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Court : Kolkata

Decided On : May-19-1981

Reported in : 1981CriLJ1403

Judge : Anil Kumar Sen and ;B.C. Chakrabarti, JJ.

Appellant : Zamila Khatoon

Respondent : Umar and anr.

Judgement :

B.C. Chakrabarti, J.

1. This is an appeal by the plaintiff of Title suit No. 10/80 now pending in the 4th Bench of the City Civil Court at Calcutta and is directed against an order dt. Sep. 9, 1980, refusing the plaintiff appellant's prayer for temporary injunction under Order 39 Rules 1 & 2 of the Civil Procedure Code.

2. The plaintiff appellant (hereinafter called the plaintiff) instituted the suit for a declaration that the plaintiff is a tenant in respect of the suit premises which comprises one room on the ground floor of 49 Raffi Ahmed Qiduai Road and for further declaration that an order passed by the learned Executive Magistrate dt, December 21, 1979 arising out of a proceeding under Section 144 CrI.P.C. is not binding on her. Claim includes a prayer for permanent injunction restraining defendant No, 1 from disturbing the peaceful possession of the plaintiff. The case

of the plaintiff in brief is as follows :-

The plaintiff is tenant under the defendant No. 2 in respect of the suit room and has been in occupation thereof for more than 24 years. On March 29, 1978, the defendant No. 1 insisted for letting out the suit premises to him but the plaintiff refused to do so and she had not the right either to sublet the premises in view of the legal prohibition under Section 14 of the West Bengal Premises Tenancy Act. The plaintiff in fact holds 2 tenancies in the same premises, the other carrying a rental of Rs. 30/- per month which is now in the occupation of the plaintiff's son. In view of the illegal demand of defendant No. 1 the plaintiff filed an application under Section 144 of the I.P.C. and the defendant No. 1 likewise filed another application under the aforesaid section alleging that he was a sub-tenant in occupation but that he had been ousted by the plaintiff on Mar. 31, 1978, The learned Executive Magistrate started a proceeding under Section 145 CrI.P.C. and by order dt. December 21, 1979 declared that the defendant No. 1 shall be deemed to be in actual possession of the suit room and further directed the plaintiff to deliver possession to defendant No. 1 within 15 days from the date of the order. Hence the suit for the reliefs already mentioned.

3. In this suit the plaintiff filed an application under Order 39 Rules 1 and 2 of the Civil Procedure Code on the selfsame allegations and asked for temporary injunction restraining defendant No. 1 from disturbing the peaceful possession of the plaintiff and also prayed for an interim order

4. As it appears from the record that initially the learned Judge passed an order directing the parties to maintain status quo. By the impugned order however the prayer for temporary injunction was refused and the order of status quo was vacated. The learned Judge found that criminal Court had directed the defendant No. 1 to be restored to possession and any interference with such direction even by way of a temporary injunction would amount to restraining the defendant No. 1 from prosecuting a proceeding in a criminal matter which is prohibited under Section 41 of the Specific Relief Act. He further held that the defendant No. 1, in view of the order of the learned Magistrate was entitled to possession even if he is ultimately found to be a trespasser until evicted by an order of the Civil Court

made in due course of law. In coming to this conclusion the learned Judge relied on the decision reported in : 1959 CriLJ1223 . On such findings the application for temporary injunction was dismissed.

5. Being aggrieved the plaintiff has preferred the present appeal.

6. The proceeding under Section 145 was registered as Misc. Case No. 523/78. Evidence was adduced by both parties before the learned Magistrate. The learned Magistrate found as it appears from the order that the defendant No. 1 was in actual possession of a portion of the suit room upon a claim of sub-tenancy for several years up to March 31, 1978 and that he had been ousted from possession on April 1, 1978. The portion of the room in the occupation of defendant No. 1 was held to be separated by a partition, The question whether the claim of sub-tenancy was sustainable or not, was left open for decision before the proper tribunal. Factually it was found that the defendant No. 1 was deemed to be in actual possession at the time of filing of the case on April 5, 1978 and the plaintiff was directed to restore possession to the defendant No. 1. This was obviously an order passed under Section 145(6) of the Cr.P.C.

