

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.M.C. 3699/2002

% Date of reserve : 18.02.2009
Date of decision : 18.03.2009

KANSHI RAM & ORS. Petitioners
Through: Mr.J.K.Jain, Advocate

Versus

INDER SINGH and ORS. Respondents
Through: Mr.K.K.Sud, Sr.Advocate with
Mr. M.L. Sharma, Advocate

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

MOOL CHAND GARG, J.

1. On 10.02.2001 a dispute arose between the petitioners on the one hand and the respondents on the other hand regarding possession of a plot of land measuring 1000-1200 sq. yards forming part of khasra no. 188, Main Dabri Nasirpur Road (hereinafter referred to as the 'disputed property') which also resulted in registration of two cross cases against each of the parties vide FIR No. 100/2001 and 101/2001 both under Sections 147/149/308/323/427/506 IPC at P.S. Najafgarh which are still pending.

2. SHO Najafgarh on the same day also made a reference of the dispute to the then SDM Najafgarh under Section 145 Cr.P.C. apprehending breach of peace. SDM passed a preliminary order under

Section 145(1) of Cr.P.C. and called upon both the sides to file their written statements. The petitioner was arrayed as the first party while the respondents were arrayed as the second party in those proceedings. In their written statements both the parties claimed settled possession in the aforesaid plot on the relevant date as well as two months before that and alleged that it was the other party who wanted to grab the possession of the same.

3. During the course of proceedings the parties at one stage also requested for dropping the proceedings but it was not agreed by the SDM. In fact vide his detailed order dated 11.05.2001 the SDM declared that the second party i.e the respondents herein were in possession of the disputed property and were entitled to retain the possession till evicted in accordance with law by a competent Civil Court. He also directed SHO concerned to provide necessary protection in this regard. However the order was passed without recording any evidence.

4. The petitioner (i.e the first party) filed a revision against the aforesaid order before the Sessions Judge which was decided by the then Addl. Sessions Judge, Shri. R.K. Gauba. He remanded the case back to the SDM with the following directions:

9. But then, I am disturbed at the manner in which proceedings appear to have been short-shrived by the SDM. The provisions of section 145(4) Cr.P.C. enjoin upon the SDM to receive such evidence as the parties may produce before him. The SDM had called upon both sides to lead evidence on 4.5.2001. Both sides sought the proceedings to be dropped though for different reasons. The SDM adjourned the matter to consider the said joint prayer of both sides. But apparently he did not agree with them. He considered it proper to take the matter to logical end by way of final order U/s 145(6) Cr.P.C. But, for this purpose, it was his bounden duty to call upon the parties to lead their respective evidence for purposes of enquiry U/s 145(4) Cr.P.C. Rather than doing this, the SDM proceeded to decide the matter only on the basis of the documents and written replies that had been earlier submitted.

10. The counsel for second party has relied on 1885 Cr.L.J. 1837 to argue that recording of oral evidence was not compulsory since the proceedings before the SDM were short and summary in nature and the Magistrate could dispose it of on perusal of the documents without examining any witness. The Id. Counsel for the second party seems to be ignoring the full import of

observations in Para 9 of the judgment cited at bar. It was observed in that case that recording of oral evidence was not compulsory "if none of the parties desire to produce such evidence and if the Magistrate does not feel the necessity for the same". It is quite clear that in a case where questions of fact about physical possession was raised on account of contradictory claims of both sides, the matter could not be settled by the SDM without calling upon the parties to lead evidence. This is why the SDM had listed the matter for evidence of the first party as per his order dated 20.4.2001. A finding about the merits of the rival claims could not be given under Section 145 Cr.P.c. till both parties had led evidence. (AIR 1965 J&K 69), In these circumstances, the impugned order seems to be based on no evidence and thus cannot be sustained. It appears to have been passed by way of denial of the right to adduce evidence and so is not only erroneous but improper. It may be added that the SDM appears to have also gone by extraneous considerations like evidence collected in another proceedings U/s 145 Cr.P.C. between petitioner No.2 and a third person named Narender Singh. This approach was not permissible and would also vitiate the impugned order.

11. Before concluding, I must also observe that the SDM in proceedings U/s 145 Cr.P.C. is required to also identify the property properly, give specific finding as to which of the parties before him was in possession on the date the proceedings were initiated (or within 2 months preceding the said date) and further if such party (in possession) had been dispossessed. In the impugned order, the SDM did not give any specific findings about the possession and it appears he also did not make a follow up on the directions for demarcation report as called for vide order dated 4.4.2001 inasmuch as the subsequent order sheets do not reflect such a report to have been submitted.

12. Consequently, the impugned order cannot be sustained. It is accordingly set aside. The matter is remanded to the SDM for further proceedings in accordance with law on the stage where the matter was as per order dated 20.4.2001. The SDM after due enquiry shall pass a fresh final order. The parties shall appear before the SDM for further proceedings on 17.8.2001. The lower court record be returned with a copy of this judgment. The revision petition stands disposed of. "

5. After the remand, the SDM recorded the evidence as led by both the parties. On behalf of the petitioners Shri Devender Singh son of Shri Kanshi Ram, Shri K.K. Sharma a sanitary inspector MCD, ACP S.L. Dua of P.S. Mayapuri, Shri Balbir Singh who claims to be a tenant under the petitioners in a room also described as a shop situated in the plot in dispute, Shri Ashok Kumar son of Shri Mam Chand and one Rajbir Singh son of late Shri Hamir Chand were examined. The documents filed by these witnesses such as MCD challans filed by K.K. Sharma, a report filed by the ACP S.L. Dua were also taken on record. However Shri Kanshi Ram who claims to be the bhumidar and in possession of the property did not appear in the witness box.

