Mst. Hosnaki And Ors. vs State Through Sheo Baran Rai on 20 September, 1955

Equivalent citations: AIR1956ALL81, 1956CRILJ168, AIR 1956 ALLAHABAD 81

JUDGMENT

1. For the reasons which we shall give later we allow this application, set aside the or

Desai, J.

This is an application in revision against an order passed by a Judicial Magistrate, in a proceeding under Section 145, Code of Criminal Procedure.

2. The Judicial Magistrate on being satisfied on 23-6-1952 that there existed, a dispute between the applicants and the opposite party regarding certain land & that it gave rise to an apprehension of a breach of peace, started proceedings under Section 145 by issuing the order contemplated by Sub-section 1. During the pendency of the case the opposite-party instituted a suit under Sections 20 and 232, Zamindari Abolition and Land Reforms Act, against the applicants and the suit was decreed on 10-9-1953 in his favour by the revenue Court which declaired that he was entitled to retain possession of the land in dispute.

No declaration of the opposite-party's title was given by the revenue Court but it had given a finding on an issue that he had been in possession in 1376 Falsi. Under Section 20 read with Section 232 a. declaration can be given that a person has acquired adhivasi rights on account of his name being entered in the khasra of 1356 Falsi, but the revenue Court actually did not give any declaration that the opposite-party had acquired adhivasi rights. The opposite-party produced a copy of the judgment before the Magistrate, who thereupon stopped taking further evidence and immediately proceeded to declare him to be in possession of the land in dispute and forbid the applicants to interfere with his possession He had already recorded evidence of the applicants in Cull and was in the midst of recording the opposite-party's evidence on 18-9-1953, on which date he passed the order mentioned above, the subject-matter of this revision. It was contended before us that the Magistrate acted illegally in not completing the inquiry into possession and in declaring the opposite-party to be in possession simply on the basis of the decree of the revenue Court and without considering the evidence on the record at all.

The applicants are certainly hot hit by the Magistrate's stopping further inquiry into possession by refusing to record any further, evidence because their evidence had been recorded in full;

but they are certainly hit by his refusal to consider the evidence recorded by him and by his considering himself bound by the decree of the revenue Court.

The applicants Vent up in revision against the Magistrate's order and the Sessions Judge summarily dismissed their application without going into the question whether the Magistrate acted legally in treating the decree, of the revenue Court as conclusive; he did not even consider what was, decided under the decree and what was to be decided by the Magistrate.

3. On 20-2-1955 we allowed, the application, set aside the order of the Magistrate & directed him to re-hear the case by receiving evidence and deciding which party was in possession on the relevant date, namely, 23-6-1952. We had then postponed giving our reasons for the order and I now proceed to give them.

4. Section 145(1) lays down that whenever a Magistrate is satisfied "that a dispute likely to cause a breach of the peace exists concerning any land ..... he shall make an older ..... requiring the parties concerned "in such dispute to attend his. Court ..... and to put in Written statements ot their respective claims as respects the fact of actual possession of the subject of dispute."

When the parties appear and put in written, statements, the Magistrate "shall ..... without reference to .the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively, consider the effect of such evidence ..... and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

There is a proviso to these provisions stating that if the Magistrate finds that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat him as if he had been in possession at, such date. The only provision enabling the Magistrate to drop the proceedings without deciding as required above is that contained in Sub-section (5) and is to the effect that if he finds that no dispute as mentioned in Sub-section (1) existed at all, or exists, he must cancel the order and stay all further proceedings. Under Sub-section (9), "the Magistrate may, if he thinks fit ..... on the application of either party, .issue summons to any witness directing him to attend."

5. The object behind the provisions of Section 145 is merely to prevent a breach of. the peace by maintaining one party to the dispute in possession and forbidding the other on pain of a penalty to interfere with it. When there is a' dispute concerning! land, neither party is prepared to have it decided by a Court of competent jurisdiction and they cannot exercise the right claimed by them without causing a breach of the peace, it becomes necessary for a Magistrate to prevent a breach of the peace by taking some action.

A breach of the peace must be prevented & the ' legislature has thought that the best way of doing it is by maintaining one party in possession ana forcing the other party to go to a court, of competent jurisdiction for a decision of title. The orders that a Magistrate passes under Section 145 are merely "police orders" in the words of Lord Lindlev in -- "Dinomoni v. Brojo Mohinj.', 29 Ind App 24 (PC)

(A).

