

**Dariya Vs. Suba and anr.**

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**Court :** Rajasthan

**Decided On :** May-30-1957

**Reported in :** AIR1959Raj50; 1959CriLJ236

**Judge :** K.L. Bapna, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 145

**Appeal No. :** Criminal Ref. No. 35 of 1957

**Appellant :** Dariya

**Respondent :** Suba and anr.

**Disposition :** Reference allowed

**Judgement :**

ORDER

**K.L. Bapna, J.**

1. This is a reference by the learned Additional Sessions Judge, Dholpur by order of 15th February, 1957.

2. Dariya made an application to the learned Sub-Divisional Magistrate, Dholpur on 27th June, 1956 that he with his nephew Sukha was in possession of Raimjawala land in village Gunpur Tahsil Rajakhara for a number of years but

there was interference by Suba and Bhagwansingh non-petitioners. The dispute first arose about that land in 1954 which led to an institution of the suit by the petitioner. The petitioner was successful. A pan-chayat was also held in respect of that land, and the Panchas on 8th June, 1954 also decided the possession in favour of the petitioner. It was alleged that the non-petitioners were however, bent upon taking possession of the land and committing breach of the peace. Re has, therefore, prayed that proceedings be taken under Section 145 of the Criminal Procedure Code for declaring his possession and for prohibiting the non-petitioners not to disturb the possession of Dariya petitioner. The learned Sub-Divisional Magistrate passed a preliminary order on 9th October, 1956 and attached the land in dispute which was khasra No. 615 in village Gunpur. After perusing the affidavits, the learned Sub-Divisional Magistrate held that on the petitioner's own showing the land was in actual possession of Sukha, who was not a servant but a partner in cultivation, and therefore the petitioner had no locus standi to come to court for declaring his possession. He dismissed the application on 9th October, 1956. On revision the learned Additional Sessions Judge has recommended that the order of the Sub-Divisional Magistrate of 9th October, 1956 be set aside and the case be sent back to him for decision on merits.

3. It was observed by the learned Additional Sessions Judge that actual possession need not be confined to mere bodily personal possession, but that it would still be an actual possession if the petitioner was constructively in possession of the property. There is some difference of opinion among the High Courts and some of them have taken the view that in order that the court may interfere under section 145 Cr. P. C. the possession of a claimant should be actual physical possession and the constructive possession, as for example through tenants, does not entitle a person for an order under Section 145, Cr. P. C.: vide *Rangarazu v. Sreenivasa Jagannatha Rao*, AIR 1938 Mad 654. This decision was not followed in a subsequent case of the same court in *Venugopal Mudaliar v. Neelakanta Mudaliar*, AIR 1945 Mad 255. It was held in the latter case that

'as between a landlord and tenant the rule that the possession of the tenant is the possession of the landlord does not apply, but as between rival landlords or between the landlord and the tenant of another landlord the rule will apply for the

purpose of a declaration under Section 145.'

4. In the recent case Padmaraju Subba Raju v. Padmaraju Koneti Raju (S) AIR 1955 Andhra 99, it was held that:--

'Where a third person is in possession and claims under one of the parties, it is that party who is in actual possession and such party is entitled to a declaration.'

5. In my opinion if there is no dispute or clash of interest between the person who is in actual possession, and the petitioner through whom such person is in possession, the petitioner has a right to come to court if his such possession is interfered with in circumstances mentioned in section 145 Cr. P. C. While it was admitted that Sukha was actually cultivating the land, it was also said that ha was the nephew of the petitioner and was living with him. Sukha also in his affidavit said that he was living with his uncle Dariya and was in possession of the land through his uncle Dariya who was recorded as the tenant in the revenue records- There was thus no clash of interest. Sukha was actually cultivating the land and through Dariya he claimed to do so. Dariya was, therefore, entitled to come to court and pray for action under Section 145 Cr. P. C. against others who according to the petitioner, wanted to commit trespass on his land, and there is apprehension of breach of peace.

6. The reference is therefore allowed. The order of the learned Sub Divisional Magistrate dated 9th October, 1956 is set aside and the case will go back to him for decision on merits.

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