

Golam Mahammad Vs. Sarif Baig

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Court : Orissa

Decided On : Nov-07-1958

Reported in : AIR1960Ori18; 1960CriLJ261

Judge : P.V. Balakrishnarao, J.

Acts : [Constitution of India](#) - Articles 215, 522 and 561A; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 344 and 439

Appeal No. : Criminal Misc. Case No. 90 of 1957 and Original Criminal Misc. Case No. 8 of 1958

Appellant : Golam Mahammad

Respondent : Sarif Baig

Advocate for Def. : P.K. Mohanti, Adv. in Cri. M.C. 90/57 and ;Govt. Adv. in Cri. M.C. 8/58

Advocate for Pet/Ap. : V. Passayat and ;P.V.B. Rao, Adv. in Cri. M.C. 90/57 and ;Adv. General in Cri. M.C. 8/58

Judgement :

ORDER

P.V. Balakrishnarao, J.

1. Criminal Misc. Case No. 90 of 1957 was filed by one Golam Mahammad under Section 561A of the Criminal Procedure Code for clarification of my order in Original Revision No. 190 of 1956 and for quashing the proceeding before the Sub-Divisional Magistrate for redelivery of land started by the opposite party Sarif Baig in Criminal Misc. Case No. 19 of 1957. The petitioner also prayed that pending the disposal of the application the proceeding before the Sub-Divisional Magistrate, Sadar, Dhenkanal be stayed.

2. Original Criminal Misc. Case No. 8 of 1958 is a proceeding in contempt against the Sub-Divisional Magistrate, Dhenkanal, which was instituted under the following circumstances: The application in Criminal Misc. Case No. 90 of 1957 was filed by the petitioner on 28-11-57 and was moved before me on the same day. By order No. 2 dated 25-11-57 I admitted the application and granted an interim stay of further proceedings in Criminal Misc. Case No. 19 of 1957 of the Court of Shri B. K. Kar, Sub-Divisional Magistrate, Dhenkanal. This order of stay was communicated, as was the practice then, to the District Magistrate of Dhenkanal for being communicated to the Sub-Divisional Magistrate.

In the usual course of business the stay order must have been received by the District Magistrate of Dhenkanal on 26-11-57 and the Court of the District Magistrate, I am told, is by the side of the Court of the Sub-Divisional Magistrate. A telegram was also sent to the pleader appearing for the petitioner before the Sub-Divisional Magistrate by the learned counsel who appeared before me for the petitioner to the effect, 'Golam Mohammad's case, further proceedings stayed'. The application filed by the opposite party before the Sub-Divisional Magistrate for restoration of possession was posted for orders to 27-11-57. After the receipt of the telegram on 26-11-57 the petitioner filed an application before the Sub-Divisional Magistrate that the proceedings were stayed by an order of this Court and with the petition the telegram also was enclosed.

The Sub-Divisional Magistrate was not in headquarters on that day and the Second Officer received the application and directed the same to be placed before the Sub-Divisional Magistrate. On 27-11-57 this application was placed before the Sub-Divisional Magistrate, by which time he had not pronounced the order in the

case. But on this application the Sub-Divisional Magistrate passed an order, 'No action can be taken on telegram. File'. This order was not carried into the order-sheet of the Misc. Case No. 19 of 1957 and immediately afterwards he pronounced the order on the application filed by the opposite party directing that he is to put in possession of the disputed property if he is not now in possession.

3. These facts were brought to my notice when the Criminal Misc. Case was taken up for hearing on 18-8-58. As the Magistrate pronounced the order after a stay of further proceedings was ordered by this Court, even though a telegram to that effect sent by the learned counsel for the petitioner in this Court to the pleader appearing for him in the Sub-Divisional Magistrate's Court was filed before the Sub-Divisional Magistrate along with & petition, I was of the opinion that a prima facie case of contempt existed against the Sub-Divisional Magistrate and therefore directed a notice to be issued to the Magistrate to show cause why he should not be committed for contempt for making the order after knowing that there was a stay order by this Court.