6. For a Magistrate to have jurisdiction to proceed under Section 145 there must exist a dispute likely to cause a breach of the peace. He is only concerned with the existence of a dispute; he is not concerned at all with the questions how it arose, which party is on the aggressive or unreasonable, whether the dispute had been decided remotely or even recently by a Court of competent jurisdiction or whether an alternative remedy is open to the party that seeks his assistance.

The law has not made his assumption of jurisdiction" dependent on any of these matters. The use of the word "shall" in Sub-section (1) makes it obligatory upon him to assume jurisdiction on being satisfied that a dispute likely to cause a breach of the peace exists. Neither is any other fact require to exist before he can assume jurisdiction nor is his jurisdiction barred by the existence of any fact.

Everyone does not submit himself to decision on title of a competent Court and there are people who are prepared to take the law in their own hands & disturb the public tranquillity even though their rights have been negatived by a competent Court. Therefore, a dispute like the one mentioned in Sub-section (1) can exist notwithstanding a decision, howsoever recent, of a competent Court; if it does exist, the Magistrate has no option but to take cognizance of it and proceed under Section 145.

I respectfully dissent from the contrary view taken in -- 'Makhan Lal v. Mangal', ILR (1943) All 150 (B); -- 'Mrs. V. E. Argles v. Chhail Behari', AIR 1949 All 230 (C); -- 'Jang Bahadur v. Nazimul Haque', AIR 1947 Pat 245 (D), and -- 'Imtiaz Ali Krian v. Sheikh Badruddin', AIR 1943 Oudh 410 (E). In the case of ILR (1943) All 150 (B)', Yorke J. approved of the observation that "When the rights of the parties have been determined by a competent Court, the dispute is at 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."

If the dispute is at an end, the jurisdiction pf the Magistrate ceases altogether vide Sub-section (5), and he cannot pass any orders; he can maintain the successful party in possession only if his jurisdiction continues and he decides that he is in possession. In the case of 'AIR 1949 All 230, (C)', Bind Basni Prasad J. approved of the above observation of Yorke J.

In AIR 1947 Pat 245 (D), Ray J. thought that a Magistrate has no jurisdiction to reagitate a dispute that has been settled by a competent Court and give a declaration in favour of a party whose claim to title and possession has been negatived in a very recent litigation. He said on p. 247:

> "To allow this should amount to permitting a criminal Court to fly in the face of the decision of a competent civil Court being the only Court competent to adjudicate with finality the disputes as to title and possession as between the parties having conflicting claims thereto. It this is permitted to be done, there will be no end to it.
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> What I mean to emphasise is that every time that the civil Court comes to a final decision, it will be at the option of the Magistrate to unsettle the settled fact at the

> instance of the vanquished party and declare possession contrary to the civil Court decision thereby compelling the parties to come to civil Court over and over again."

An order under Section 145(6) may furnish a fresh cause of action to the party who was successful in the previous litigation in the civil Court, but in the opinion of Ray J. it would not be complying with the spirit of the law to hold that a Magistrate is at liberty to set the civil Court's decision at naught and to hold the party whose possession has been confirmed by the civil Court, to be a wrong-doer; the scope and purview of Section 145 does hot allow such free and untrammelled interference by Magistrate with final decisions of civil Courts, particularly recent decisions.

I regret I am unable to accept much of the reasoning of the learned Judge. The question of jurisdiction of the Magistrate to initiate proceedings under Section 145 has been mixed up with the question what order should be passed by him under Section 1456. A previous decision of a civil Court may operate, if it at all does, in either of the two ways, (1) by depriving a Magistrate of his jurisdiction under Section 145, or (2) by preventing him from passing final orders in conflict with the civil Court's decision, It cannot operate in both ways; obviously if it strikes at the root of the jurisdiction of the Magistrate, there arises no question of his passing final orders and he cannot pass any, even an order maintaining the title or possession conferred by the civil Court. I shall discuss later how a civil Court's decision affects the orders passed under Section 145 (6); at the present I am concerned with the question of jurisdiction only. It is erroneous to think that when a Magistrate assumes jurisdiction, he does so with the intention ol unsettling a settled fact at the instance ol the vanquished party. He does not decide the matter contrary to the civil Court's decision at all.

