CRIMINAL REFERENCE.

Before Rankin C. J. and Graham J.

PHAKIR MANDAL

v.

MADAR MANDAL.*

1930

Dec. 18.

Criminal Revision—Powers of High Court—Reference to High Court—Evidence, when will be gone into—Police order by magistrate, reference against—Code of Criminal Procedure (Act V of 1898), ss. 145, 438.

The powers of the High Court in Criminal Revision are not confined to matters of law and the court will always refuse to fetter its hands by any attempt to crystallise its discretion by general principles. But, as a rule, the court will not go into evidence, unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law.

Referring courts must always bear in mind the limits which the High Court has, in practice, put upon its own discretion and they should not make a Reference where the only objection is to the findings of the court below, upon the merits. Moreover, they ought to make their References in the form prescribed by the Circular Orders of the High Court, stating in what particular portion of the order, the court making the Reference considers an error on a point of law to exist.

In the case of orders under section 145 of the Code of Criminal Procedure, which are mere police orders to be made by magistrates to quiet disputes, even if it should appear from the judgment of the magistrate that there is an error of law, References should not be made unless it appears that the error of law is of such a character as to call for interference by a higher authority.

The land in the case was originally held by one Swarup and his cousins Ramdhan and Ramsundar. One Patua Bewa inherited the property from Swarup and the persons of the second party claimed to be successors-in-interest of Ramdhan and Ramsundar. In their first written statement, the second party alleged that Patua Bewa had no interest in the land, and later they put in a further written statement in which they claimed the land as reversioners of Patua Bewa.

It was in evidence that Swarup alone was registered in the landlord's *sheristâ*.

All other facts appear from the judgment.

*Criminal Reference, No. 154 of 1930.

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Asitaranjan Ghosh and *Shrishchandra Datta* for the first party.

Sureshchandra Talukdar and *Jaygopal Ghosh* for the second party.

RANKIN C. J. In my opinion, this Reference must be rejected.

It appears that a magistrate of the first class was trying a proceeding under section 145, Criminal Procedure Code, and he came to the conclusion that the second party was shown to be in possession. The learned Sessions Judge of Khulna has, under section 435, Criminal Procedure Code, called for the record and has exercised his power under section 438 in reporting the case to the High Court. He reports the case with the recommendation that the order finding that the second party was in possession of the land and prohibiting interference with such possession should be set aside. He suggests that the true finding in the case would have been a finding that the first party was in possession. He recommends that the magistrate's order be vacated but he does not appear to recommend that this Court should declare the first party to be in possession with the usual reliefs. He suggests that the order should simply be vacated and that, thereupon, if there be any reason still to apprehend a breach of the peace, the proceedings should either be begun all over again or the magistrate should take action under section 107, Criminal Procedure Code. I may say that the judgment of the magistrate is dated in April of this year, and the Reference by the Sessions Judge is dated in June. We are now in the middle of December.

When I come to look at the judgment of the magistrate, it appears to me that there is one criticism which cannot be made against it. It is a judgment which confines itself entirely to the question of fact as to whether the first party or the second party was in actual possession, and the magistrate is most careful to deal in no way with complicated questions of title, nor is he in his

judgment mixing up the question of the right to possession with the question of actual possession. It seems that the first party claimed that the land, until about a year before the proceedings, belonged to one Patua Bewa. That is agreed by all the parties. The first party say that Kushilal used to live with Patua Bewa and looked after all her affairs, ploughed her lands and so on and that, after her death, he remained in possession, and the second party say that they are the heirs and reversioners of Patua Bewa, that they were looking after her property all along and that, on her death, they succeeded to the possession of the property.

The magistrate has given four reasons, which led him, upon the evidence, to hold that the story of the second party, that they got possession on the death of Patua Bewa, was true. First, he says, the neighbouring and adjoining witnesses prove it; secondly, the tenants on the land prove it; thirdly, the house of the second party adjoins the disputed land and that of the first party is at a distance, and fourthly, he makes an observation—a very proper observation—which has been entirely misconstrued by the learned Sessions Judge. He says "They are "the natural heirs and reversioners of Patua Bewa "who was undoubtedly the owner till her death." It is on the strength of that and the following observation that most of the criticism has been made. The magistrate goes on to say "So, though Kushilal of the "first party might have been with Patua, he could "not be in possession after the death of Patua about "a year back. The second party took up the "possession; so it is that the first party took a "settlement from the landlord, who had not the "slightest right to lease out to any one when the heirs "and reversioners to the deceased were in existence." Because of that observation, it is said that the magistrate has not addressed himself to the questions of fact, but has addressed himself to the question of title or the question of right. To my mind, that is a most unreasonable criticism. Having shown that the

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second party were living on the spot, the magistrate, as one of his reasons for finding that they would get possession on the death of Patua Bewa, says that they are Patua Bewa's natural heirs and reversioners. That is a circumstance which makes it very probable indeed that, on her death, they would exercise their claim and get possession of her property. The remaining observations that he makes are equally to the point upon the question of fact. As regards the lease, which was put forward by the first party, the magistrate explains that by saying that, because the second party was in possession, the first party had to do something to stiffen up their claim and so they went to the landlord and got a lease and, as the magistrate observes, the bogus character of this could be seen from the circumstance that the landlord had no pretence of right to grant such a lease when the heirs and reversioners of Patua Bewa were in existence. The magistrate's reasoning is entirely to the point. He has, in no way, violated the terms of the sub-section (*4*) of section 145, Criminal Procedure Code.

