CRIMINAL REFERENC

Before Walmsley and B. B. Ghose JJ.

1925

May 13.

FORBES

v.

ALI HAIDAR KHAN*

Local Inspection—Omission to record a memorandum—Inquiry under s. 145 of the Code—Effect of omission—Prejudice—Criminal Procedure Code (Act V of 1898) s. 539 B.

The omission to record a memorandum under s. 539 B of the Criminal Procedure Code in an inquiry under s. 145 is not an illegality vitiating the proceeding, but an irregularity which does not affect it in the absence of prejudice to the parties.

Per B. B. GHOSE J. There is no universal rule that disobedience of a mandatory provision of a statute results in nullification of the proceeding, irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends on a consideration of various circumstances.

Hiday Govinda Sur v. *Emperor* (1) doubted, but distinguished.

ON the receipt of a police report, the Subdivisional Officer of Sylhet drew up a proceeding under s. 145 of the Code against the Kaliti Tea Estate, represented by Mr. Forbes, as the first party, and the Prithimpasa Estate, represented by Ali Haidar Khan, as the second party, in respect of a plot of land where coal had been discovered. On the 24th February 1924 the Magistrate held a local inspection in the presence of the pleaders of the parties, but omitted to record the memorandum required by s. 539 B. Neither the

* Criminal Reference No. 36 of 1925 by B. N. Rau, Sessions Judge of Sylhet, dated Feb. 2, 1925.

(1) (1924) I. L. R. 52 Calc. 148.

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parties nor their pleaders asked the Magistrate to record such memorandum or to attach it to the record, or applied for a copy, or referred to the results of the local inspection during the rest of the enquiry. By his order, dated the 25th March, the Magistrate declared the first party to be in possession. He referred in the final order to matters observed by him at the inspection, and his conclusions therefrom, but his findings on the evidence were sufficient to support the order apart from the results of his observations.

The second party then moved the Sessions Judge of Sylhet who reported the case, under s. 438 of the Code, on the authority of *Hriday Govinda Sur* v. *Emperor* (1).

Sir B. C. Mitter (with him *Babu Preo Nath Dutt*), for the first party. The case of *Hriday Govinda Sur* v. *Emperor* (1) is distinguishable. It related to an offence: here the proceeding was under s. 145 of the Code, and is of a civil character. "*Shall*" is not always mandatory, especially when the proceedings are civil. It is often used in the Code in the sense of being directory. See *Sukh Lal Sheikh* v. *Tara Chand Ta*(2), *Abasu Begum* v. *Umda Khanum*(3), *Parbutty Charan Aich* v. *Queen-Empress* (4). Whether non-compliance with a provision of the law invalidates the proceedings depends on the nature of the subject matter: *Government of Assam* v *Sahebulla* (5). If the provision violated was a matter of procedure, s. 537 applies. The provision in s. 539 B is one of procedure. The opposite party was not prejudiced in any way: he did not ask the Magistrate to record a memorandum at the time or afterwards, nor did he;

(1) (1924) I. L. R. 52 Calc. 148. (3) (1882) I. L. R. 8 Calc. 724,726.
(2) (1905) I. L. R. 33 Calc. 68. (4) (1888) I. L. R. 16 Calc. 9.
(5) (1923) I. L. R. 51 Calc. 1.

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even enquire, during the inquiry under s. 145, what the results of his observations were, but took the objection after the final order was passed, and when he had lost the case. He was not prejudiced by the irregularity. Refers to *Atiar Rai* v. *Emperor* (1). In a civil proceeding there may be waiver, though not in a criminal one: See *Queen* v. *Bishonath Pal* (2), *Queen* v. *Bholanath Sen* (3).

Mr. B. Chakravarti (with him *Moulvie Amiruddin Ahmed*), for the second party. The history of s. 145 shows that it is a criminal proceeding. Section 539 B applies to every inquiry. There is no distinction in the section between civil and criminal proceedings: its very object was to put an end to the discussion on the question that arose in *Babbon Sheik* v. *Emperor* (4) and *Atiar Rai* v. *Emperor* (1). It has been held in *Hriday Govinda Sur* v. *Emperor* (5) that s. 539B is mandatory, and the case applies to an inquiry as well as a trial for an offence.

WALMSLEY J. This case comes before us on a Reference made by the Sessions Judge of Sylhet under the provisions of section 438 of the Criminal Procedure Code.

In a proceeding under section 145 of the Criminal Procedure Code, the Subdivisional Magistrate declared the first party to be in possession of the disputed land by an order dated March 25, 1924. The learned Judge recommends that this order be set aside on the ground that the Magistrate, after making a local enquiry, did not record a memorandum of the relevant facts which he observed. The rule which requires such a memorandum to be made was enacted by Act XVIII of 1923

(1) (1912) I. L. R. 39 Calc. 476.
(2) (1869) 12 W. R. Cr. 3.
(3) (1876) I. L. R 2 Calc. 23.
(4) (1910) I. L. R. 37 Calc. 340.
(5) (1924) I. L. R. 52 Calc. 148.

and is contained in section 539 B of the Code as it is after amendment. It does not, however, introduce any new principle, for this Court had often laid down that a memorandum should be prepared, so that both sides to an enquiry or trial might know what the Magistrate during his enquiry had noticed or failed to notice.

It is the form of the rule that creates difficulty. It runs " Any Magistrate may. . . . and shall record a memorandum. . . . Such memorandum shall form part of the record of the case." The learned Judge refers to a decision by a Divisional Bench of this Court in the case of *Hriday Govinda Sur* v. *Emperor*(1), where it was held that the rule contained in the second clause of the section, that is, the rule which directs that the memorandum shall form part of the record, was mandatory, and that failure to comply with it was an illegality and not an irregularity which can be cured. With all deference to the learned Judges I venture to doubt whether that result does follow from applying the epithet mandatory. The decision, however, was in a trial for an offence, whereas in the case before us there was no accused person before the Court, and the only question was which of two parties was in possession of the land, and which should shoulder the burden of instituting a civil suit. In such a proceeding I think that we are entitled to consider what action the petitioners took in regard to the writing of a memorandum. I have already pointed out that the requirement of section 539B introduced no new principle. The local enquiry was made in the presence of the petitioner's pleader : he knew exactly where the Magistrate went, and the points to which his attention was drawn. The petitioners through their pleader must be assumed to be familiar with

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pronouncements so often made by this Court that a memorandum should be recorded. They did not however, ask the Magistrate to record a memorandum, or to attach a memorandum to the record or to give them a copy. They were content to go on to judgment without seeing the memorandum, or even ascertaining whether one had been made. I do not think that they can now be allowed to say that for this formal defect the proceedings should be set aside, unless they can show that the Magistrate's omission has caused them prejudice.

As to prejudice, it is quite true that the learned Magistrate referred to what he had seen, and to the conclusions which he drew, but those remarks are redundant for the findings on the evidence adduced by the parties are summed up in these words. "I can say with conviction that I consider the first party's evidence to be true, and I can say with even more conviction that I consider the second party's evidence to be a mass of lies and fictions supported by documents which must have been specially made for the occasion."

In these circumstances I hold that sufficient reason has not been made out for interference, and I reject the reference.

GHOSE J. I agree that this Reference should be rejected. I only desire to add that there is no universal rule that disobedience of a mandatory provision in a statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is imperative or only directory depends upon a consideration of various circumstances. It seems to me that the observations in *Hriday Govinda Sur* v. *Emperor* (1) are too wide

E. H. M.

(1) (1924) I. L. R. 52 Calc. 148.