If the civil Court has decided the question of title only, his decision that the other party has possession cannot possibly be said to be in conflict with the civil Court's decision. Even if the civil Court's decision involves a finding on pos session in favour of the title-holder, the possession might have been disturbed after the decision and not only would it be open to the Magistrate, but also it would be his duty, to declare that the other party is in possession.

If the civil Court has delivered possession to a party and the possession has not been disturbed by the other party, there is no reason to think that the Magistrate by assuming jurisdiction would decide the other party to be in possession; if proper evidence is led, he would find the party that succeeded in the civil Court still in possession and would maintain it. If, however, he has been dispossessed after the delivery of possession by the civil Court, there is no reason why the Magistrate should ignore that fact and hold the party successful in the civil Court to be still in possession.

If he holds the other party to be in possessior, because he is in fact in possession, he is certainly not setting the civil Court's decision at naught. If the decision, is set at naught or if a settled fact is unsettled, it is by the opposite-party and not by the Magistrate. It proper evidence is led, there is no reason to think that the Magistrate will hold a party to be in possession even though he is not and the law does not require him to give, a wrong decision in favour of the party just because he was successful in the civil Court.

The decision in 'Jang Bahadur Singh's case (D)', also was approved by Bind Basni Prasad J. in the case of 'Argles (C)'. In 'Tmtiaz Ali Khan's case (E)', Imtiaz Ali Khan bad applied under Section 4, Encumbered Estates Act claiming a certain property as his, Badruddin had not filed a claim against the property, the Special Judge had while transferring the decrees to the Collector informed him that the property was liable to attachment and sale in execution of decrees against Imtiaz Ali Khan and on account of a dispute between Imtiaz Ali Khan and Badruddin over possession there had arisen an apprehension of a breach of the peace.

Consequently, proceedings under Section 145, Cr. P. C., were taken by a Magistrate but they were quashed by Bennett J. It is not easy to understand the reasons which prompted the learned Judge to quash the proceedings. There admittedly was a dispute of the nature mentioned in Section 145 (1) and the Magistrate was bound to take proceedings under Section 145. If Badruddin was actually in possession, he was not required by any law to surrender, his possession to Imtiaz Ali Khan merely of account of his failure to file a claim over the property before the Special Judge; he was entitled to retain his possession.

If the Magistrate in proceedings under Section 145 found that he was in possession and was bound to maintain it, nothing would prevent Imtiaz All Khan from going to a civil Court, A suit by Imtiaz AH Khan in a civil Court would not at all have been barred by the proceedings before the Special Judge. As a matter of fact he was bound to go to a civil Court to obtain possession, the Special Judge having granted him only the title. The learned Judge re-Bed upon -- "Brahma Nath v. Sundar Nath', AIR 1919 All 311 (2) (F).

In that case, proceedings under Section 145 were set aside by Knox J. because there was no order of the nature and the form contemplated by Section 145 1. He repelled as irrelevant the argument that there was a dispute of the nature mentioned in Section 145 (1) because there existed a decision of a , civil Court and it was open to the aggrieved party to start proceedings under Section 107 of the Code. The head note in the All India Reporter is misleading; Knox J., did not decide at all that there was no jurisdiction to start proceedings under Section 145; what he said was that he did not consider it expedient to start them.

The use of the word "expedient" is certainly inconsistent with the use of the word "shall" in Section 145 (1), but that is besides the point; what I wish to point out is that Knox J., did not treat it as a matter of jurisdiction as suggested in the head note. In -- 'Agni Kumar Das v. Mantazaddin', AIR 1928 Cal 610 (G), a Full Bench of five Judges, spealang through Rankin C. J., dissented' altogether from the doctrine that a dispute within the meaning of Section 145 must be a bona fide or a reasonable dispute.

I respectfully agree with the learned Chief Justice's exposition of the law contained in Section 145; it is impossible for me to improve upon the language and I cannot do better than to quote his words. On page 614 he pointed out that Sub-section (1) is concerned, with the reality of disputes, the danger of disputes, and added:

> "It matters little to a broken head whether it be broken in good faith or in bad and the Magistrate can have no preference. When he finds from a police report that he must take action, he can hardly be in a position to enter into such question".