6. On the other hand, respondents examined Shri Inder Singh

Solanki, Shri Naresh Kumar, ACP Hardeep Singh of District South West Vasant Vihar, New Delhi and Shri Satpal Singh Solanki as witnesses. They also relied upon four sets of documents about purchase of property from Kanshi Ram which had been executed by him much before the relevant date which fact is not in dispute.

7. After recording the evidence, the SDM vide his order dated 27.9.2002 held that it was the petitioners (first party) who were in possession of the disputed property on the relevant date and two months before that and thus, again ordered the SHO concerned to protect the possession of the disputed property in favour of the petitioners. This order of the SDM dated 27.09.2002 was assailed in revision but this time by the respondents which was decided by the Addl. Sessions Judge Shri Rajesh Kumar on 07.11.2002.

8. The Addl. Sessions Judge by his order also declared that it was the respondents herein who are in actual possession of the plot in dispute shown in the site plan placed by the respondents which is undisputedly admitted by both the parties is an open land. The possession of the shop-cum-room to maintain breach of peace a status quo qua possession of the said shop was maintained as on the date of the order. It was further held that the respondents herein shall remain in possession of the remaining entire open land in dispute until ousted by due course of law by the petitioners and directed the SHO to ensure that no disturbance is caused in the possession of the disputed portion of the land. The SHO was directed to comply with the order within 3 days of the issue of the order and consequently the order of the SDM dated 27.09.2001 was set aside.

9. It is against the aforesaid order the present petition has been filed by the petitioners who not only questions validity of the orders on merits but also questions the propriety of the said order keeping in view the limited powers vested in a revisional Court under Section 397 Cr.P.C. This petition was decided by Hon'ble Mr. Justice R.S. Sodhi (as His Lordship then was) vide judgment dated 19.02.2004, whereby the order of the Addl. Sessions Judge dated 07.11.2002 was set aside and the order of the SDM dated 27.09.2002 was upheld. A review application against the said order was also dismissed.

10. The matter was then taken to the Apex Court by the the respondents by way of an SLP. The Apex Court disposed of the SLP vide order dated 20.04.2006 with the following directions:

By the impugned order dated 19th May, 2004, the High Court has set aside order dated 7th November, 2002 passed by the learned Additional Sessions Judge in Criminal Revision No. 28 of 2002 whereby possession of the appellants over the subject of dispute was declared. The sole ground for allowing the application by the High Court was that present appellants filed a petition before the High Court in the said case admitting therein that they were put into possession of the subject of dispute on 11th November, 2002 by the police. It appears that on 7th November, 2002, the learned Additional Sessions Judge allowed the Revision Application, set aside the order of the sub-Divisional Magistrate whereby the possession of the respondents over the subject of dispute was declared and directed that possession of the appellants shall not be distributed in any manner and the Station House Officer of the concerned police station was directed to see that this direction is complied with. Pursuant to the aforesaid order, the Station House officer of the concerned police station submitted a report dated 9th November, 2002 stating therein that in the evening of 8th November, 2002, the said order passed by the revisional court was received by him and on 9th November, 2002 when he went to the subject of dispute, found appellant Inder Singh Solanki was present there with his son and bricks etc. for the purposes of making construction over the subject of dispute by them were collected which was objected to by the respondents. Stating these facts the Station House Officer submitted the report that there is likelihood of beach of peace. The said report was placed before the learned Additional Session judge on 9th November, 2002. He directed the Station House Officer to remain present in person on 11th November, 2002 on which date the learned Additional

Sessions Judge after perusal of the report passed the order that no further action should be taken in the matter. It appears that erroneously it was observed in the said order dated 11th November, 2002 that police had submitted a report as if possession has been delivered to the appellants by them whereas in the report no such fact has been stated, rather the report shows that possession of the appellants was declared by the revisional court and the police when goes to the subject of dispute found that appellants were present there and wanted to raise construction thereon. Nowhere it was stated that police at any point of time delivered possession to the appellants. It appears that in the order of Additional Sessions Judge dated 11th November, 2002 as well as petition filed by the appellants before the High Court under some confusion such statement was made as if the police had delivered possession of subject of dispute to the appellants, which is factually not correct. This being the position, we are of the view that the impugned order is fit to be set aside and matter should be remitted to the High Court to dispose of the application on merits. **Accordingly, appeals are allowed, impugned orders dated 19th May, 2004 and 31st May, 2004 refusing to review the said order are set aside and the matter is remitted to the High Court to consider the matter on merits after taking into consideration the evidence already on behalf of the parties and decide the case in accordance with law.**

11. It has been submitted by the parties that in view of the aforesaid directions given by the Apex Court, this petition has to be decided on merits after examining the evidence of both the sides. It is submitted that the main issue which needs to be adjudicated upon by this Court is “as to who was in possession of the suit property as on 10.02.2001 and two months before that”. It has been submitted by the petitioners that in these proceedings the evidence which is required to be taken into consideration would be that of the physical possession of the disputed property and not the documents relied upon by the respondents. It is also submitted that the identification of the plot also becomes necessary as in terms of the demarcation report on the Southern side of khasra No. 188, there is also khasra No. 185 which is also shown as a part of the disputed plot and in respect of the said report no objections have been filed by the respondents and,

therefore, the question of petitioners being in possession thereof does not arise. It is pleaded on behalf of the petitioners that the evidence available on record proves that the disputed property was in the possession of petitioners as on date of the dispute and they had been using the said plot of land as Gitwar where Kuri etc. were lying, Dung cakes were put, cattles were tied & more particularly three doors of the house of petitioners were opening in the land. It is also submitted that there is only one wall with aforesaid openings towards the land in dispute. Petitioners have day to day access to the land in dispute, residing along side, whereas the respondents are not residing even nearby. It is also submitted that the land also has a shop (as also identified by demarcation report & police Kalandra) – which is possessed by the tenant of petitioner. This fact has been accepted by the Ld. SDM & even not disputed by the Ld. ASJ, who never held respondent to be in possession of the portion of shop. The petitioners have also relied upon the report of Shri S.L. Dua ACP who has reported that the possession of land in dispute was that of the petitioners as per his report dated 10.04.2001.

