decree for possession of land—Actual or symbolical possession—Criminal Procedure Code, ss. 145, 146—Same question between same parties before magistrate—Magistrate not competent to go behind civil decree—Decree-holder not to be compelled to re-establish his right.

In a proceeding under s. 145 of the Criminal Procedure Code between the parties to a civil decree the magistrate cannot go behind the decision of the civil Court and ignore the decree, and purporting to act under s. 146 of the Code, require the parties to fight out again in the civil Court the question as to who is entitled to possession of the land which the civil Court had already decided. It is immaterial for this purpose that the delivery of possession under the decree of the civil Court was symbolical only.

Abhoy Mondal v. Basu Rai, 27 C.W.N. 267, referred to.

A judgment-debtor cannot be allowed to retain possession of property against his decree-holder who has actually been given possession against him by a civil Court, and in a criminal proceeding under s. 145 of the Criminal Procedure Code, to assert that possession and by force of the order of the magistrate drive the decree-holder back to the civil Court for a further declaration of his rights.

Atul Hazrah v. Uma Charan, 20 C.W.N. 796; *Aung Baw v. Tun Aung*, 3 L.B.R. 129, referred to.

K. C. Sanyal for the applicant.

No appearance for the respondent.

MYA BU, J.—This is an application for revision of certain orders passed by the Subdivisional Magistrate of Paungdè purporting to act under sections 145 and 146 of the Criminal Procedure Code. The proceedings before the Subdivisional Magistrate were initiated by a petition filed by the applicant against the respondent and five others who are described as the respondent's men. The facts that led to the filing of the petition were as follows:—In Civil Regular No. 7 of 1938 of the Subdivisional Court of Paungdè, the applicant and

* Criminal Revision Nos. 125B and 126B of 1939 from the order in review of the Subdl. Spl. Power Magistrate of Paungdè in Cr. Misc. No. 34 of 1938.

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his wife obtained a decree against the respondent and his wife for recovery of possession of a piece of paddy land, being Holding No. 109 of Mogyobyit *kwin*, Paungdè Township, measuring 10.53 acres. That decree was passed on the 19th September, 1938. In execution of the decree the Subdivisional Court on the 19th October, 1938, passed an order for delivery of possession to the applicant and his wife. Effect was given to this order by the process-server of the Court executing the delivery warrant on the 26th October, 1938, by affixing a copy of the same on the land and by proclamation by beat of gong in the locality concerned. On the 24th November, however, the respondent and his men attempted to effect forcible entry upon the land in question, with the result that two days later the applicant filed his petition in the Court of the Subdivisional Magistrate for action under section 145 of the Criminal Procedure Code.

The bases of the application were that since the execution of the delivery warrant issued by the Subdivisional Court the petitioner had been in possession both in fact and in law of the land in question, and that on the 24th November the respondent and his men attempted to effect forcible entry for the purpose of reaping the crops standing on the land, in consequence of which there was a likelihood of a breach of the peace concerning the land in question.

On the day of the filing of the petition the Subdivisional Magistrate passed a preliminary order directing the issue of a prohibitory order to both parties and of notices to the respondent and his men to appear before him on the 29th November and to put in written statements of their claims as respects the fact of actual possession of the land. The prohibitory order was ignored by the respondent and his men, who, in

execution of their threat, went on reaping the standing crops on the land, and it appears that by the 29th November all the crops had been reaped.

When the matter came before the Subdivisional Magistrate on the 29th November arrangement was made to keep the produce in the hands of the headman and a villager of Leusu village on their signing a bond for the production of 550 baskets of paddy when required. The enquiry then proceeded, in the course of which each party contested the claim of the other as to the factum of actual possession and also as to who is entitled to reap the crops. In the end, however, the learned Subdivisional Magistrate found it, in the circumstances of the case, impossible for him to come to any "rational decision as to which party were in actual possession of the crops and the land." He, therefore, decided to proceed to act under section 146 and appointed the Bailiff of his Court "to take charge of the properties and to credit to the Court all the moneys or proceeds of the lands." Having passed that order, the learned Subdivisional Magistrate also instructed the Bailiff "to deduct incidental expenses regarding cultivation, reaping etc. from the sum realized." The Bailiff not only carried out this instruction, but in his report of his having taken custody of the paddy and of his having sold the same mentioned that he had paid to various persons to whom various sums were due for such incidental expenses. It is quite clear that the payments so made were unauthorized. It is also clear that the Magistrate's instruction to the Bailiff to deduct incidental expenses regarding cultivation, reaping etc. from the sum realized is quite improper, because although it appears to be common ground that the crops on the land had been raised by the respondent, the question as to who is entitled to the crops or to the

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possession of the crops could not arise separately from or independently of the main bone of contention between the parties *viz.* who is entitled to the possession of the land. While the Subdivisional Magistrate admitted that he was not able to decide the question concerning the crops, he obviously had no right to determine which of the parties was liable to defray the expenses of cultivation.

In the face of the decree of the civil Court in favour of the applicant and his wife, the order of the Subdivisional Magistrate referring the parties to the civil Court for the determination of their rights under section 146 (1) is highly improper. So far as the land is concerned it is absurd to think that the parties should again fight out in a civil Court the question as to who is entitled to the possession of the land which the civil Court had not only decreed in favour of the applicant and his wife but which the civil Court had already enforced by the execution of its delivery warrant.

When a decree is inter-parties it is immaterial whether the delivery of possession made under that decree is actual or merely symbolical: see *Abhoy Mondal and others v. Basu Rai and others* (1), in which it was laid down that in a proceeding between the parties to a civil decree under section 145 of the Criminal Procedure Code, the Magistrate could not go behind the decision of the civil Court in the matter and could not ignore the decree even though the Court passing the decree had no jurisdiction over the land and it was immaterial that the delivery of possession was symbolical only. Therefore, in the enquiry under section 145 there was only one conclusion possible for the learned Subdivisional Magistrate to arrive at with reference to the land, that is, that it was in the

(1) 27 C.W.N. 267.

possession of the applicant on the date of the order passed under sub-section (i). Even assuming that the applicant had been forcibly dispossessed at any time after the execution of the delivery order of the Sub-divisional Court the first proviso to sub-section (iv) will operate in favour of the applicant, as such dispossession must have taken place within two months next before the date of the order under sub-section (i).

I hold, therefore, that as regards the land the learned Subdivisional Magistrate's order is contrary to all principles of justice. My finding is the same as regards the crops or the produce also. Where the decree-holder is put in possession of land, such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land: see *Aung Baw v. Tun Gaung* (1). I respectfully adopt the observation of Chitty and Walmsley JJ. in *Atul Hazrah and others v. Uma Charan Chongdar and others* (2):

“ It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession against him by a Civil Court, and, in a Criminal proceeding, to assert that possession and, by force of the order of the Magistrate, drive the decree-holder . . . back to the Civil Court for a further declaration of his rights.”

The order of the Subdivisional Magistrate of Paungdè dated the 17th January, 1939, is set aside, and in its stead it is ordered that the learned Subdivisional Magistrate declare that the applicant was at the date of the order under section 145 (i), Criminal Procedure Code, in possession of the land, including the standing crops, and declaring the applicant to be entitled to

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possession thereof until evicted therefrom in due course of law, and forbidding of all disturbance of such possession until such eviction. The Subdivisional Magistrate will take necessary steps to call into the custody of the Court the net sale proceeds of the paddy (*i.e.*, sale proceeds less the Bailiff's commission) and to deliver the same to the applicant.