He had no hesitation in rejecting the contention that once a civil Court has pronounced upon the right of" one party as against another there is no place for an order under Section 145 which proceeds upon mere possession.

He could not understand why a party out of possession and attempting to take or retake possession forcibly at the cost of public peace should not be required to assert his right in the proper way. A civil Court can give possession but cannot attempt in the same suit to keep the plaintiff in perfect peace; new causes of action require a fresh consideration of the facts. The learned Chief Justice observed on page 617;

> "The Magistrate is not there to give a form of execution that the civil Courts cannot give..... A breach of the peace requires the Magistrate to act: necessarily it makes place for an order which proceeds on 'mere possession' because it makes place for a Magistrate who is not the judge of titles or the bailiff of a civil court."

Saunders J. in -- 'Gaya Prasad Singh v. Ram Sarober Saran Singh', AIR 1934 Pat 471 (H), followed 'Agni Kumar v. Mantazaddin (G)'.

7. That proceedings can be taken under Section 107, Cr. P. C., or an order can be passed under Section 144. Cr. P. C., is no bar to the assumption of jurisdiction under Section 145. Unless a Magistrate holds an inquiry and ascertains which person is in the wrong in attempting to take forcible possession, he cannot pass an order under Section 144 prohibiting him from doing so and if the has to make an inquiry, there is nothing to differentiate between that, inquiry and an inquiry under Section 145 and he may as well undertake an inquiry under Section 145.

Section 144 is meant for passing orders in emergency which does not permit an inquiry into possession. Similarly proceedings under Section 107 also can be started against a party that is trying to take forcible possession; unless it is first found out which party is out of possession and, therefore, is trying to take forcible possession he cannot be bound down under Section 107.

It would not be proper to bind down both the parties or even start proceedings against both. If an inquiry into possession has to be made, I am at a loss to know why one should object to holding such an inquiry under Section 145. Rankin C. J. observed in the case Agni Kumar Das (G), at page 615;

> "To say that where the claim of one party is mala fide or is unreasonable the Magistrate cannot act under Section 145 and should act under Section 107 is both bad advice and bad law."

8. Once a Magistrate assumes jurisdiction under Section 145, Cr. P. C., he is required by Sub-section (4) to ascertain which of the parties was in "actual possession". Naturally when the object behind the

proceedings is to find out which party should be compelled to go to a civil Court, the party out of possession being the weaker party should be required to do so.

The party in possession is to be maintained in possession and the inquiry is aimed at ascertaining which party is in possession. An inquiry into title i.s expressly barred because the very object behind the proceedings is to ascertain which party should be compelled to go to a civil Court for a decision on tide; the urgency requires a simple inquiry and a criminal Court is not the proper forum to decide questions of title.

Actual or de facto possession must be considered during the inquiry and not constructive possession. This is according to the express language used in Section 145 (1) and is also laid down in numerous authorities such as -- "Agni Kumar Das v. Mantazaddin (G)'; -- 'Rajendra Narain Roy v. Mohammad Arzumand Khan', 2 Cri LJ 408 (Cal) (I); -- 'Maharaja Pratap Udai Nath Sahi Deo v. Sunderbans Koer', AIR 1923 Pat 76, (J); -- 'Gainda Lal Sharma v. Bishamber Nath Kumar', AIR 1949 EP 231 (K), and in re Sanganbasawa 2 Cri LJ 28 (Bom) (L).

In -- Gainda Lal's case (K), Harnam Singh J. remarked that a Magistrate is not concerned with the questions how the party came into possession and whether he is rightfully in possession. When an inquiry into title is barred, a Magistrate cannot find that a party though not in actual possession has a right to be in possession and is, therefore, in constructive possession. See -- 'Mahmood Beg v. Ehsan Beg', AIR 1941 Ondh 515 (M).

The law contained in Section 145 that actual possession is to be maintained knows of no exceptions except the one contained in the first proviso to Sub-section (4) and actual possession must be maintained even if it is wrongful or was preceded by force. Unless an inquiry into title is made, a Magistrate cannot find out whether the possession is wrongful or not.

Under the first proviso to Sub-section (4) if a Magistrate finds that a party was forcibly and wrongfully dispossessed within two months of his passing the order under Sub-section (1) he may treat him as if he continued in possession on that date. It follows that it is not open to a Magistrate to ignore dispossession that had taken place more than two months previously.