12. It is also stated that the witnesses examined by the petitioners have stood by their examination during the course of cross-examination, but Shri Hardeep Singh ACP who appeared on behalf of the respondents in his cross-examination has admitted the existence of the house of the petitioners, 10 feet height walls in between the disputed plot and the house of the petitioners with 3 openings in the said wall towards the disputed property. It is stated that the orders passed by the SDM is based upon the actual possession of the

petitioners in the disputed property who were sought to be dispossessed by the respondents and it is for that reason they also filed a report on 17.11.2000 i.e. prior to the incident in question. The claim of the respondents is based upon transfer documents, raising of wall of 6 feet height but the evidence led by them does not prove actual user of the disputed property.

13. It is submitted that the transferred documents relied upon by the respondents which are unregistered documents shows that every plot which was sold to the respondents as pleaded by them has 1 boundary wall and a room i.e. there are 4 boundary walls and 4 rooms and each of the walls has a 6 feet height. It is submitted that reliance upon the documents executed in 1982 whereas dispute started in 2001 does not permit presumption of the continuity of the possession in favour of the respondents in view of the judgment delivered by the Supreme Court in AIR 1966 SCC 605.

14. It is also submitted that the order of the Additional Sessions Judge suffers from a jurisdictional error which proceeds on the basis that title follows possession which cannot be the basis of an adjudication under Section 145 Cr.P.C. It is submitted that non-examination of Kanshi Ram as a witness makes no difference as in a proceeding initiated under Section 145 Cr.P.C, the adjudication has to be of actual possession and in this regard the evidence of Devender Singh is sufficient. It is also submitted that even if the transfer of the land to the respondents is taken as proved in the absence of the testimony of Kanshi Ram that alone would not prove the possession of the respondents. It is also submitted that even though in criminal miscellaneous application 3564/03 and 4744/02 the respondents have

tried to establish as if possession had been delivered to them by the Police which fact is totally mis-conceived as noticed by the Hon'ble Supreme Court in the order passed by them on 20.04.2006.

15. On the other hand the respondents justified the order passed by the Addl. Sessions Judge on the ground that in the absence of Kanshi Ram appearing in the witness box who is the author of the 4 Power of Attorneys in favour of the respondents transferring the disputed land to the petitioners which documents also mentions about the delivery possession, the evidence of Devender Singh who was aged about 5 years at that time can disprove the case of the respondents that the possessions was given to them qua the disputed property. It is stated that according to the petitioners the land stands vested in the Gram Sabha in 1985. Thus, there is no infirmity in the order of learned ASJ in setting aside the order of the SDM, which was rightly done while exercising powers under Section 397 Cr.P.C and that the said order needs to upheld.

16. At the outset, it may be observed that in the proceedings under Section 145 of Cr.P.C., the SDM is required to adjudicate as to who was in actual and physical possession of the disputed property on the relevant date. In those proceedings even though evidence of title can be given but the question to be decided for making a declaration under Section 145(4) of Cr.P.C. is the factum of actual possession of the property in question as on the date of the dispute and two months before that.

17. At this juncture, it would be appropriate to make a reference to a judgment delivered by the Apex Court in the case of Ranbir Singh Vs. Dalbir Singh and Ors. 2002 (3) SCC 700 where it has been held:

8. However, the High Court was in error in dealing with the revision petition as if it was exercising appellate jurisdiction. The High Court has dealt with the developments in the case relating to the acquisition of title, the allegations of fraudulent transfers made by Karnail Singh and M/s Homestead and the circumstances in which the suit was dismissed as withdrawn. **Keeping in view the limited scope of the proceeding under Section 145 CrPC these questions were not material for determination of the main issues in the case. The Court, while dealing with a proceeding under Section 145 CrPC, is mainly concerned with possession of the property in dispute on the date of the preliminary order and dispossession, if any, within two months prior to that date; the court is not required to decide either title to the property or right of possession of the same.** The question for determination before the High Court in the present case was one relating to the validity or otherwise of the preliminary order passed by the learned Sub-Divisional Magistrate under Section 145(1) CrPC and sustainability of the order of attachment passed under Section 146(1) CrPC. For deciding the questions it was neither necessary nor relevant for the High Court to have considered the matters relating to title to and right of possession of the property. Further, both the parties in the case have filed suits seeking decree of permanent injunction against each other and in the suit filed by the appellant an order of interim injunction has been passed and an objection petition has been filed by Respondent 1. The suits and the interim order are pending further consideration before the civil court.

18. I may also refer to the provisions contained under Section 145 of Cr.P.C which is reproduced hereunder:

145. Procedure where dispute concerning land or water is likely to cause breach of peace.

(1) Whenever an Executive Magistrate is satisfied from a report of a police officer or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within his local jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, on a specified date and time, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section, the expression and or "water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy, of the order shall be served in the manner provided by the Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the Subject of dispute:

(4) The Magistrate shall then, without reference to the merits

or the claims of any of the 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, take such further evidence, if any as he thinks necessary, and, if possible, decide whether and which of the parties was, at the date of the order made by him under subsection (1), in possession of the subject of dispute:

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of a police officer or other information was received by the Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1).

