

**Ambler and anr. Vs. Pushong and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/868284](http://sooperkanoon.com/868284)

**Court :** Kolkata

**Decided On :** Feb-24-1885

**Reported in :** (1885)ILR11Cal365

**Judge :** Tottenham and ;Ghose, JJ.

**Appellant :** Ambler and anr.

**Respondent :** Pushong and anr.

**Judgement :**

**Tottenham, J.**

1. This was a case under Section 145 of the Code of Criminal Procedure, the Magistrate deciding it in favour of the second party, and the first party have moved this Court to set aside the order on various grounds.

2. In the first place, it was urged that the ease did not properly fall under Section 145 at all, the matter in dispute not concerning any tangible immoveable property; and in the next place, it was contended that if this section did apply then the first party were entitled upon one of the findings of the Magistrate himself to an order in their favour, the Magistrate having found that the first party were actually in possession at the time when these proceedings were instituted. The Magistrate appears to have decided in favour of the second party, because he considered that they were in possession up to within a few days before this case was

instituted, and that the possession of the first party had been wrongfully obtained by force.

3. It seems to me that the first objection taken by the petitioners cannot be maintained. No doubt the Magistrate in his initial proceeding speaks of the dispute as concerning a right to quarry stone in a certain hill, but what he meant was that a dispute existed concerning the possession of the hill itself. Both parties so understood the matter, and both parties adduced evidence upon that understanding and the Magistrate's decision is as to possession of the hill itself, which certainly is tangible immoveable property. Were we to set aside the order upon the ground that the Magistrate's proceeding was not sufficient to give him jurisdiction, the only result would be that proceedings would be taken afresh, and then the Magistrate would correctly describe the subject of dispute by the name of the hill of which each party claims possession.

4. As regards the other objection, that depends upon the construction to be put upon Section 145, as to the period at which the Magistrate is to determine in whose possession the subject of dispute is or was. After setting out what proceedings the Magistrate is to take, the section says: 'The Magistrate shall, 'if possible, decide whether any and which of the parties is then in such possession of the said subject.' And it further provides that, 'if the Magistrate 'decides that one of the parties is then in such possession of the said subject, 'he shall issue an order declaring such party to be entitled to retain possession 'thereof until evicted therefrom in due course of law.' The question is what is meant by the word 'then.' It has been argued, on the other side that, 'is then in such possession' really means was in possession at the time the dispute began, or, 'was in possession at the time when the Magistrate' s attention was called to the dispute.' For the petitioners it has been contended that ' is then ' has its literal meaning, and means the time during which the enquiry is being made, or at any rate, it cannot be construed as having reference to a period previous to the time when the case was instituted by the Magistrate; and this view, I think, is the correct one. The section expressly prohibits the Magistrate from taking into consideration the merits of the claim of any party to possess the subject of dispute. He has simply to determine which party is de facto in possession at the time when he is enquiring into the matter.

And I think that the law contemplates that the time of the institution of proceedings and the time of deciding the case are practically identical. It does not contemplate any change of possession pending the proceedings. The proceedings are intended to be prompt and to be concluded without any delay.

5. In the present case the Magistrate distinctly finds that at the time when he instituted his proceedings, that is, on the 18th October last, the first party were in possession, having two or three days before ousted the second party who had been in possession for some three or four weeks. That being so, the Magistrate's simple duty was to maintain the first party in possession, although he might be of opinion that they were in wrongful possession. He had no power in law in these proceedings to oust the party whom he considered in wrongful possession, and maintain in possession the party whom he considered rightfully entitled to possession. That being so, the rule must be made absolute. The order of the Magistrate is set aside, and in lieu thereof he is directed to maintain the first party in possession until ousted by due course of law.

6. Another objection was taken by the petition. The Magistrate required the first party to enter into recognizances to keep the peace under Section 107. We find that there is no evidence to warrant him to make that order. That order therefore is also set aside.

**Ghose, J.**

7. I concur in the judgment just delivered by my learned colleague. There seems to me to be a certain amount of conflict of authorities upon the question whether the Magistrate is bound to enquire as to which party was in possession at the time when the dispute arose, or whether he should confine his enquiry to the time when the proceedings were instituted before him. These rulings were either under Section 318, Act XXV of 1861, or under Section 530 of Act X of 1872. The latest case upon the point is a Full Bench decision by the Madras High Court, which is to be found in Mr. Weir's edition of the Madras High Court Reports, page 437. This decision was passed in 1880, overruling an earlier decision of the same Court which had taken a contrary view. It held that the Magistrate was to ascertain who

at the time of enquiry was in possession, and it was probably this decision, as was contended by Mr. Ghose, that the Legislature had in view when, in Section 145 of the law of 1882, they introduced a change of wording. The words I refer to are to be found in the second paragraph of Section 145, namely, 'which of the parties is then in such possession.' I believe the Legislature by introducing the word 'then' intended to remove the doubt which had existed before in this matter, and it seems to me that what the Magistrate is required to do under Section 145 is to enquire which party is in possession at the time of the institution of the proceedings, and not at the time when the dispute arose.