I also observed that though this order was communicated by this Court to the District Magistrate on 25-11-57 the same was not communicated to the Sub-Divisional Magistrate till 28-11-57 that it was the duty of the District Magistrate to communicate orders of this court forthwith to the Magistrate concerned as there is a peculiar practice in this State for communicating the orders of this Court to the District Magistrate instead of directly to the Magistrate concerned and that as District Magistrates do not convey orders immediately to the concerned Magistrate in whose courts the concerned cases are pending, it is high time that the rule, if there is any, to the effect that all orders should be communicated through the District Magistrates be changed at once. In accordance with this observation, the Full Court directed that the orders passed should be communicated to the Magistrate direct and a copy of the same should be sent to the District Magistrate as there is no specific rule that the order should be sent to the District Magistrate.

4. In accordance with this order a notice to show cause why he should not be committed for contempt was issued by this Court to Shri B. K, Kar, Sub-Divisional Magistrate, Dhenkanal on 26-8-58 and this was numbered as Original Criminal

Misc. Case No. 8 of 1958. The Advocate General entered appearance for the State on 4-9-58. On receipt of this notice, the contemner appeared personally on 17-9-58 before a Division Bench of this Court consisting of the Chief Justice and Mr. Justice Barman, which ordered, 'His further appearance in person is dispensed with. He should appear in Court if and when called for', and gave 15 days time to show cause why he should not be committed for contempt of court. Mr. R. C. Misra, the learned Government Advocate, appeared for the opposite party, the contemner.

5. The contemner filed a counter-affidavit showing cause and pleading not guilty to the notice issued by this Court. He stated on oath in the said counter affidavit that Messrs. Nilakantha Misra and C. S. Misra, pleaders appeared for the petitioner Golam Mahammad before him in the Criminal Misc. Case No. 19 of 1957; that arguments were heard in that case on 21-11-57 and the case was posted for orders to 23-11-57; and that on 23-11-57 orders could not be pronounced and the case was accordingly adjourned for orders to 27-11-57. He also stated that during his absence on 26-11-57, a petition was filed on behalf of Golara Mahammad with a telegram attached to the said petition before the Second officer who passed an order to the effect 'Put up before the Sub-Divisional Magistrate with records': that on 27-11-57 the record of the case together with the petition and the telegram was put up before him; that the telegram did not disclose the authority that stayed further proceedings in the case; and that the petition filed to stay further proceedings along with the telegram was not accompanied by an affidavit nor was it signed by the party or by any of his lawyers who filed vakalat on his behalf but purported to have been signed by one Shri D. Tripathy who had no power in the case. He also admitted that it was alleged in that petition that the telegram was sent by the Advocate of Golam Mahammad.

Therefore he submitted that the petition thus being an invalid petition, no action on the telegram could be taken and he took no notice of the same and pronounced the order in the case on 27-11-57. He further stated that the stay order of the Hon'ble High Court was received in his office on 28-11-57 from the District Magistrate during his absence and on receipt of the said order the Second Officer passed an order staying further proceedings in pursuance of which all further

proceedings were stayed and no writ for redelivery of possession was issued. He submitted that he had not the slightest intention to disobey or go beyond the orders and direction passed by the High Court and that he passed the order on 27-11-57 due to the fact that the petition was not accompanied by an affidavit nor was the said petition signed by the party or by his lawyer.

And in the last paragraph after stating the grounds on which he is to be held not liable for contempt he submitted that he had no intention or motive in any way to prejudice or effect the course of justice in the disposal of the Criminal Revision petition and acted in good faith in discharge of his official duties and prayed that if after considering the circumstances explained by him this Court hold that there has been violation of Court's order in any manner, he expresses his regret and tenders apology for the same. Thus this apology is only a conditional one subject to the condition that he regrets and apologises only if the Court comes to the conclusion that he is guilty of contempt.

6. During the hearing of this case, I asked the learned Government Advocate if the Sub-Divisional Magistrate wants to examine himself as a witness so as to give him an opportunity to state any circumstances in his favour to this Court. He stated on the last day of the hearing 31-10-58 that he contacted the contemner and the latter was not willing to be examined.