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) (a) If the Magistrate decides that one of the parties was, or should under the proviso to sub-section (4) be treated as being, in such possession of the said subject he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction; and when he proceeds under the proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(b) The order made under this sub-section shall be served and published in the manner laid down in sub-section (3).

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purposes of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the Magistrate to proceed under section 107.

19. In this case, the SDM did pass an order under Section 145(1) of the Cr.P.C. as there was apprehension of breach of peace due to a dispute regarding the possession of the disputed property. After holding the trial and recording of evidence, he passed an order under Section 145(4) of the Cr.P.C. which is a declaration that at the relevant time i.e on 10.2.2001 and two months before that the respondents were in possession of the disputed property. This declaration is not

final in view of sub-clause (6) of the aforesaid Section of the Cr.P.C. and can always be disputed by the person who is affected by the aforesaid order by taking appropriate legal proceedings by also implicating the person who has been held to be in possession.

20. It will further be appropriate to take note of a judgment delivered by the Apex Court in *Shanti Kumar Panda Vs. Shakuntala Devi (2004) 1 SCC 438* where law relating to Section 145 and 146 Cr.P.C. proceedings has been elaborately discussed and it was held as under:

10. Possession is nine points in law. One purpose of the enforcement of the law is to maintain peace and order in society. The disputes relating to property should be settled in a civilized manner by having recourse to law and not by taking the law in own hands by members of society. A dispute relating to any land etc. as defined in sub-section (2) of Section 145 having arisen, causing a likelihood of a breach of the peace, Section 145 of the Code authorizes the Executive Magistrate to take cognizance of the dispute and settle the same by holding an enquiry into possession as distinguished from right to possession or title. The proceedings under Sections 145/146 of the Code have been held to be quasi-civil, quasi-criminal in nature or an executive or police action. The purpose of the provisions is to provide a speedy and summary remedy so as to prevent a breach of the peace by submitting the dispute to the Executive Magistrate for resolution as between the parties disputing the question of possession over the property. The Magistrate having taken cognizance of the dispute would confine himself to ascertaining which of the disputing parties was in possession by reference to the date of the preliminary order or within two months next before the said date, as referred to in the proviso to sub-section (4) of Section 145 and maintain the *status quo* as to possession until the entitlement to possession was determined by a court, having competence to enter into adjudication of civil rights, which an Executive Magistrate cannot. The Executive Magistrate would not take cognizance of the dispute if it is referable only to ownership or right to possession and is not over possession simpliciter; so also the Executive Magistrate would refuse to interfere if there is no likelihood of breach of the peace or if the likelihood of breach of peace though existed at a previous point of time, had ceased to exist by the time he was called upon to pronounce the final order so far as he was concerned.

11. There is a difference between a case where the subject-matter of dispute is not attached by the Executive Magistrate under Section 146(1) and the case where it is so attached. Under sub-section (1) of Section 145 a preliminary order taking cognizance of the dispute having been passed, the Magistrate would under sub-section (4) decide who was in possession of the disputed property on the date of the passing of the preliminary order. Consistently with such finding, a declaration by the Magistrate in favour of such party would follow under sub-section (6), entitling it to retain possession over such property until evicted therefrom in due course of law. And until such eviction all disturbances in its possession shall be forbidden. If any party is found to have been forcibly or wrongfully dispossessed within two months next before the date on which the report of a police officer or other information setting the Magistrate in motion was received by him or between such date and the date of order under sub-section (1), then the party dispossessed has to be fictionally treated as one in possession on the date of preliminary order under sub-section (1). The declaration of entitlement to possession under the proviso to sub-section (4) read with sub-section (6) shall be made in favour of such party and the party found to have been so dispossessed forcibly and wrongfully may also be restored into possession. The declaration having been made, it would be for the unsuccessful party to approach the competent court and secure such order as would enable his entering into possession and evicting the party successful in proceedings under Section 145.

12. What is an eviction “in due course of law” within the meaning of sub-section (6) of Section 145 of the Code? Does it mean a suit or proceedings directing restoration of possession between the parties respectively unsuccessful and successful in proceedings under Section 145 or any order of a competent court which though not expressly directing eviction of the successful party, has the effect of upholding the possession or entitlement to possession of the unsuccessful party as against the said successful party. In our opinion, which we would buttress by reasons stated shortly hereinafter, ordinarily a party unsuccessful in proceedings under Section 145 ought to sue for recovery of possession seeking a decree or order for restoration of possession. However, a party though unsuccessful in proceedings under Section 145 may still be able to successfully establish before the competent court that it was actually in possession of the property and is entitled to retain the same by making out a strong case demonstrating the finding of the Magistrate to be apparently incorrect.

13. In a case where attachment has been made under Section 146(1) of the Code, it is not necessary for the unsuccessful party to seek the relief of possession from the court; a mere adjudication of rights would suffice

inasmuch as the attached property is held *custodia legis* by the Magistrate for and on behalf of the party who would be successful from the competent court by establishing his right to possession over the property.

