

## Masih Uddin vs The State And Ors. on 28 February, 1952

**Equivalent citations: AIR1953ALL383, AIR 1953 ALLAHABAD 383**

ORDER

Wali Ullah, J.

1. The applicant has come up in revision against an order passed by the learned Magistrate on 19-7-1950, by which the crops attached were directed to be released in favour of the opposite party i. e., Bhura and others. This order of the learned Magistrate was affirmed by the learned Sessions Judge on 9-3-1951, when he dismissed the application in revision.
2. It appears that the applicant, on 26-11-1949, made an application under Section 145, Cr. P. C., as the Mukhtar-i-am of the Mutwallis of a waqf. It was alleged by the applicant that the opposite party, namely Bhura and others, were interfering with the possession of the Mutwallis trustees over a large number of plots of land in village Kalolijar in the district of Namirpur. It was alleged that there was consequently an apprehension of a breach of the peace.
3. Notice was issued to the opposite party and proceedings under Section 145, Cr. P. C., were carried on in the Court of the Magistrate. The applicant, in support of his case, filed the Dakhalnama which showed that, in pursuance of a decree for ejectment passed by the revenue Court in a case under Section 180, U. P. Tenancy Act, against Bhura along with some others, proceedings in execution had been carried out by a Vakil Commissioner appointed by the Court and possession delivered to the decree-holder. Along with this piece of documentary evidence some witnesses were also produced by the applicant to support his case.
4. The opposite party denied that the trustees of the waqf had obtained actual possession by means of execution proceedings in the revenue Court. Some witnesses were also produced to support the case of the opposite party.
5. The learned Magistrate, on a consideration of the materials before him, recorded the opinion that in spite of the formal ejectment of Bhura under the decree passed in the suit in 1948, he i. e. Bhura, continued in possession of the plots in dispute; in other words, it was held that the second party was not actually dispossessed from the land in dispute in spite of the delivery of possession which, according to the learned Magistrate, was only formal.
6. There were four witnesses in support of the case of the applicant, namely Mathura, Raja Ram, Ahmad and Masihuddin while there were three witnesses in support of the case of the opposite party, namely Bhura, Bhaggi Singh and Jodha Singh. There was also an extract of Khasra for 1357 Fasli filed on behalf of the opposite party.

7. The oral evidence given by the opposite party was apparently believed by the learned Magistrate, while that produced in support of the case of the applicant appears to have been rejected.

8. In revision the learned Sessions Judge found that there was no legal defect in the judgment of the learned Magistrate and so the application in revision was rejected.

9. Learned counsel for the applicant has raised two points in this Court; (1) that the learned Magistrate has not attached due weight to the decree for ejectment passed by the revenue Court in the suit under Section 180, U. P. Tenancy Act and (2) that the learned Magistrate had misread the evidence of some of the witnesses produced by the applicant. It was also urged that the evidence of Masihuddin applicant had been entirely ignored by the learned Magistrate.

10. In support of point No. 1 taken by the learned counsel for the applicant, my attention has been invited to a number of rulings in which, in effect, it has been held that it is the duty of the Magistrate holding proceedings under Section 145, Cr. P. C., to maintain the rights of the parties when such rights have been declared by a competent Court within a time not remote from taking proceedings under the section.

11. Learned counsel has relied on the cases of Daulat Koer v. Rameshwari Koeri, I. L. R. 26 Cal. 625, Sukan Singh v. Prayag Singh, A. I. R. 1920 Pat. 210; Makhan Lal v. Mangal, I. L. R. (1943) ALL. 150 and Imtiaz Ali v. Badruddin, A. I. R. 1943 Oudh 410.

12. In the case of Makhan Lal v. Mangal, (I.L. R. 1943 ALL. 150) decided by this Court, it was held by Yorke J.:

"Where the civil Court had decided in favour of a certain person that he was the owner entitled to the possession of a plot, it was held that in such a case Section 145, Criminal P. C. could not apply."

At p. 153, the learned Judge observed :

"It has been held in various cases that where there is a decree of a civil Court for possession in respect of the disputed land, the duty of a criminal Court proceeding under this section is to find which party held such civil Court decree and then to maintain that party in possession." Further the learned Judge proceeded to observe :

"Again it has been said that it is the duty of the Magistrate to maintain any order which has been passed by the civil Court; and therefore to take proceedings which must necessarily have the effect of modifying or cancelling such order or of interfering with the rights of the parties determined by a civil Court is to assume a jurisdiction that the law does not contemplate. Similarly it has been held that when the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the right of the successful party, and the defeated party will not be allowed to invoke the aid of the Magistrate

and the police to neutralise the effect of the decree of the competent civil Court."