7. The learned Government Advocate contended that the Sub-Divisional Magistrate cannot be held to be guilty of contempt as he is not bound to set upon the telegram and that he is bound to Stay the proceedings only after the receipt of the orders from the High Court. He also contended that as the petition was not supported by an affidavit and as the telegram filed along with that petition did not disclose the authority that stayed further proceedings in the case and as the petition was signed by one Sri D. Tripathy and not by the pleaders who filed vakiaat for Golam Mahammad, the contemner was justified in not acting upon the petition or the telegram and therefore is not guilty of any contempt Of this Court.

8. The only ground on which the application filed on 26-11-57 along with the telegram as stated by the Sub-Divisional Magistrate in his order passed by him on 27-11-57 was not acted upon is 'No action can be taken on a telegram'. He did not

say then that he could not take any action upon it and that that petition was an invalid petition as it was not supported by an affidavit, or as it was not filed by the pleaders who filed vakaiat on behalf of Golam Mahammad. These two latter grounds are taken only in the counter affidavit showing cause why action should not be taken against him. The order passed by the Sub-Divisional Magistrate shows that he did accept the application as filed by person competent to file the same and that he never had in his mind that such an application should be supported by an affidavit.

It is only when the concerned Magistrate before whom a telegram is filed staying further proceedings doubts the genuineness of the telegram that he should ask for an affidavit about its correctness. It is only after being asked for by the Magistrate to file an affidavit that an affidavit is necessary. But where, as in this case, the Magistrate did not doubt the genuineness of the telegram an affidavit is not necessary and he passed an order on the petition filed simply to the effect that no action could be taken on the telegram. Consequently in my opinion the two latter grounds taken by him cannot be accepted.

9. In support of his contention that no action need be taken on a telegram filed into Court, the learned Government Advocate relied upon a decision in the case of *Queen Empress v. Virasami*, ILR 19 Mad 375, in which a Division Bench of the Madras High Court held that the order for transfer made on 4th December, which, in fact, did not reach the Judge till after judgment was pronounced did not vitiate the proceedings: and that the Sessions Judge was not wrong in refusing to adjourn the case on the strength of a telegram said to have been received by prisoner's vakil stating that the High Court has ordered a transfer. The facts in that case were with reference to a transfer application of a case which was being tried by the Sessions Judge. The case before the Sessions Judge was a case of dacoity and the High Court when it made the order was not appraised of the fact that the trial in the case had already commenced by the time the application for transfer was made. By the time the telegram was filed before the Sessions Judge, the trial practically closed as the judgment was delivered on 5th December. Under those circumstances, the learned Judges simply stated:

'We cannot say that he was wrong in refusing to adjourn the case, at so late a stage, on the strength of a telegram said to have been received by the accused's vakil to the effect that the High Court had passed an order to transfer the case'.

This case, in my view, does not support the contention of the learned Government Advocate. In dealing with the question whether a telegram received from the advocate in the High Court staying further proceedings Venkatasubbarao, J, in the case of Ponnuswami Aiyer v. K. Ganapathy Aiyer, AIR 1924 Mad 393, which I will deal with presently, noticed the case in ILR 19 Mad 375 and observed that it has no bearing on the question before him.

10. The law on the subject whether the Judge or the Magistrate has to act upon a telegram, breach of which would constitute contempt, is clear according to the English decisions and several other decisions of the Madras, Patna and Calcutta High Courts placed before me by the learned Advocate General. These cases also clearly lay down that the officer must stay his hands till at least some time if he is apprised of the fact of stay by a telegram filed by the parties received from the counsel in the appellate Court informing the order of stay. In the case of *In re Bryant*, (1876) 4 Ch D 98, where a sheriff's officer and an auctioneer proceeded with the sale of the property of a trader seized under a fi. fa. after they had received notice by a letter from the debtor's solicitor that he had filed a liquidation petition, and had also received notice by telegram that the Court of Bankruptcy had made an order restraining further proceedings under the writ, the Court held that the Sheriff's officer and the auctioneer had been guilty of contempt of Court, and that they must pay the costs of a motion to commit them. In the Judgment Bacon, C. J. observed:

'There can be no kind of excuse for the conduct which the sheriff's officer has thought fit to pursue, ...It is perfectly clear that he knew that an act of Bankruptcy had been committed, and he admits that a telegraphic communication had been made to him before the sale of the fact that an injunction to restrain the sale had been ordered by the Court..... It is an admitted fact that an injunction had been granted, and that the Sheriff's Officer and the auctioneer after they knew this disregarded it, and proceeded to a sale But instead of this he chose, in violation

of the law and in contempt of the Court, to proceed to a sale, thereby occasioning not only loss but considerable expense to the estate'.

This decision clearly lays down that the telegram should be acted upon because it gives the officer concerned 'the knowledge that the said order has been made. In the case of *Ex parte Langley*, *Ex parte Smith*; *In re Bishop*, (1879) 13 Ch D 110, it was held that sufficient notice of the granting of an injunction may be given by telegram. Relying on these two cases, Venkatasubba Rao J. held in the case of AIR 1924 Mad 393, already referred to:

'Notice of an order can be given otherwise than by an official communication of it. Under certain circumstances a telegram may constitute such a notice of an order of a Court as to make a person who disregards the notice and acts in contravention of the order liable for contempt of court'.

In the case of *Satinath Sikdar v. Ratanmani Naskar*, 15 Cal LJ 335, it was held that the act of the Mun-siff in assessing mesne profits after being informed that a telegram was received staying the proceedings was a contempt of the authority of the High Court and that the order made by him was without jurisdiction. In the case of *Rameshwar Singh v. A. N. Choubey* AIR 1954 Pat 554, it was held by a Division Bench following the decision in the case of *Har Kishun Singh v. Chhotan Mahton* AIR 1951 Pat 494:

'When an order of stay or other such prohibitory order has been made by the High Court and when the Subordinate Judge or Magistrate is informed of the order by an Advocate or pleader, he ought ordinarily to accept what is stated by the Advocate or pleader and stay further proceedings. Certainly, he ought to do so, if the Advocate or pleader is in a position to satisfy him as to the source of his information and is prepared to support it by an affidavit. Where no affidavit is filed, the Subordinate Court would be better advised to either act upon the information supplied to him by the Advocate or ask for the filing of an affidavit in support of that statement'.

In the case of AIR 1951 Pat 494, it was held by Division Bench of the Patna High Court.

'When an order of stay or other such prohibitory order has been made by the High Court and when the Subordinate Judge or the Magistrate is informed of the order by an advocate or pleader, he ought ordinarily to accept what is stated by the advocate or pleader, and stay further proceeding. Certainly he ought to do so, if the Advocate or pleader is in a position to satisfy him as to the source of his information and is prepared to support it by an affidavit. If the Subordinate Judge or Magistrate disregards such information and continues the proceeding, he may find it a matter of difficulty to satisfy the High Court that he believed in good faith that no prohibitory order had been made'.

The reason for this conclusion is given by Shearer J. who delivered the judgment as follows,--

'The reason why the Subordinate Judge or Magistrate should invariably take such a course is that an advocate or a pleader is an officer of the Court and is not likely to supply information as to the correctness of which he is not himself completely satisfied. If an advocate or pleader acts improperly or carelessly and it eventually turns out that no prohibitory order has been made by this Court suitable action can be taken against him'.

He further observed:

'There are decisions both in India and in England which show that when a Subordinate Judge or Magistrate disregards a prohibitory order of which he has been given a notice in this way, it amounts to a contempt of Court, vide 14 Ind Cas 808 (Cal) and (1879) 13 Ch D 110'.

