

CRIMINAL REVISION.*Before Sharfuddin and Teunon JJ.*

SADANANDA MANDAL

v.

KRISHNA MANDAL.*

1914

June 24.

Dispute concerning land—Evidence not recorded according to law, but memorandum taken down and signed by the Magistrate personally—Legality of final order—Criminal Procedure Code (Act V of 1898) ss. 145, 356 (1) and (3).

The provisions of sub-section (1) of s. 356 are mandatory. Sub-section (3) applies only where evidence has been recorded in accordance with sub-section (1) but not personally by the Magistrate.

Where the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same:—

Held, that the provisions of s. 356 had not been complied with, and that the order declaring the opposite party to be in possession was bad in law

UPON the receipt of a police report that there was a likelihood of a breach of the peace between the petitioner and Krishna Mandal, the opposite party, regarding the possession of certain land in village Moghi, in the district of Jessore, the Sub-divisional Officer of Magura drew up a proceeding under s. 145 of the Criminal Procedure Code and called upon the parties to file written statements of their claims as respects the fact of actual possession. On the date fixed for the hearing of the case, the Magistrate examined the witnesses of both parties, but did not record their

* Criminal Revision No. 807 of 1914 against the order of S. N. Dāg, Subdivisional Officer, Magura, dated March 18, 1914.

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evidence himself nor was it recorded in his presence and hearing in accordance with the provisions of sub-section (1) of s. 356. He, however, made a memorandum of the substance of the evidence and signed the same. By his order, dated the 18th March 1914, he declared the opposite party to be in possession of the disputed land until evicted by the order of a competent Civil Court. The petitioner thereupon moved the High Court and obtained the present Rule on the grounds stated in the judgment below.

Babu Hari Bhushan Mukerjee (with him *Babu Satish Chandra Ghatak*), for the petitioner. The Magistrate has not complied with the provisions of s. 356 of the Code which requires the evidence to be taken down in full. He cannot decide a case under s. 145 only on a memorandum of the evidence.

Babu Narendra Kumar Bose, for the opposite party. The Magistrate is competent to act on a memorandum of the evidence. Besides, the irregularity, if any, does not go to the root of the case. The proceedings cannot be set aside on such a ground.

SHARFUDDIN AND TEUNON JJ. This Rule, issued at the instance of the first party to proceedings under section 145 of the Criminal Procedure Code, called upon the District Magistrate and the opposite party to show cause why the final order made in these proceedings should not be set aside on two grounds, namely, *first*, that the evidence had not been recorded in the manner provided by section 356 of the Criminal Procedure Code; and, *secondly*, on the ground that the Magistrate did not receive the oral and documentary evidence tendered by the petitioner. The District Magistrate has submitted an explanation. From this explanation we find that in fact the trying Magistrate

did receive all the evidence, oral or documentary, that was offered. With regard to the first ground what the Magistrate says is that the Subdivisional Magistrate, that is to say, the trying Magistrate, made a memorandum of the evidence in the manner required by sub-section (3) to section 356 of the Code of Criminal Procedure, and that the making of that memorandum should be regarded as a sufficient compliance with the requirements of the law. We are unable to accept this contention. The provisions of sub-section (3), section 356 of the Code of Criminal Procedure, apply only to cases in which the evidence recorded under sub-section (1) is not recorded in the Magistrate's own hand. The provisions of the first sub-section are imperative, and we are unable to condone the non-compliance therewith. We, therefore, make this Rule absolute and set aside the order complained of.

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Rule absolute.