If a civil Court had delivered possession to a party and that party was dispossessed wrongfully and forcibly by the other party more than two months before the date of the order under Section 145 (1), the wrongful possession of the other party must be maintained according to the very words of Sub-section 4. The Magistrate has not to act as a bailiff of a civil Court and to restore the rightful party to possession.

9. A decision of . a competent Court on a question of title, even if followed by delivery of possession to the successful party, is not conclusive evidence oi the party's possession in an inquiry under Section 145 (4); a Magistrate is not bound by any law to give his finding in accordance with the decision regardless of the actual evidence. If the evidence satisfies him that the other party is in actual possession, he is bound by law to declare him to be in possession despite the decision of the civil Court or the delivery of possession by it. The admissibility of a previous judgment is governed

by the provisions of the Evidence Act; there is no provision which makes a judgment of a civil Court conclusive.

In -- 'Kulada Kinkar Hoy v. Danesh Mir', 33 Col 33 (FB) (N), it was observed that a Magistrate is not concluded by every decree of a civil Court. In -- "Masih, Uddin v. The State', ATR 1953 All 383 (O), Wali Ullah J., said at page 384 that .the Magistrate "did not attach that importance to the decree for ejectment and the. execution proceedings consequent upon it, which' it was his bouiiden duty to do", and that if a right to possession has been, declared in favour of a party, "that decision must be respected and maintained by the criminal Court". It is not clear if the learned Judge meant that the Magistrate was concluded by the decision of the civil Court, but if be meant so, I respectfully differ.

It is not res judioata or a judgment in rem and is not relevant under Sections 40 and 41 of the Evidence Act. It does not relate to matters of public nature; it is, therefore, not relevant under Section 42 also. The only other section under which it can be relevant is Section 43; but under it only the existence of a judgment (as opposed to its contents) is relevant and that too, if it is relevant under some other provision of the Act.

If it relates only to title, it is wholly irrelevant because an inquiry into title is expressly barred and it cannot be admitted in evidence at all. Even if the declaration of title in favour of the successful party implies a finding of his being in possession (because if he were not in possession, he would not have been granted declaration) or even if there was a specific issue of possession and it was decided in his favour, it is not admissible to prove his possession in the inquiry under Sub-section (4).

The only section under which it might be said to be admissible is Section 13 on the ground that it provides an instance in which the light to be in possession was claimed or recognised. An inquiry under Sub-section (4) is about which party was in actual possession on a certain date; it is not about the existence of any right to be in possession. An inquiry into the right to be in possession is barred. Moreover the judgment would not provide an instance in which the right to be in possession on a certain date was claimed or recognized.

If in pursuance of the previous judgment of a civil Court possession has been delivered to a party, the judgment is certainly relevant to show the fact of delivery of possession. A Magistrate can apply the well known presumption of continuity and hold that the possession continues in the absence of evidence to the contrary. See -- 'Dalip Narayan Singh v. Rasik Lal', AIR 1933 Pat 586 (P); --'Kulada Kinkar Roy v. Danesh Mir (N)', and --'Pamiessar Singh v. Kailaspati", AIR 1916 Pat 292 (Q).

In -- 'Kulada Kinkar Roy's case (N)', it was stated at page 48 that a view more consistent with the provisions of the Code of Criminal Procedure is that a civil. Court decree for possession affords "only, a presumptive proof of possession, to be taken along with such other evidence of possession as might be forthcoming". In the case of --AIR 1916 Pat 292 (Q), Sharfuddin J. held that if there is no evidence to show disturbance or change of possession since a civil Court decree of a recent date, the Magistrate is bound to respect it.

Thus it supplies only a piece of evidence that the party was in possession on the date on which it was delivered to him. It is immaterial if the possession delivered to him was symbolical, because even symbolical possession is possession and effects a break in possession of the other party. The other party may retake possession subsequently, but unless he does so he must be held to be out of possession.

In the case of 'Agni Kumar Das (G)'. Rankin C. J. observed at page 616 that the defendant's actual possession is broken as a matter of fact, even if for the moment, by the delivery of symbolical possession to the plaintiff and that a Magistrate cannot ignore it. In -- 'Maharaja Pratap Udai Nath Sahi Deo's case (J)', Adami J., said at page 82 that delivery of symbolical possession operates as actual possession against the judgment-debtor.

