

erroneous. Had I been able to see that the accused had suffered any injury, or had been put face to face with any difficulty in defending himself, I would have sent the case down for re-trial. Failing, however, to perceive any such disadvantage or difficulty, I find the conviction was a conviction had according to law and ought not to be disturbed.

Let the papers be returned.

1903

 EMPEROR
 v.
 GUR NARAIN
 PRASAD.

Before Mr. Justice Banerji.

MAHADEO KUNWAR AND OTHERS v. BISU*

1903

 April 3.

Criminal Procedure Code, sections 145 (5) and 435 (3)—Order of Magistrate on dispute as to possession of immovable property—Revision—Jurisdiction of High Court.

The order to which finality is given under sections 145 (5) and 435 (3) of the Code of Criminal Procedure must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order, it is null and void, and the High Court in the exercise of its revisional powers is competent to interfere with it. *Hurbullabh Narain Singh v. Luchmeswar Prasad Singh* (1), *In re Pandurang Govind* (2) and *Agra Bank v. Leishman* (3) referred to.

Where a Magistrate under circumstances which would apparently have justified his taking action under section 145 of the Code of Criminal Procedure, took action in fact under section 107, and having passed an order seemingly under section 118, added, as it were, as an appendix to this order:—“Bisu Ahir put in possession under section 145, Code of Criminal Procedure”—it was held that this order, passed without any of the procedure prescribed by section 145 being adopted, was more than an irregularity, and was an order passed without jurisdiction and liable to revision by the High Court. *Mohesh Sodar v. Narain Bag* (4) and *Sakor Dusadh v. Ram Pargash Singh* (5) referred to.

THE facts of this case were as follows:—

The parties to the present proceeding, Mahadeo Kunwar and others, and Bisu Ahir had a dispute about the possession of a certain quantity of land. The existence of this dispute, and the likelihood of its leading to a breach of the peace were brought to the notice of the Joint Magistrate of Ballia. The Magistrate, instead of proceeding under section 145 of the Code of Criminal Procedure, took action under section 107 of

— Criminal Reference No. 59 of 1903.

- (1) (1898) I. L. R., 26 Calc., 188. (3) (1894) I. L. R., 18 Mad., 41.
 (2) (1900) I. L. R., 24 Bom., 527. (4) (1900) I. L. R., 27 Calc., 981.
 (5) (1902) 7 C. W. N., 174.

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the Code, and made an order calling upon the parties to show cause why they should not be ordered to furnish security to keep the peace. On the day fixed the parties appeared, filed statements in answer to the notice issued to them and adduced evidence. Upon the evidence the Joint Magistrate came to the conclusion that Bisu Ahir was in possession of the land, and thereupon made an order, described by him as an order under section 107, but which must have been passed under section 118, directing Mahadeo Kunwar and others to furnish security to keep the peace. After the Joint Magistrate had signed this order and dated it, he added these words:—"Bisu, Ahir, put in possession under section 145 of the Code of Criminal Procedure." Against these orders Mahadeo Kunwar and others applied in revision to the Sessions Judge, who reported the case for the orders of the High Court under section 438 of the Code of Criminal Procedure recommending that the orders passed by the Joint Magistrate should be set aside.

Babu *Sital Prasad Ghosh*, for the applicants.

Mr. *C. Dillon* and Maulvi *Muhammad Ishaq*, for the opposite party.

BANERJI, J.—This case has been reported under section 438 of the Code of Criminal Procedure with the recommendation that two orders passed on the 25th of November, 1900, by the Joint Magistrate of Ballia, purporting to be orders under sections 118 and 145 respectively of the Code of Criminal Procedure, be set aside. As for the latter order, Mr. *Dillon* contends that, having regard to sub-section (5) of section 145, and sub-section (3) of section 435, the order is not open to revision. In my judgment the order to which finality is given under those sections must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order it is null and void, and this Court in the exercise of its revisional powers is competent to interfere with it. This has been held by the Calcutta High Court in several cases, of which I may mention the cases of *Hurbullubb Narain Singh v. Luchmeswar Prasad Singh* (1)

(1) (1898) I. L. R., 26 Cal., 188.

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The same view was held by the Bombay High Court in *in re Pandurang Govind* (1), and the Madras High Court in *Agra Bank v. Leishman* (2) exercised its revisional powers in such a case. We have therefore to see whether the order which the Joint Magistrate purported to make under section 145 is in fact and substance an order under that section and was passed with jurisdiction. The facts are these:—