21. In the present case, after an order was passed under Section 145(1) Cr.P.C. by the SDM on 05.03.2001, both the parties were called upon to file their respective written statements in support of their claim of possession of the disputed property with relevant date and two months before that. The petitioners filed a written statement dated 21.03.2001 wherein they have pleaded that Shri Kanshi Ram was the owner and in possession of the disputed plot forming part of khasra no. 188 (6 Bighas and 9 biswas) and that they have also constructed a boundary wall over the same along with a residential house in which they were residing with their family members. It was also stated that at the time of commencement of Delhi Land Reforms Act Shri Kanshi Ram was also declared as Bhoomidar. Later on the aforesaid khasra bearing no. 188 was vested in Gram Sabha vide order dated 07.02.1985 yet the possession remained with the Kanshi Ram, as the possession was never taken over by Gram Sabha. It was also stated that the petitioners also constructed a shop on the land in question which is on the main road and which has been let out to Shri Balbir Singh, son of Shri Bisambar Dayal who is using the same for supplying the building material. The said Balbir Singh also filed a suit for permanent injunction against son of Shri Kanshi Ram for injuncting him from forcible dispossessing him from the said shop.

22. Regarding the dispute it is alleged that the respondents came on the spot on 10.02.2001 along with some Goonda elements and wanted to encroach upon the land in question but the same were resisted by

the petitioner which led to registration of two FIRs as aforesaid. ***It may however be observed here that in the aforesaid written statement nothing was stated about openings in the walls which is allegedly constructed by Shri Kanshi Ram in his house towards the disputed property.***

23. On the other hand, in their written statements respondents have submitted that the local Police and the petitioners in collusion with each other wants the respondents to deprive their legal and factual possession over the disputed property which has been purchased by Shri Sardar Singh, s/o Sh. Bhagmal, Smt. Dhanno, w/o Shri Sardar Singh, Sh. Randhir Singh, s/o Shri Sardar Singh and Shri Inder Singh, s/o Shri Sardar Singh who are all the members of the same family vide legal documents i.e Agreement to sell, General Power of Attorney, Receipts and Affidavits all dated 18.07.1982 executed by Shri Kanshi Ram and Shri Harikishan son of Shri Duly Chand whereby they have sold different parts of land measuring 400 sq. yds, 400 sq. yds., 500 sq. yds and 500 sq.yards respectively. It is stated that at that time physical possession of the plot was also handed over to the respondents, namely, Shri Inder Singh, Shri Sardar Singh, Smt. Dhanno Devi and Shri Randhir Singh by the vendor Shri Kanshi Ram and Harikishan. It was further submitted that total land so purchased by them measures 1800 sq. yds. comprising in khasra no. 188 and is the disputed property which remained in physical use of the respondents and their family members after the same was purchased and the possession handed-over to them. They also constructed a pucca boundary wall of 6 feet height in the year 1982 after the purchase of the property after integrating all the 4 plots into 1 plot. It is also stated

that Shri Kanshi Ram and Harikishan sold the land part of khasra no. 188 (6-9) to different persons including the respondents and their family members and it was on account of such violation that the land was vested in Gram Sabha on 07.02.1985 and thereafter Shri Kanshi Ram and Shri Harikishan are left with no right or title in the aforesaid property.

24. It was further submitted that on 10.02.2001 when the family members of the respondents were constructing the boundary wall which had fallen because of the same was constructed in the year 1982, the petitioners started throwing stones and bricks on the top of their house which is adjacent to the plot of the second party and which led to the registration of FIR bearing no.100/2001 dated 10/2/2001. It has been submitted that as the respondents and their family members are in actual possession of the disputed property since 18.07.1982 and there was no disruption in any kind of user or enjoyment or the said plot of land measuring 1800 sq. yds and as such the petitioners had no right to disturb the possession but it appears that the petitioners in coalition with local Police wanted to disturb the possession of the respondents and, therefore, under the cover of proceeding under Section 145 it was submitted that the execution of General Power of Attorney, Affidavit, Agreement to Sell and Receipt etc. executed by Kanshi Ram and Harikishan had never been challenged by the petitioner at any point of time till the filing of his written statements. It was also submitted that on a complaint made by the respondents an enquiry was also conducted by the Addl. DCP (South-West Distt.), Delhi who had reported to the Joint Commissioner Shri Hardeep Singh Sandhu that the possession of the respondents in the aforesaid

property was verified.

25. It is also stated that a piece of land measuring 58 sq. yds. forming part of the aforesaid property was also sold by the respondents to one Narender Singh with whom Devinder Singh tried to create a dispute which resulted in initiation of proceeding under Section 145 Cr.P.C. which was adjudicated by SDM Najafgarh Delhi and vide his order dated 21.09.2000 held that the possession of the property was not with Devinder Singh as he could not give any evidence to show his possession. That respondents also sold 200 sq. yds of land out of 500 sq. yds belonging to Inder Singh Solanki purchased from Shri Kanshi Ram. The said Ram Bahadur Gupta also constructed a pucca house on the said land on the transferred documents so executed. A son of Shri Kanshi Ram also signed the documents as a witness. It is in the light of the aforesaid stand taken by the parties the evidence led by them needs to be analysed.

26. I have heard the submissions of the parties. It is the submission of the petitioners that in the facts of this case the evidence was correctly appreciated by the SDM while declaring that it was the petitioners who was in possession of the property, and therefore, the order of the Addl. District Judge reversing the said finding of the SDM is erroneous. It is also submitted that the Addl. Sessions Judge even exceeded the brief inasmuch as while exercising revisional power the said Court ought not to have re-appreciated the evidence.

27. However, the respondents have stated that the evidence has been correctly analyzed by the Addl. Sessions Judge which has been brought on record. It is stated that the reasoning of the SDM was contrary to the written statements filed by the parties and the fact that

both the parties admit that the documents which were relied upon by the respondents were executed by Shri Kanshi Ram which mentions even the handing over of the possession of the property to the respondents. In these circumstances, when according to the petitioners the property in question now stands vested in Gram Sabha since 1985 the possession of the disputed property with that of the petitioners does not arise who gave the possession thereof to the respondents as acknowledged in the documents executed in 1982, the execution whereof has not been disputed inasmuch as the Kanshi Ram has not appeared in the witness box.