13. In the case of *Imtiaz Ali v. Badruddin*, (A. I. R. 1943 Oudh 410) (*ubi supra*), decided by the Chief Court, Bennett J. held :

"Where the civil Court which was seized already of the matter has disposed of it in favour of one of the parties to proceedings under Section 145, the proceedings under Section 145 should be set aside in revision. It will be open to the Magistrate, if he thinks necessary, to take proceedings against either or both parties under Section 107, Criminal P. C."

14. In view of the case law mentioned above, it seems to me quite clear that the learned Magistrate in the present case did not attach that importance to the decree for ejectment and the execution proceedings consequent upon it, which it was his bounden duty to do. After all when proceedings under Section 145, Criminal P. C., are taken it is intended by the Legislature that the Court concerned would come to a finding as to which of the two parties is actually in possession. Such possession has to be protected. The party found to be in actual possession has to be maintained in that possession until such party is evicted therefrom in due course of law. Meanwhile all disturbance of possession is forbidden. If there has already been a decision by a competent Court, under which a right to possession has been declared in favour of one party or the other, that decision must be respected and maintained by the criminal Court.

15. In the present case, the learned Magistrate has again and again treated the proceedings, for delivery of possession in pursuance of the decree for ejectment to be purely a formal proceeding divorced altogether from the factum of actual possession. In this, it seems to me, the learned Magistrate was very much mistaken.

16. Again, the learned Magistrate has put a good deal of reliance on the extract of khasra for 1357 Fasli in holding in favour of the opposite party, 1357 Fasli began on 8-9-1949. The application under Section 145 was filed in the Court of the Magistrate by the present applicant on 26-11-1949. It is, therefore, clear that at the time when the Khasra entries for the year 1357 Fasli were actually made, the dispute with regard to the possession of the fields in question had in all probability already commenced. Moreover, the Patwari of the circle who prepared the Khasra entries, was then in possession of this Khasra as the copy of the extract of the Khasra filed by the opposite party was obtained from him sometime in April 1950.

17. It seems to me, therefore, that the learned Magistrate did not approach the evidence in this case from the proper point of view. This was particularly so in regard to the documentary evidence, namely the Dakhalnama filed on behalf of the applicants and the Khasra extract for 1357 Fasli filed on behalf of the opposite party. As I have said above, the learned Magistrate failed to appreciate the effect of the decree and consequently of the Dakhalnama executed in execution of the decree for ejectment.

18. Mr. S. N. Misra, the learned counsel for the opposite party, Bhura and others, has contended that in revision this Court is bound to accept the finding of the learned Magistrate on the question of the factum of possession. He has cited some authorities of Courts other than this Court, to show that the finding on the factum of possession is binding on this Court. It seems to me, however, that the correct position is that ordinarily this Court, sitting in revision, will not interfere with findings of fact recorded by the Court or Courts, below. When, however, it appears to this Court that the case has not been approached from the proper point of view by the Court, or Courts below as the ease may be and that consequently there is reason to think that there has been a failure of justice, this Court will undoubtedly interfere at the revisional stage. This, to my mind, is the correct legal position and this has been affirmed again and again by decisions of this Court.

19. It seems to me that, on the basis of the decree very recently obtained by the trustees of the waqf, whose Mukhtar-i-am was the applicant, prior to the institution of proceedings in the criminal Court under Section 145, Criminal P. C., the applicant must be held to be in possession. It may be noted here in passing that it is not the case of the opposite party that they obtained possession of the plots afresh after the termination of execution proceedings under which the decree-holder must be deemed to have obtained actual possession of the plots in dispute. I am unable to appreciate the significance of the word "formal" which has been repeatedly used by the learned Magistrate in connection with the execution proceedings in pursuance of the decree for ejection.

20. For the reasons given above, it must be held that the first party was in actual possession of the plots in dispute on the relevant date. I accordingly set aside the order of the learned Magistrate dated 19-7-1950. The possession of the applicant i. e. the first party, over the land in dispute shall be maintained and the second party is directed not to interfere with the possession of the first party until that party is ejected therefrom in due course of law.

21. It appears that the crops attached during the pendency of these proceedings were sold and the money is in deposit in Court. This money, which is in deposit in Court, shall now be paid over to the first party.

22. Mr. Misra, the learned counsel for the opposite party, has submitted that in pursuance of the order of the learned Magistrate passed on 19-7-1950, his clients i. e, the second party, have been in actual possession of the plots and been cultivating them, and that his clients the second party, should be allowed to reap the crops standing to-day as they must have been sown by them. This order will not stand in the way of the second party reaping the crops standing in the fields in dispute. In any case, therefore, the possession of the plots must be delivered to the first party after 15-5-1952.