

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr Justice Taylor.

KUNJA BEHARI DAS

v.

KHETRA PAL SING. *

1901
July 31.

Possession—Decree of Civil Court—Magistrate, duty of—Code of Criminal Procedure (Act V of 1898) s. 145.

Where in execution of a decree a Civil Court had given symbolical possession of the lands in dispute to the first party on the 9th September 1900, and proceedings under s. 145 of the Code of Criminal Procedure were instituted between the parties to the decree in the following December, and the Magistrate found and maintained the possession of the second party :—

Held that the Magistrate was bound to give effect to the decree of the Civil Court and to maintain the party in possession, who under the decree had already been put in possession of the property in dispute.

Doulat Koer v. Rameswari Koeri (1) referred to.

In this case the petitioner, Kunja Behari Das, instituted a civil suit against Khetra Pal Sing and others, the opposite party, for the recovery of possession of eight bighas of land, and in April 1900 obtained a decree, in execution whereof symbolical possession was delivered to him by the Court on the 9th September 1900. Against this decree Khetra Pal Sing and others preferred an appeal, which was still pending in July 1901.

At the time of the reaping of the crops growing on this land, the petitioner being apprehensive of a breach of the peace by the opposite party applied to the police for assistance. The police submitted a report to the Deputy Magistrate of Serampore stating that there was a likelihood of a breach of the peace between the parties.

* Criminal Revision No. 456 of 1901, against the order of Babu G. C. Mukerjee, Deputy Magistrate of Serampore, dated the 28th of February 1901.

(1) (1899) I. L. R. 26 Calc. 625.

Thereupon the Deputy Magistrate instituted proceedings under s. 145 of the Code of Criminal Procedure between the parties on the 3rd December 1900, but owing to some defect in these proceedings a fresh proceeding was instituted on the 3rd January 1901, and the Magistrate by an order, dated the 28th February 1901, found Khetra Pal Sing and others in possession of the land in dispute and ordered them to be maintained in possession.

Babu Mohendra Nath Roy for the petitioner.

Babu Saroda Charan Mitter for the opposite party.

GHOSE and TAYLOR JJ. It appears that there has been a decree between the parties, which was passed on the 28th April 1900, and although that decree has been appealed against to this Court, and that appeal is pending, yet we find that in execution thereof possession (though it may be called symbolical) was delivered to the petitioner on the 9th September 1900. The present proceeding was instituted on the 3rd December of the same year, and a fresh proceeding by reason of some defect in the earlier proceeding, was instituted on the 3rd January 1901.

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The Magistrate, no doubt, finds that on the date of the institution of the proceedings under s. 145 of the Code of Criminal Procedure (he describes it as the date of the dispute), it is the second party that was in possession of the land involved in the proceedings, and he accordingly affirms the possession of that party, but in doing so he seems to have ignored the decree, to which we have made reference. That decree is binding between the parties, and so is the delivery of possession effected on the 9th September 1900, and, until that decree is set aside by a higher Court, it must be taken to be operative, and it is a decree which the Magistrate is bound to give effect to.

S. 145 of the Code in one of the paragraphs says: "If the Magistrate decides that one of the parties was in such possession (that is to say, upon the date of the institution of the proceedings or within two months antecedent thereto) of the said subject, he shall issue an order declaring such party to be entitled to possession thereof, until evicted therefrom in due course of law, and forbidding all disturbance of such possession, until such eviction."

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Now it is obvious that the order of a Magistrate under s. 145 is meant to be only a temporary or tentative order, and is to be operative so long only as the rights of the parties are not determined by a Civil Court. In the present case the rights of the parties have been determined by a Civil Court, and therefore it seems to be plain that the Deputy Magistrate was not competent to ignore the decree of the Civil Court. We observe that the proceedings under s. 145 were instituted within a very short time, that is within three months of the date of the delivery of possession to the decree-holder, the petitioner, and that being so, it seems to us that there was really no difficulty in the way of the Magistrate giving effect to the decree of the Civil Court and maintaining the party in possession who under that decree had already been put in possession of the property in dispute.

In this connection we may refer to the observations in the judgment of a Divisional Bench of this Court in the case of *Doulat Koer v. Rameswari Koeri* (1). The particular passage which we desire to refer to being in page 628 of the report. There, a decree had been passed between the parties and the learned Judges in dealing with the questions raised observed as follows: "Now the object of s. 145, as we understand it, is to enable a Magistrate to intervene and to pass a temporary order in regard to the possession of the property in dispute to have effect, until the actual right of one of the parties has been determined by any competent Court. It is consequently his duty when that right has been declared within a time not remote from his taking proceedings under s. 145 to maintain any order which has been passed by any competent Court, and, therefore, to take proceedings which necessarily must have the effect of modifying or even cancelling, such orders, is to assume a jurisdiction, which the law does not contemplate. In this case we have it that so late as the end of August possession was formally given over to Doulat Koer. Nevertheless, the Magistrate has found that Dulin Shaheba obtained possession about the same time, and that she and not Doulat Koer is shown to have been in actual possession," and so on.

(1) (1899) I. L. R. 26 Calc. 625.

We agree in the view herein expressed.

We think that in the circumstances of this case, the Deputy Magistrate had no authority to make the order, which he has made in this case, an order which had the effect of nullifying the decree of the Civil Court.

The rule will accordingly be made absolute.

D. S.

Rule made absolute.

APPELLATE CRIMINAL.

Before Mr. Justice Stevens and Mr. Justice Harington.

SURAT LALL CHOWDHRY

v.

EMPEROR.*

1902

Jan'y. 21.

Transfer—Application for adjournment of trial before hearing—Duty of Court to grant reasonable adjournment—Refusal to adjourn trial, effect of on subsequent proceedings—Code of Criminal Procedure (Act V of 1898), s. 526, cl. (8).

The law does not require that an application for postponement under sub-s. (8) of s. 526 of the Code of Criminal Procedure, or an application to the High Court for transfer, should be made within any particular period before the date fixed for the hearing. It requires only that the party should notify to the Court before which the case is pending before the commencement of the hearing, his intention to make an application for the transfer of the case. If such an intention is notified at however short a time before the commencement of the hearing, the Court before which the case is pending is bound to exercise its powers of postponement or adjournment without reference to any opportunity that the party might have had of making an application at some earlier time.

The refusal to grant such an application for postponement is illegal, and the whole of the proceedings that follow cannot be supported.

Queen-Empress v. Gayitri Prosunno Ghosal (1) followed. *Queen-Empress v. Virasami* (2) distinguished.

THE accused, Surat Lall Chowdhry and others, appealed to the High Court.

* Criminal Appeal No. 671 of 1901.

(1) (1888) I. L. R. 15 Calc. 455. (2) (1896) I. L. R. 19 Mad. 375.

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