28. At this juncture, it may be appropriate to take note of the judgment delivered by Apex Court in State of Maharashtra Vs. Jagmohan Singh Kuldip Singh Anand and Others (2004) 7 SCC 659 where it has been observed as to how the Revisional powers under Section 397 Cr.P.C. are to be exercised. The observations are reproduced as under:

22. The revisional court is empowered to exercise all the powers conferred on the appellate court by virtue of the provisions contained in Section 401 CrPC. Section 401 CrPC is a provision enabling the High Court to exercise all powers of an appellate court, if necessary, in aid of power of superintendence or supervision as a part of power of revision conferred on the High Court or the Sessions Court. Section 397 CrPC confers power on the High Court or Sessions Court, as the case may be,

“for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court”.

It is for the above purpose, if necessary, the High Court or the Sessions Court can exercise all appellate powers. Section 401 CrPC conferring powers of an appellate court on the revisional court is with the above limited purpose. The provisions contained in Section 395 to Section 401 CrPC, read together, do not indicate that the revisional power of the High Court can be exercised as a second appellate power.

29. A perusal of the order passed by the SDM goes to show that the SDM accepted the version of the petitioners by fully relying upon the testimony of Shri Devinder Singh son of Shri Kanshi Ram with an assumption that there were 3 openings in the wall belonging to the residential house of the petitioners despite the fact that nothing was stated in this regard in their written statement. Yet the SDM has considered it a very important fact to hold that the possession of the property in dispute was with the petitioners. In this regard the SDM also relied upon the statement of Shri S.L. Dua ACP Dabri area who while submitting his report opined that it was the petitioners who were in possession of the property on the basis of recorded statement of the witnesses including Devinder Singh. However Shri Devinder Singh in his deposition before the SDM has stated that he never met Shri S.L. Dua visiting the disputed property. SDM also relied upon the challans which were produced by K.K. Sharma Sanitary Inspector from MCD despite the fact that those challans were of dates subsequent to the date of dispute. Another witness relied upon very heavily by the SDM is Shri Balbir Singh the tenant who is alleged to be a tenant of the shop which is situated in the plot through Shri Devinder Singh which fact is not substantiated by any cogent witness.

30. On the other hand, the SDM rejected the evidence which has been led on behalf of the respondents by observing that Shri Inder Singh did not produce any document/ evidence about the usage of the plot prior to 10.02.2001 & that even Narender Singh who claims to have purchased 58 Sq. yds. was prevented by Shri Devender Singh when he warranted to build up a boundary. However, the SDM failed to consider the admissions made by Shri Devinder Singh about the

execution of the documents executed by Shri Kanshi Ram in favor of the respondents on 18.07.1982 which shows that the possession was also handed over at that time to the respondents despite any rebuttal given by Shri Kanshi Ram by appearing in the witness box.

31. SDM also ignored the statement of Shri Inder Singh who very categorically stated that before 10.02.2001 there was no dispute between the petitioners and the respondents and that they have been enjoying the uninterrupted peaceful enjoyment of the disputed property. It may be observed here that in his testimony Shri Inder Singh also stated that there was no entry gate from the house of Kanshi Ram towards the plot in dispute. As stated above, it is not the case of the petitioners in the written statement that they had opened any such opening before the date of the dispute which arose between the parties on 10.02.2001. As regards the existence of building material or the Kurri etc., no evidence has been led by the petitioners to prove the ownership of material which is allegedly lying on the disputed portion of the property. The report of ACP Sandhu has not been relied upon by the SDM merely because he also said that the disputed plot has three openings in the Eastern wall without taking into consideration that those openings must have been opened by the petitioners later on. While the testimony of Satpal Solanki and Narender Singh has been disbelieved by the SDM on account of their relationship with Shri Inder Singh Solanki, the SDM has relied upon the statement given by Shri Devinder Singh who has admitted that Shri Ram Bahadur Gupta to whom the respondents sold 200 sq. yds of land out of the disputed property also constructed a house which is very much in existence. He also admits execution of judgment relied upon

by Shri Kanshi Ram in favour of respondents. Similarly, the documents executed by the respondents in favour of Narender Singh which also contains witness of one of the son of Shri Kanshi Ram have not been considered by the SDM. The findings returned by the SDM that documents filed on record by the respondents does not show that the possession has been delivered by the petitioner Kanshi Ram to the respondents is contrary to the documents placed on record. The SDM further stated that the document simply mentioned that the executer appointed the respondents only as Attorney and has talked about the Agreement to Sell which is also relied upon by the respondents in their favour.

32. The SDM formed an opinion that the possession of the disputed plot was that of the petitioners only because the residential house of the petitioners is adjacent to the plot and they probably opened some entry gates from their side after the dispute started between the parties. If it was not so there would have been no reason for not stating this material fact in the written statement. The SDM failed to appreciate that even if the petitioners had started coming on the plot in question by making an opening in the wall belonging to their house it does not establish that they are in possession of the property though they might have acquired some easement rights.

33. Thus, in these circumstances, the entire emphasis of the order of the SDM is based upon the factum of construction of shop in one of the portion of the plot which it is stated to be in possession of Balbir Singh who alleges himself to be a tenant of Shri Devinder Singh who has not disclosed as to when he was inducted as a tenant inasmuch as with respect to the agreement he was unable to say when the same was

executed and on what kind of stamp paper it was executed. He was unable to produce any record or any rent receipt executed by Shri Devinder Singh in his favour.