11. The learned Advocate General then contended that even if it is held that the Subdivisional Magistrate ought to have acted upon the telegram received from the Advocate at Cuttack he did not commit any contempt inasmuch as he had no deliberate intention to flout the order of this Court. In support of this contention he relied upon a decision of the Supreme Court in the case of H. P. Singh v. Thakur Prasad Tewari AIR 1953 SC 436 in which it was held :

'The District Magistrate was not personally guilty of contempt. The fact that he was away on tour and was not aware of the order of the High Court, must be regarded as a good defence in the contempt proceeding. Again as there was no intention to flout or disobey the order of the High Court, that must also be regarded as an important circumstance in favour of the District Magistrate'.

This case went up in appeal to the Supreme Court from a decision of the High Court of Patna holding that the District Magistrate was guilty of contempt, though it discharged the rule issued against him. The Supreme Court confirmed the order of the Patna High Court and dismissed the appeal subject to the observation that the appellant did tender an apology but that apology must not be taken to be a confession of guilt, especially as it was made in connection with the delay which had occurred in his office and that as the rule against the appellant had been discharged by the High Court, the purpose of the appellant was served by the Supreme Court's pronouncement that in law he was not guilty of contempt. But the Supreme Court approved of the observation of the High Court.

The facts of this case are quite different. The District Magistrate was absent at the time when the order of the High Court ordering release of the prisoner was received. The delay was on account of his absence. When he is not aware of the receipt of the order of the High Court on account of his absence, he cannot be said to have any intention to flout the order of the High Court and therefore cannot be personally held guilty of contempt. But the facts of the case before me are quite different. Here the Magistrate had knowledge of the order of stay. The telegram received from the counsel at Cuttack was filed before him with a petition and he acted contrary to the telegram and so he is said to have disobeyed the order of stay.

The learned Government Advocate also relied upon the observation of Mr. Justice Shearer in the case of AIR 1951 Pat 494 and also the observation in the case of AIR 1954 Pat 554 already referred to above. The learned Government Advocate relied upon the following observation made by Justice Shearer in the first case. After holding, as already observed by him, that if the Subordinate Judge or Magistrate disregards a prohibitory order of which he has been given a notice in

this way, it amounts to a contempt of court, Justice Shearer observed;

'I think myself that Mr. K. N. Singh acted im-providently in tearing up this letter without apparently reading it, and that he would have been better advised to have read it and to have considered whether or not it did not show, satisfactorily enough for him to have acted on it, that an order staying further proceedings had been made by this Court. It is, however, quite impossible to say that either he or Mr. Mukherjee deliberately committed any contempt of Court'.

So observing the learned Judge discharged the rule, but in the circumstances did not make any order for costs against the petitioner. On the authority of this observation, the learned Government Advocate contended that the Sub-Divisional Magistrate, Dhenkanal cannot be held to be guilty of contempt. The facts in the above case are quite different and the observations of the learned Judge are made with special reference to those facts. In the case of AIR 1954 Pat 554, the judgment of the Division Bench was disbelieved by Mr. Justice Jaisankar who was a party to the decision in 1951 Patna Case. He adhered to the view in 1951 Patna Case as far as the duty of the Subordinate Judge or Magistrate was concerned that when it was brought to his notice by a telegram received from the Advocate in the High Court he should stay the proceedings. But on the facts present before the Division Bench, after a consideration of those circumstances, observed:

'Although I think that Mr. Choubey, the Second Officer of Jamui, acted somewhat indiscreetly in the matter and that he would have been better advised to have acted either upon the information supplied to him by the Advocate of this Court, or asked for the filing of an affidavit in support of that statement, I do not think that Mr. Choubey did anything deliberately in the way of committing a contempt of this Court. Accordingly, in the circumstances, I am not prepared to hold that Mr. Choubey's action amounts to a deliberate disobedience of an order of this Court. I would accordingly discharge this rule'.

in this case the order which was disobeyed was the order of a Munsif and the Second Officer rejected the application holding that the order under Section 133, Cr. P. C. which was the subject matter of the proceeding before him was already upheld by the High Court. In my opinion therefore, the observations of the learned