There is only one other argument which I propose to refer to among the arguments contained in the Reference by the Sessions Judge. It is said that the magistrate, in his judgment, has not made specific reference to the record-of-rights. It now appears that the record-of-rights was finally published before the death of Patua Bewa and that all it shows is that she and certain other people, who were co-sharers of this land, were in possession for some considerable time before her death. The magistrate has not referred to this, because, as a matter of fact, it does not show that either the first party or the second party was likely to be in possession when Patua Bewa died. In my judgment, this is an order by the magistrate which may be right or wrong, but it is a mere police order and not a judgment in a title suit. The learned Judge has gone into the evidence for himself and has come to a different conclusion on the facts and that is all.

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When this Reference was first mentioned to us yesterday, it seemed to me that it was of a character that was somewhat unusual and I may say that I have taken some trouble to find out what the practice of this Court has been in such a matter. It is quite clear now that the practice, in a case under section 145, Criminal Procedure Code, is exactly like the practice in any ordinary case. This Court, as regards the exercise of its power in criminal revisions, has always taken a somewhat liberal view—more liberal than some of the other Courts. At one time, before the Code was revised in 1882, the revisional power of the Court was limited to material errors of law committed in judicial proceedings and, at that time, such a Reference as this would have been hopelessly misconceived. But since then, the power of the High Court has extended to correctness, legality or propriety of the order and, as a matter of jurisdiction, the revisional power is not confined to matters of law. It is probably a thing which this Court will always refuse to do—to fetter its hands by any attempt to crystallise its discretion by general principles. Interference in revision is a matter which will be undertaken or left alone upon a consideration of the character of the case as a whole and in detail. But it is quite obvious that, unless this Court is going to do again the work of all the magistrates in the whole of the province, it must, as a matter of practice, restrict the special power that it has got to suitable cases, and the first rule which has always been observed is that this Court will not go into evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law. There must appear, on the face of the judgment or of the order complained of or of the record, some ground—which need not always be a ground of law—to induce this Court to think that the evidence ought to be examined in order to see whether there has been a miscarriage of justice, and it is not the right of a party to claim that the Court should investigate the facts merely on the allegation that there should be

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another trial because he has not succeeded before the lower court. This being the principle upon which our powers in revision are exercised, the next thing that is to be observed is that referring courts must always bear in mind the limits which the High Court has, in practice, put upon its own discretion, and they should not make a Reference where the only objection is to the findings of the court below upon the merits. It is not the rule of the Court to interfere with decisions on facts upon evidence, except for special reasons and the referring courts have again and again been asked to make their References subject to this consideration. Moreover, they have to make their References in the form prescribed by this Court's Circular Orders, from which it clearly appears that they have to state in what particular portion of the order the Court making the Reference considers an error on a point of law to exist. I make this observation because, in cases under section 145, Criminal Procedure Code, which are mere cases of police orders to be made by magistrates to quiet disputes and which are in no way final, it is intolerable that, after the magistrate has heard all the evidence, there should be, in effect, an appeal to the Sessions Judge on questions of fact and that, by means of Reference there should, in effect, be a second appeal to the High Court upon question of fact, *viz.*, as to the correctness or otherwise of the magistrate's opinion upon the question of possession. In my judgment, a Reference, such as the present, ought not to be made merely upon a difference of opinion as to the value of the evidence. I will go further and say, that, even if it should appear from the judgment of the magistrate that there is an error of law—and I need hardly say that magistrates with the assistance they can obtain in a police court have not very great advantages for the purpose of correctly discussing questions of title—References should not be made unless it appears that the error of law is of such a character as to call for interference by a higher authority. The power of Reference is not for the instruction of the magistrates. It is an over-

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riding power and is only to be exercised in a case which really calls for it. In my judgment, the present case is simply this that the magistrate has come to a finding on a single question of fact. The learned Sessions Judge has read into his judgment errors of law which are not to be found there, and he has come to another conclusion upon the facts going into them all over again for himself. That being so, he has thrown on this Court the burden of a third trial upon these questions of fact involved in the police order. In my judgment, that is an extremely inconvenient course to be adopted and, as I am quite satisfied with the judgment of the magistrate, I think the Reference should be rejected.

GRAHAM J. I agree. In my judgment, it would be quite contrary to the long established practice of this Court for us to interfere in a case of this description and upon the grounds which have been urged in support of this Reference. The Reference was, in my opinion, wholly unnecessary.

Reference rejected.

S. M.