34. The Addl. Sessions Judge while passing the order dated 07.09.2002 has taken into consideration all these aspects and has given cogent reasons to discard the evidence of the first party i.e. the petitioners claiming possession of the suit property and has rightly accepted that the possession of the suit property except the shop with that of the respondents. The observations made by the Addl. Sessions Judge is reproduced for the sake of reference which gives reasons in accepting the case of the respondents and rejecting the case of the petitioners. The said observations are as under:

I have found that undisputedly land in dispute i.e. plot is an open ground touching house of party no. 1. Party no.2 has relied on 4 sale documents executed by head of party no.1 Kanshiram on 18.7.1982 that by virtue of these 4 sets of documents Inder Singh Solanki and other purchased land from Kanshiram and his brother in the shape of 4 plots consisting of plot no.1 and 2 sold to Inder Singh Solanki and Randheer on 500 sq. yards each valuing Rs. 26,000/- each and plot no. 3 and 4 to Sardar Singh and Dhanno mother of Inder Singh comprised of 400 sq. yards each at the cost of JRs. 20,000/- each. All these 4 plots as per these documents are falling in khashra no. 188. It is also argued by the Revisionist that Ld. SDM has wrongly relied on the evidence of witness K.K. Sharma an MCD official who proved on record in the Court of Ld. SDM that he challaned under MCD rules for violation for garbage etc. and party no. 1 is relying heavily on this evidence these challans relating to the period about 3 months after the date on which possession was decided by Ld. SDM for party no. 1 as on 10.2.2001 and also held by Ld. SDM that on the basis of this documentary evidence of the MCD official who challanded the first party respondent no. 2 possession of party no. 1 is proved beyond doubt on the plot in dispute. These document of MCD and Court fine receipts is of April and May and the date of determination of possession is much earlier to it i.e. 10.2.2001.

I have also found that Devinder Respondent no. 2 in his evidence on oath in the Court of the Ld. SDM has deposed that he had seen the plot in dispute measuring 1000 or 1150 sq. yard falling in khasra no. 188 is owned by his father Kanshiram and his uncle. They are owners of 2500 sq. yards land, in 1400 sq. yard they have built their house and remaining 1000 sq. yard it is a plot in

dispute. He also had said that out of this plot Inder Singh Solanki has sold 58 s1. Yards land to Narender Singh through GPA and his father Kanshiram never sold any land to Sardar Singh or his wife Dhanno i.e. plot no. 3 and 4. And these are bogus document but had not taken any legal steps. But he admits that land in dispute falls in khasra no. 188.

Therefore, I am of the considered view that in view of this documentary evidence of MCD official produced by first party and his entire case vested on it as the property in dispute is an open plot except the small portion on it and that first party claiming the possession on the basis of the piece of evidence of MCD by throwing kura (turi) etc. and using it as an open land. Ld. SJDm has mainly relied on this document as a good documentary piece of evidence in favour of party no. 1. I have also found that 2nd party has produced the law referred above that best evidence i.e. Kanshiram party no. 1 did not come in the witness box to deny or assert whether land of these 4 plots i.e. 4/ sets of documents were sold & documents executed by him or not, whether possession was handed over the Revisionist & others or not, whether payment was received by him or not. He also did not come in the witness box at all to deny or assert that plot in dispute is or not the part of land in dispute or the above executed documents are false or forged or true.

As the MCD official's evidence was independent but goes against the party no. 1 and do not prove beyond the shadow of reasonable doubt that party no. 1 was in possession of the plot in dispute on 10.02.2001 or earlier as all these documents pertain to the period 3 months after the date 10.02.2001 which is earmarked date for deciding the possession of either party in this case. I have also found that no other document which could be with the first party i.e. electricity bills or other documents to prove possession were not produced. Most important witness Devinder of the first party has also deposing that ACP Sh. S.L. Dua never came to spot to enquire.

From the above evidence on record I am of the considered view that Ld. SDM has erred in holding that first party has proved beyond reasonable doubt that the actual possession of the plot in dispute as submitted by first party always remained with the first party and remained on 10.02.2001 also and Ld. SDM wrongly held that first party was in actual and peaceful possession and second party tried to forcibly evict the first party. I have also found that first party failed to prove that second party was ever dispossessed. Open land in dispute remained open land and second party has proved that by virtue of documents of plot no. 1, 2, 3 & 4 which falls in khasra no. 188 & as per witness Devinder disputed land also falls in khasra no. 188 that they are title holder and owner of plot in dispute as respondent no. 1 Kasiram did not come in witness box.

I have also found that Ld. SDM has not considered the basic problem of breach of peace for which local police was worried and for which provisions under Section 145 Cr.P.C. are enacted by the legislature in criminal procedure law.

Nature of Proceedings:

Chandu Naik V/s Sitaram B. Naik AIR 1978 SC page 333 in substance and effect a proceeding under

Section 145 Cr.P.C. is not for eviction of a person from any land but for the prevention of breach of the peace by declaring the party found in possession to be entitled to remain in possession until evicted therefrom in due course of law.

I have found that local Police by Kalandara informed the Ld. SDM that by the conduct of both the parties who are quarelling with each other and claiming ownership as well as possession over the plot in dispute requested Ld. SDM to decide who is the owner in possession.