8. Subsequently to this order of the High Court, directing the Magistrate to maintain Ambler in possession, an application was made by Ambler to the Magistrate, for the purpose of obtaining possession, and for the withdrawal of the order of the 11th December 1884, under which Pushong and Sen had been retained in possession.

9. The Magistrate then passed an order to the effect that Ambler should be / put in possession. Thereupon Pushong and Sen presented a petition to the Magistrate, in which they urged that Ambler had relinquished possession of his own accord, and that they having obtained possession, the order of the High Court could not be carried out if it was intended by that order that Ambler should be restored to possession; they also urged that the Court had no power, under the circumstances, to restore a party to possession. The Magistrate, after hearing both sides, directed that his previous order should be stayed, pending a reference to the High Court to ascertain whether the High Court intended that Ambler should be restored to possession, and, if not, what effect should be given to the order. Before this reference reached the High Court, Ambler moved the High Court in the matter, and obtained a rule calling upon Pushong and Sen to show cause why the order of the High Court, dated the 24th February 1885, should not be carried out by the Magistrate, and why the order of the Magistrate, dated 11th December 1884, should not be withdrawn. Before the hearing of this rule the reference made by the Magistrate reached the High Court, and the two matters were heard together at the hearing of the rule on the 1st May 1885.

10. Mr. Ghose for Ambler contended that possession given under an illegal order, subsequently set aside, must be ignored; that the true effect of the High Court's order was that the Magistrate should regard Ambler as in possession from the date of his order of the 11th December 1884; that there would be no object in the High Court possessing powers of revision in such cases if orders made by it were to have no effect. [Ghose, J.--But it is said that you relinquished possession of your own accord.] Mr. Ghose contended that there was nothing to support that allegation; and that the Magistrate had stated that the other side were now in possession under his own order; that until that order had been withdrawn Ambler was bound to obey it. That in a similar case to this, viz., in the matter of Chutraput Singh 5 C.L.R. 200 the High Court had directed what was practically restoration to possession; it directed the Magistrate, whose order was reversed, to see that the other side was kept in possession; and that, although it was doubtful whether under the Code of 1861 the High Court possessed this power, yet since the passing of the Code of 1872 there was no longer room for doubt.

11. Mr. Mullick for Pushong and Sen contended that the Court had no power to restore a person to possession, except under the 'provisions of Section 522 of the Code.

12. Ghose was not called upon to reply.

13. The Order of the Court (Tottenham and Ghose, JJ.), was as follows:

On the 24th of February last, this Court on revision set aside an order of the Joint Magistrate of Monghyr, under Section 145 of the Criminal Procedure Code, in a case of disputed possession, between Charles Ambler on the one side, and Pushong and Sen on the other. The present proceedings have arisen out of that order of the 24th of February, which comes before us in a two-fold manner : Ambler, in whose favour the order of this Court was passed, applied to us that the Magistrate of Monghyr may be informed that it was his duty, in carrying out the orders of this Court, to put the petitioner in possession; and the Magistrate directed to withdraw the order by which Pushong and Sen were put into possession. Upon this petition a rule was issued on the other side to show cause. In the meantime the Magistrate had by a letter referred to this Court to know

whether the High Court intended to restore Ambler to possession, or, if not, what effect was to be given to the High Court's order.

14. It appears to us that neither the reference nor the application upon which the present rule was granted should have been necessary. It is difficult to conceive how any Magistrate could doubt what the meaning of this Court's order was, or what his duties were in respect of that order. The Magistrate, in December last, while deciding the case, found Ambler to be in possession of the subject of dispute, and yet because he found also that the other side, Pushong and Sen, were in actual possession on the 14th October, that is, a few days before the institution of the case, he declared them entitled to retain possession until legally evicted.

15. The order of this Court was, that the order of the Magistrate was to be set aside, and in lieu thereof the first party, Ambler, should be maintained in possession till ousted by the due course of law. It seems perfectly clear that the meaning of this order is that the possession of Ambler be declared, and that at the time when the Magistrate made the order in favour of Pushong and Sen, his order should have been in favour of Ambler. We now direct that the Magistrate formally withdraw the order passed on the 11th of December last in the matter in question, and that in lieu thereof take the order of this Court of the 24th February as being the order which should have been passed, and accordingly declare Ambler to be in possession, and entitled to retain possession until ousted by due course of law. This order will govern the reference.