What is the weight to be attached to the fact of delivery of possession is a matter for the Magistrate; see -- 'Kulada Kinkar Roy v. Danesh Mir (N)', and -- "Gaya Prasad Singh v. 9am Sarober Saran Singh (H). It was said in 'Jang Bahadur's case (D)', and 'Argles' case (C)', that stale delivery of possession will not protect. The presumption of continuity grows weaker as time elapses but is never destroyed completely.

10. In -- 'Kunj Behari Das v. Emperor', 'AIR 1936 All 322 (R), it was pointed out by Allsop, J. that under Section 145 (9) it is discretionary with a Magistrate not to issue a summons to any witness. A Magistrate is certainly not bound to. issue a process against any witness. But he is bound by Sub-section (4) to receive all evidence that may be produced before him; the words used there are "shall..... receive all such evidence".

If a party's witnesses are. present in Court, the Magistrate has no discretion in the matter at all and must examine all. What he can refuse at his discretion is to issue a process against a witness. In the case of 'Argles (C), a Magistrate on receiving a copy of a decree of a revenue Court at once terminated the proceedings under Section 145 and passed an order under Sub-section (6) in favour of the party successful in the revenue Court.

He did not give an opportunity to the other party to produce evidence but her objection on that score was overruled by Bind Basni Prasad, J. who relied upon the decision in -- AIR 1936 All 322 (R). No reference was made to the mandatory provision in Sub-section 4. The question in the case of 'Argles (C)' was not whether the Magistrate could validly refuse to issue a process but whether he was justified in not giving an opportunity to Mrs. Argles to produce her evidence.

The existence of a judgment of a Court deciding a question of title or even of possession does not justify a Magistrate's refusing to receive evidence. He may terminate the proceedings on finding that the dispute referred to in Sub-section (1) has ceased to exist, but if he means to puss an order under Sub-section (6) or under Section 146 by continuing the proceedings, there is no circumstance in which he can refuse to receive evidence if offered by a party.

It follows that there is no circumstance in which he can refuse to allow an opportunity to a party to produce evidence. It evidence must be received in spite of the existence of a judgment of a civil

Court, it necessarily follows that the Magistrate is not concluded by the judgment but must consider it along with other evidence.

11. I have already referred to the observation of Ray J. in -- 'Jang Bahadur's case (D)'. In --'Venkatachallam v. Palayam', AIR 1953 Mad 594 (S), V got a decree from a civil Court and in execution obtained delivery of possession on 24-1-1927. P interfered with V's possession on two occasions and on the later occasion in 1941 V obtained permanent injunction against him. Still in 1948 P gave trouble to V and a Magistrate started proceedings under Section 145 and held P to be in possession.

His order was set aside by Samasundaram J., not on the ground that his finding on the question, of possession was illegal or improper but because he held :

> "It is the duty of the Magistrate in cases like this to support the decisions of the civil Courts and see, as far as possible, that the decrees of the civil Courts are maintained. Otherwise it would only amount to puting a premium upon the high handed and unlawful activities of the other side". (P. 595) In -- 'Makhan Lal v. Mangal (B),. which was followed in the case of 'Argles (C), it was held to be a Magistrate's duty to maintain the rights of the party that succeeded in a civil Court and not to allow the deleated party to invoke his aid to neutralise the effect of the decree of the civil Court. A similar view was expressed by Wali Ullah, J. in the case of 'Masihuddin (O)'. With great respect to the learned Judges I differ from these observations, which are against the provision in Section 145 (4).
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> What a Magistrate has to do and how he has to do it are stated in Sub-section 4. To what extent a judgment of a civil Court is relevant, if at all, has been dealt with above. It would be against law to say that a Magistrate must, regardless of evidence, pass the final order under Sub-section (6) in favour of the party that was successful in the civil Court. Sometimes a Magistrate has to be reminded that he is not justified in disregarding a civil Court's decree and that it is his duty to uphold and carry it out so far as it lies in him to do so.
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> For example, when a Magistrate ignores the delivery of possession on the ground that it is only a symbolical delivery; or when he ignores the presumption of continuity or refuses to attach due weight to a judgment of a civil Court declaring a party to be in possession nr delivering possession to him. If occasionally a decree of a civil Court is unjustly nullified by an order of a Magistrate under Section 145, it is on account of the erroneous finding of possession by the Magistrate and not because of his following an illegal procedure or assuming jurisdiction not vesting in him.
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> Rankin C. J., said in the case of 'Agni Kumar Das (G), at page 616:
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> "Cases in which it has been said that the Magistrate has interfered with nr nullified the civil Court's decree will on examination be found to be cases where the Magistrate