In October last the Joint Magistrate was informed by the police that a dispute existed between the parties to these proceedings about the possession of a certain quantity of land, which was likely to lead to a breach of the peace. The Magistrate, instead of proceeding under section 145, which, under the circumstances, was the appropriate section applicable, chose to proceed under section 107, and made an order calling upon the parties to show cause why they should not be ordered to furnish security to keep the peace. On the day fixed the parties appeared, filed statements in answer to the notice issued to them, and adduced evidence. In the view which the Magistrate took of that evidence, he came to the conclusion that Bisu *Ahir* was in possession of the land, and he made an order, which he calls an order under section 107 but which must have been passed under section 118, directing Mahadeo Kunwar and others, the first party, to furnish security to keep the peace. After he had signed this order and dated it, he noted the following order at the foot of the order:—“Bisu *Ahir* put in possession under section 145 of the Code of Criminal Procedure.” It is thus clear that no proceedings under section 145 were initiated by the recording of an order under sub-section (1) of that section, no notice was issued, no written statements were called for, and no inquiry was held under the section. It is manifest that for the making of an order under sub-section (6) of section 145, it is essential that the provisions of the section should be complied with. Where a Magistrate has failed to do so, his omission is something more than an irregularity, and his order must be deemed to be an order made without jurisdiction. The Calcutta High Court has held this view in a series of decisions, of which I may refer to *Mohesh Sowar v.*

(1) (1900) I. L. R., 24 Bom., 527.

(2) (1894) I. L. R., 18 Mad., 41.

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Narain Bag (1), and *Sakor Dusadh v. Ram Pargash Singh* (2). The Bombay High Court also in *In re Pandurang Govind* (3) was of the same opinion. The Joint Magistrate states in the explanation which he submitted to the Sessions Judge that the parties were not prejudiced, as they filed their written statements and adduced evidence. As I have already said, the omission to take proceedings under sub-section (1) of section 145 was more than an irregularity. Further, it was distinctly pleaded by Bisu *Ahiv* in answer to the notice issued to him that this being a case in which there was a question of disputed possession, proceedings should be initiated under section 145. It is thus clear that the parties did not understand that the Magistrate intended to hold proceedings under that section, and that they did not adduce such evidence as they would have adduced in a matter of which cognizance could be taken under that section. The parties were therefore prejudiced by the proceedings of the Magistrate, and his order directing Bisu *Ahiv* to be put in possession under section 145 was passed without jurisdiction, and must be set aside.

As regards the other order which was passed in the proceedings taken under section 107, I think, having regard to the provisions of section 145, that the Court should have proceeded under that section, and not under section 107. Chapter XII of the Code of Criminal Procedure lays down the procedure in regard to disputes relating to immovable property, where such disputes are likely to cause a breach of the peace. This was a case in which a report had been made by the police that a dispute likely to cause a breach of the peace existed between the parties concerning certain land. The Magistrate ought, therefore, to have proceeded in the manner prescribed in section 145, and not under section 107. It is not necessary to decide, for the purposes of this case, whether the fact of the Magistrate having been informed that a dispute existed in regard to land, ousted his jurisdiction to take proceedings under section 107. But it seems to me that when a particular section of the Code is appropriately applicable to a certain state of things, proceedings

(1) (1900) I. L. R., 27 Calc., 981. (2) (1902) 7 C. W. N., 174.
(3) (1900) I. L. R., 24 Bom., 527.

should be held under that section, and not under any other section. Mr. *Dillon* contended that if the Magistrate were to proceed under section 145 a breach of the peace might take place before the proceedings under that section could be completed. A remedy, however, for such a case is provided in the section itself. The second proviso to sub-section (4) empowers the Magistrate in case of emergency to attach the subject of dispute pending his decision under the section. The order under section 107, therefore, was not a proper order, and should not have been made. This view is supported by the recent ruling of the Calcutta High Court in *Saroda Prosad Singh v. The Emperor* (1). If the Magistrate still thinks that there is likelihood of a breach of the peace occurring in consequence of a dispute concerning land, he may proceed under section 145; but he must also have regard to the fact that there has been litigation between the parties or their predecessors in title in the Civil Court by which their rights in regard to the property in question have been determined. For the above reasons, acceding to the recommendation of the learned Sessions Judge, I set aside the orders passed by the Joint Magistrate on the 25th of November, 1902.

1903

 MAHADRO
KUNWAR
v.
BISU.

 APPELLATE CIVIL.

 1903
April 14.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

JADU NATH PRASAD (JUDGMENT-DEBTOR) *v.* JAGMOHAN DAS
(DECREE-HOLDER).*

Civil Procedure Code, section 230—Execution of decree—Limitation—Act No. IV of 1882 (Transfer of Property Act), sections 88 and 90.

Held that a decree which is a combination of a decree for sale on a mortgage under section 88 of the Transfer of Property Act, 1882, with the decree provided for by section 90 of the same Act, cannot be treated as a decree for money to which the provisions of section 230 of the Code of Civil Procedure are applicable. *Jogul Kishore v. Cheda Lal* (2) followed. *Ram Charan Bhagat v. Sheobarat Rai* (3) and *Kartick Nath Pandey v. Juggernath Ram Marwari* (4) referred to in the judgment of Aikman, J.

* First Appeal No. 182 of 1902 from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 28th of July 1902.

- (1) (1900) 7 C. W. N., 142. (3) (1894) I. L. R., 16 All., 418.
(2) Weekly Notes, 1893, p. 184. (4) (1899) I. L. R., 27 Calc., 285.