Judges in these two cases, in which it was held that information conveyed by a telegram of the order of stay should be acted upon, that there was no deliberate intention to flout the order of the Court and therefore did not amount to contempt of Court cannot be applied to the facts present in the case before me. Further with all respect to the learned Judges who made the relevant observations in those two cases, I am of opinion that not acting upon the telegram sent by the Advocate informing of the stay of further proceedings is a disobedience of the order of the High Court. In the case of (1876) 4 Ch D 98 already referred to, Chief Justice Bacon observed :

'I am not willing to believe that he did not intend to commit a contempt of the Court, but I find that he did wilfully and with full knowledge disobey the order. I am not pressed to make an order for commitment, though that would be the proper thing to do. I am told that the money produced by the sale is still in the Sheriff's hands, and, upon his undertaking to pay it over to the trustee, I order that these two gentlemen do pay the costs of this application'.

These observations clearly indicate that though there is no intention to commit a contempt of the Court, yet a wilful disobedience of the order with full knowledge would amount to contempt. This decision also clearly lays down that in the case of wilful disobedience of the order, an order for contempt can be made for such disobedience. The learned Judge did not order commitment for contempt, because he was not pressed to make an order for commitment. He expressly stated that that would be the proper order to be made in the case of wilful disobedience of an order with full knowledge,

12. The Sub-Divisional Magistrate could have, after the petition with the telegram was filed before him, sent for from the District Magistrate for the stay order if any order was received from the High Court, the Office of the District Magistrate being by the side of his court, or he could have waited for a day in order to get the order of the High Court. The matter was posted to 23rd November for orders. He adjourned the same to 27th and there is no reason why he could not have adjourned it by another day in order to get the orders of the High Court. He passed an order on the petition filed by Mr. Tripathy, the Muktear on behalf of the

complainant opposite party before the Subdivisional Magistrate. He did! not reject it on the ground that it was not supported by an affidavit. He did not ask for affidavit. The grounds of non-liability alleged in the' counter affidavit are all grounds which were not present in his mind when he did not stay the proceedings but pronounced the order. His order that he cannot act upon the telegram is therefore, an act of disobedience of the order of the High Court and on the authority of the decisions already quoted this disobedience amounts to contempt of court though there is no intention to flout the order of the High Court. In the case of State v. Radhagobinda Das, AIR 1954 Orissa 1, it was held :

'For contempt proceedings, the intention or motive of the contemner is not essential if really the writing has a tendency, or, is calculated to impede the fair trial of the case'.

This case also laid down that where the contemner said that if the law finds him guilty of contempt he bows down to the judgment of Court, it was not an adequate expression of apology.

13. I am, therefore, of opinion that Shri B. K. Kar, Sub-Divisional Magistrate, Dhenkanal is guilty of wilful disobedience of the order of this Court staying further proceedings in Criminal Misc, Case No. 19 of 1957 which was brought to his notice by a telegram sent by the Advocate who appeared for the petitioner and filed before him along with a petition before he pronounced the order, in pronouncing the order subsequently. I, therefore, convict Shri B. K. Kar, Sub-Divisional Magistrate, Dhenkanal, of contempt of Court. He showed cause and pleaded not guilty. He took untenable grounds in his defence. He tendered only a conditional apology which is no apology at all. Under these circumstances, I sentence him to pay a fine of Rs. 100/-in default to undergo simple imprisonment for fifteen days. Fine should be paid within a month.

14. Now coming to Criminal Misc. Case No. 90 of 1957, as already stated, this was an application filed to clarify the order passed by me in Criminal Revision No. 190 of 1956 and for quashing the proceedings before the Sub-divisional Magistrate for redelivery of the land started by the opposite party in Criminal Misc. Case No. 19 of 1957. The petitioner Golam Mahammad filed a case under

Sections 447 and 426, I. P. C. for Criminal Trespass and mischief against the opposite party Sarif Beig. Sherif Beig was convicted by the trial court. The conviction was confirmed in appeal as also in a Revision before this Court. The land which is the subject matter of the trespass was at that time a vacant land. Though according to the petitioner's case before me now that the accused did not forcibly take possession of the land and his trespass was only an isolated act of trespass, yet he filed an application before the Magistrate for restoration of possession of the land alleging that he was forcibly dispossessed from the land by the accused.