> has come to a wrong finding on the fact of possession by reason of this error"

of ignoring symbolical delivery of possession. In 'Dalip Narayan Singh's case (P)', Rowland J., agreed with Rankin C. J.

The correct law as to how a Magistrate should pass the final order has been laid down in several cases. The earliest case to which I may refer is -- 'Baldeo Baksh Singh v. Raj Ballam Singh', 2 Cri LJ 236 (All) (T), in which Stanley C. J., said that the Magistrate's duty was to ascertain who was in actual possession on the basis of evidence and that if any party unsuccessful in the previous civil litigation continued to be in actual possession in spite of the symbolical delivery of possession to the successful party, the Magistrate was bound to maintain his possession.

Rankin C. J., pointed out in the case of 'Agni Kumar Das (G)', at page 615 that "there are senses in which a true meaning may be given to such a phrase, but for the present purpose and in the sense required by the argument it is the statement not of a principle but of an error", when dealing with the notion that it is a Magistrate's duty to maintain the civil Court's decree.

On page 616 he stated that there is no difference between a party who has obtained a decree in his favour from a civil Court and a party who has come into possession by inheritance or by purchase (except that the former party may be entitled to rely upon the judgment as res judicata) and that the terms upon which a Magistrate is to maintain a party's possession are laid down in the Code of Criminal Procedure which has no separate law for decree-holders as a class.

Further he observed on the same page.

> "It is the civil Court's duty to give possession on the ground of right: it is the Magistrate's duty to maintain possession against force or show or force. To say that when a Magistrate 12 months after a civil Court peon has delivered possession, finds that the judgment-debtor is back in possession of the land, he is interrupting or interfering with the execution proceedings of the civil Court, if he acts under Section 145, is a violent abuse of language."

In the case of 'Parmessar Singh (Q)' the Full Bench said that it cannot be laid down as a hard and fast rule that a Magistrate must give effect to a recent decision of a civil or criminal Court. In --'Kulada Kinkar Roy's case (N)', the learned Judges said with reference to the rule that it is a Magistrate's duty to maintain an order passed by a competent Court, that "however appropriate it may be in connection with the facts of the particular case before the Court, is not obviously quite justified by the provisions of the statute, and, regarded as a general proposition, is not sufficiently precise to be applicable to all cases".

12. In the case of 'Tang Bahadur Singh (D)', Ray, T., said at page 246 :

> "The ambit of the section is hedged in by certain conditions and the final order passed therein is always subordinated and subjected to a decision, of a competent

civil Court if and when pronounced at the instance of the vanquished party".

It seems that the learned Judge was of the opinion that when there is a decision of a competent civil Court, a Magistrate has no jurisdiction to hold any inquiry under Section 145 at all. The decision of a competent Court to which an order passed under Section 145 (6) is subject, is a decision made after the order and not before it.

The order is to remain in force until the party in whose favour it is pronounced is evicted from the land in dispute in due course of law; it means that the decree of ejectment of a competent Court must be passed alter order. There is nothing in Sub-section (6) to suggest that the order must be subject to a decision of a civil court passed during the pendency of the proceedings or before they commenced.

13. My conclusions are that the jurisdiction rightly assumed by the Magistrate in the present case was not destroyed by tne decision an title of the revenue Court, that the judgment of the revenue Court was not conclusive but only a piece of evidence to prove that the opposite party was in possession on 10-9-1953, that it was open to the applicant to prove that the possession of the opposite-party ceased after 10-9-1953, that the Magistrate was bound to give him an opportunity to produce evidence and to receive all evidence that he produced though he had discretion not to issue a process against a witness at this instance and that tile order passed by the Magistrate without recording his evidence was illegal.

Bhargava, J.

14. I agree.