7. The learned Advocate for the plaintiff appellant contended that the learned Judge went wrong in refusing the prayer for temporary injunction in the facts and circumstances of the case and that there is no bar in passing an order for injunction as the learned Judge seems to think. In support of this contention reliance was placed on a decision in the case of Mirza Md. Aziz v. Safdar Husain : AIR1962 All68 . It has been held in that case that where a party against whom an order has been passed in a case under Section 145, filed a suit in a competent Civil Court for the decision of the dispute and the Civil Court issues a temporary injunction stopping the other party from taking possession of the property in dispute according to the order of the Magistrate, the order of the criminal Court though valid cannot be enforced so long as the injunction is in force. The facts of that case however, were different. There Mirza Md. filed an application purporting to be under Section 144 Cr.P.C. against Safdar Husain and Anr. The City Magistrate directed possession to be delivered to Safdar Husain. Immediately thereafter Mirza Md. went up in revision against the order of the Magistrate but the

revision was dismissed. He then came up before the High Court. In the meantime the applicant had filed a suit in the Civil Court and the Civil Court issued the temporary injunction stopping Safdar from taking possession of the room according to the order of the Magistrate. The application for revision was dismissed and the observation referred to hereinbefore was made in course of the judgment. The judgment only shows that there is no legal bar in passing an order for temporary injunction by the Civil Court. There is nothing beyond this in this decision which is of relevance for our present purposes.

8. The learned Advocate for appellant also referred to another decision in the case of *Brojendra Kr. v. Jitendra Chanda* AIR 1960 Assam 111. This decision passed by the Special Bench lays down that an order under Section 145(4) proviso does not affect the jurisdiction of the Civil Court under Order 39 to grant injunction. There also the facts were different. There the criminal Court passed an order against the plaintiff petitioner under Section 145(4) but failed to restore to possession the defendant who are held to be forcibly and wrongfully dispossessed with the result that the plaintiff was allowed to continue in possession. Within a few days of the order the plaintiff brought a suit for declaration of title confirmation of possession and permanent injunction against the defendant. It was held that the order of the Magistrate, that a party might be deemed to be in possession did not in any manner affect the jurisdiction of the Civil Court to grant an injunction restraining the defendant from dispossessing the plaintiff if an appropriate case was made for the exercise of its discretion under Order 39 of the C.P.C. It appears that in that case there was no order under Section 145(6) of the Cr.P.C.

9. Mr. Tagore on the other hand contended that even assuming the defendant No. 1 to be in wrongful possession he has the right of an owner with respect to all persons- except the true owner himself and that even a wrongdoer who is deprived of his possession can recover it from any person whatever, simply on the ground of his possession. He had drawn our attention to a passage from *Salmond's Jurisprudence* (12th ed. p. 294) which reads as follows:

Even the true owner, who takes his own may be forced in this way to restore it to the wrongdoer, and will not be permitted to set up his own superior title to it. He

must first give up possession, and then proceed in due course of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by a judgment according to law.

10. He also referred to a decision in the case of *Nair Service Society Ltd. v. K.C. Alexander* : [1968]3SCR163 . There though the dispute was with regard to a possessory suit under Section 1) of the Specific Relief Act, as it then stood, the observations made therein are not without relevance. It was held that a person in possession of land in assumed character of owner has a perfectly good title against all the world but the rightful owner. It is for the rightful owner to come forward and assert his title in due course of law. Obviously it is not, open to the rightful owner to resort to violent self-help. The observations made in : 1959 CriLJ1223 referred to and relied upon by the learned Judge in the Court below was a case arising out of a proceeding under Section 145 Cr.P.C. and there also it was held that the life of an order made under Section 145(6) is conterminous with the passing of a decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the criminal court, Mr. Tagore also referred to several other decisions where a similar view was taken and it is needless to refer to each of them.

11. Upon hearing the learned Advocates and upon considering the authorities cited the true legal position seems to be as has been held as early as in the case of *Corpn. of Calcutta v. Bijoy Kr. Addy*, 27 Cal WN 787 : (AIR 1924 Cal 334) that even if the Court has jurisdiction to restrain criminal proceedings it will not interfere as a general Rule, and that though the extreme position jannoi be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere except in very special circumstances by way of injunction. In the present case the defendant No. 1 has obtained an order for restoration of possession under Section 145(6) of the Criminal Procedure Code passed by a competent Court of Magistrate on evidence adduced before him by both parties. He was found to be in possession and to have been dispossessed. The propriety or correctness of this order for restoration of possession is open to challenge at the instance of the plaintiff in the Civil Court and the decision of the

Civil Court will ultimately have precedence over the decision of the Magistrate which really is a stop gap measure. In view of the facts of the case and the findings of the learned Magistrate which were not challenged in revision, we are not inclined to interfere with the order passed by the learned Judge in this case. We do not however propose to hold that there is any bar in doing so in a proper case but in the facts and circumstances of the present case we see no reason why the order of the learned Magistrate should be kept in abeyance by way of injunction at this stage and on the materials before the court.

12. In the result the appeal fails and is hereby dismissed on contest. We make no order as to costs.

13. The application dated November 20, 1980 stands disposed of in view of the order passed hereinbefore.

14. No formal decree need be prepared in this appeal.

Anil Kumar Sen, J.

15. I agree.

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