35. In so far as the technical points raised by the petitioners regarding power of Revisional Court are concerned, the Addl. Sessions Judge also made following observations:

As regards powers of the Revisional Court I have found that in Rajpati V/s Bachan AIR 1981 SC page 18 it is held that when a Magistrate is satisfied regarding the existence of breach of peace and once he records his satisfaction in the preliminary order in revision cannot go into the sufficiency or otherwise of the materials on the basis of which the satisfaction of the Magistrate is based. It is the only ground on which revisional powers cannot be exercised. I have found that in the impugned order dated 27.09.2002 of the Ld. SDM below despite the plot in dispute was a vacant open land and that both the parties show their willingness to close the proceedings and drop the proceedings these proceedings then were not dropped and that both the parties did not prove their title and rights and even the party no. 1 assails that plot in dispute is not in their ownership but vests in the Gram Sabha. In the arguments at bar I am of the considered view that Ld. Court below committed an error while holding that first party has proved its possession beyond the shadow of reasonable doubts that the actual possession of plot in dispute has shown in site plan submitted by the first party always remained with the first party and on 10.02.2001 the first party was in actual and peaceful possession and the second party try to take forcible possession in which could not succeed, because the evidence documentary on record produced goes against this date to show the possession of the first party no document that first party was ever in possession earlier proved and produced by the first party in the Court of Ld. SDM. In view of above submission of both the parties and my perusal of oral evidence and documentary evidence and the law referred by both the parties I am of the considered view that regarding claim of possession as on 10.02.2001 the first party i.e. Kanshi Ram, Devinder and Surender respondents 1, 2 and 3 failed to prove beyond the shadow of reasonable doubt that on 10.02.2001 that the first party was in actual and physical possession on 10.02.2001 of plot in dispute and as they failed to prove it beyond the shadow of reasonable doubt of their actual and physical possession consequences they also failed to prove beyond the shadow of reasonable doubt that second party tried to take forcible possession in which

they could not succeed. Therefore claim of actual possession over the plot in dispute and shop in dispute first party miserably failed to prove it beyond the shadow of reasonable doubt. Therefore the order of Ld. SDM dated 27.09.2002 is not sustainable in law and on evidence on merits and is liable to be set aside. Therefore I set aside the order of the Ld. SDM dated 27.09.2002 and declare that prima facie as the 4 sets of documents i.e. GPA's agreement to sell and others documents etc. wherein after taking the value of the plot in dispute possession was handed over to Revisionist and others and they were never dispossessed. And out of 4 sets of these documents, although 2 sets regarding plot no. 3 & 4 were stated to be forged and untrue but as executor/ respondent no. 1 did not come in the witness box in the Court of Ld. SDM to assert and even as per party no. 1 plot in dispute vests in the Gram Sabha has submitted by his counsel at bar I am of the considered view that the above documents are not challenged by party no. 1 at any legal forum even in the Court of Ld. SDM by producing Respondent no. 1 Kanshiram at witness box that is the basis of possession given by Respondent no. 1 Kanshiram in 1982 and that was not taken back and respondent no. 1 recovered proper amount i.e. by Kanshiram, that revisionist are in possession of plot in dispute and they are in actual and peaceful possession on 10.0.2001.

Therefore I do decide and declare that second party are in actual possession of plot in dispute shown in site plan placed by the second party which is undisputedly and admittedly by both the parties is an open land the possession of shop-cum-room to maintain breach of peace a status qua of possession shall be maintained as on day of the order with regard to that portion i.e. of shop-cum-room and the second party shall remain in possession of the remaining entire open plot in dispute until ousted by due course of law by the first party i.e. 1, 2, and 3 Kanshiram, Devinder and Surrender and it strictly forthwith any disturbance of their possession in meantime SHO concerned is hereby directed to comply this order within 3 days after issue of this order and the order of Ld. SDM dated 27.09.2001 is therefore hereby set aside.

Copy be sent to SHO concerned for compliance through Naib Court.

36. The few admitted facts which emerge from the evidence led by the parties can be enumerated, which clings the issue:-

- i) The property forms part of khasra no. 188 which at one stage belonged to Shri Kanshi Ram
- ii) Documents which have been relied upon by the respondents were executed by Shri Kanshi Ram which mentions khasra no. 188 and handing over the possession thereof to the respondents in 1982.

- iii) There is no evidence available on record that the possession of the property was not given by Shri Kanshi Ram to the respondents inasmuch as Shri Kanshi Ram has never appeared in the witness box.
- iv) There is no mention about the opening of the 3 gates in the written statements filed by the respondents which is the basis of the findings returned by the SDM
- v) It is an admission by Shri Devinder Singh that his statement was not recorded by ACP Dua and that out of the disputed property of plot measuring 200 sq. yds was sold by Shri Inder Singh to Shri Ram Chand Gupta who even constructed his house in their plot measuring 50 sq. yds. was sold by the respondents to Shri Narender Singh with whom Devinder Singh tried to raise a dispute and ultimately the SDM held that Devinder Singh had nothing to do with that property and that documents relied upon by the respondents were executed by his father Shri Kanshi Ram.
- vi) No satisfactory explanation has come forward as to why Kanshi Ram did not appear, despite the fact that the documents relied upon by the documents were executed by him and which mentions handing over the possession of the property in dispute to the petitioners.
- vii) Merely because Balbir Singh claims to be a tenant of Devinder Singh, without anything else on record specifying as to when tenancy was created and how Devinder Singh came into possession of the property which he claims to

even let out to Balbir Singh, the mere statement of Balbir Singh cannot form the basis of holding that the petitioners were in possession of the property even before 10.02.2001.

37. In view of the aforesaid, the order passed by the Addl. Sessions Judge does not require any interference by this Court. Accordingly the same is upheld. The SHO concerned will comply with the directions maintained in the said order. Petition filed by the petitioner is accordingly dismissed with costs of Rs. 10,000/-.

38. Trial Court records be sent back forthwith.

MOOL CHAND GARG, J

MARCH 18, 2009
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