That prayer was granted by the trial Court and the appellate court and in the Revision petition filed in this Court, I held that as there was no finding by both the courts that the trespass by the accused was attended by criminal force or show of force or by criminal intimidation and that by such force or show of force or criminal intimidation the petitioner had been dispossessed of immoveable property the order restoring possession was not correct and therefore I set aside the order. After the setting aside of that order, the accused opposite party moved the Magistrate for redelivery of possession. It is during the pendency of the said proceeding before the Magistrate that the present application was made before this Court under Section 561A, Cr. P. C. Though [an order of stay was granted, as already held by me, [the Magistrate pronounced the order even after coming to know of the order of stay. On the authority of the case in 15 Cal LJ 335 such an order is void order.

In his order the Magistrate said that he had carefully gone through the order passed by this Court in Criminal Revision setting aside the order for delivery of possession and the purport of the order was that in regard to the disputed property the petitioner should be allowed the same position as he was holding immediately before the restoration order was passed. As far as I see in my judgment I only set aside the order for delivery of possession. I did not mention anything that with regard to the disputed property the petitioner should be allowed the same position as he was holding immediately before the restoration order was passed. (15) Mr. Passayat contended that the opposite party is not entitled to claim possession as Section 522 of the Cr. P. C. does not enable an accused to take any step by virtue

of the section. The application of the accused cannot be said to be an application under Section 522, His application is an application for res-toration of possession under the inherent power of the Court, because the order in consequence of which the delivery of possession was made over to the complainant was set aside. Mr. P. K. Mohanti, learned counsel appearing for the opposite party cited the following decisions before me to the effect that the Court under such circumstances can order a redelivery. In the case of Bisweswar Singh v. Bholanath Pathak, AIR 1914 Cal 275(2), where the accused were convicted of criminal trespass into the complainant's garden, unattended with any force, the Magistrate ordered that possession of the garden should be restored to the complainant; accordingly possession was restored to him; the accused moved the High Court which set aside the order for restoration; and the accused then applied to the Magistrate for re-delivery of possession of the garden to them, but the Magistrate refused the prayer on the ground that he had no power to direct the Police to redeliver the possession of the garden to the accused; it was held that the order of the High Court, setting aside the order for restoration carried with it incident of restoration of the garden to the accused and that the Magistrate had power to direct the Police to restore possession of the garden to the accused. In the case of Rajathammal v. Rajamanickam Pillai, AIR 1922 Mad 188(1), it was held :

'When use of criminal force is wanting. Criminal Courts have no jurisdiction to act under Section 522. If possession has been given, it is the duty of the Court to restore the parties to the position in which they were before possession was wrongly given'.

These two decisions clearly support the contention of the learned counsel for the opposite party that on the order under Section 522 being set aside he is entitled to apply for restoration of possession. But as the order in this present case was pronounced after the stay order was issued and is void, the order legally does not exist. Mr. Mohanti contends that if the order is void the petition has to be enquired into and a fresh order should be made. Though his contention appears to be sound, on the facts present En this case I do not think it would be in the interests of justice to allow this litigation in the criminal court to go on between the parties.

At the time of the criminal case, the site was a vacant site. After possession was delivered to the complainant under Section 522, it is stated that he built a house on it. The opposite party says that it was only a temporary structure. But in any case the situation of the land has changed. The dispute between the parties is with regard to the rival claims of title to the property. It would be better that the parties get their rights adjudicated in a Civil Court instead of pursuing their remedies in a criminal court. At the time when the complainant took possession of the land, the Sub-Inspector who went to deliver possession of the same noted down simply that he made over possession of the land to the complainant. He has not stated that the accused opposite party was dispossessed from the land. Under these circumstances, it is better in the interests of justice that the opposite party, Sarif Beig, is directed if so advised, to file a civil suit for possession of the land based on his title to the same. With these observations the Criminal Misc. Case is dismissed.