REVISIONAL CRIMINAL.

1917,
May, 30.

Before Justice Sir George Knox, Acting Chief Justice.

MATUKDHARI SINGH v. JAISRI AND ANOTHER.*

Criminal Procedure Code, section 145—Government of India Act, 1915, section 107—Order under section 145 by a Magistrate duly empowered to act under Chapter XII—Revision—Jurisdiction of High Court.

Where proceedings are in intention, in form and in fact proceedings under chapter XII of the Code of Criminal Procedure, and are taken by a magistrate duly empowered to act under that chapter, the High Court has no power to send for the record of those proceedings either under the Code of Criminal Procedure or under the Government of India Act, 1915. There is no practical difference between section 107 of the Government of India Act, 1915, and section 15 of the Charter Act. *Jhingai Singh* v. *Ram Partap* (1), *Maharaj Tewari* v. *Har Charan Rai* (2), *Sayeda Khatun* v. *Dal Singh* (3), *Babban Singh* v. *Baldeo Singh* (4), *Har Prasad* v. *Pandurang* (5), *Baldeo Baksh Singh* v. *Raj Ballam Singh* (6) and *Muhammad Suleman Khan* v. *Fatima* (7) referred to. *Nathu Ram* v. *Emperor* (8) and *In re Nathu Mal* (9) distinguished. *Parmeshwar Singh* v. *Kailashpati* (10) dissented from.

THE facts of this case were as follows:—

Babu Anrudh Lal Mahendra, a Magistrate of the first class at Mirzapur, was satisfied from a police report that a dispute likely to cause a breach of the peace existed concerning certain lands situate in Jafar Khani within the local limits of his jurisdiction. He made an order in writing, No. 3A on the record, stating the ground of his being so satisfied and requiring the parties concerned in the dispute to attend his court on the 25th of September, 1916, and to put in written statements of their respective claims stating the facts of the actual possession of the subject of dispute. The order was properly served as required by law, and it may be taken therefore that the notices were originally issued in respect of about 4 bighas 19 biswas of land in Jafar Khani; but the Magistrate, on reading the written statement and petitions of

* Criminal Revision No. 235 of 1917, from an order of Anrudh Lal Mahendra, Magistrate of the first class of Mirzapur, dated the 7th of December, 1916.

(1) (1908) I. L. R., 31 All., 150.
(2) (1903) I. L. R., 26 All., 144.
(3) (1914) I. L. R., 36 All., 233.
(4) (1907) 4 A. L. J., 91.
(5) Weekly Notes, 1905, p. 260.
(6) (1905) 2 A. L. J., 274.
(7) (1886) I. L. R., 9 All., 104.
(8) (1917) 15 A. L. J., 270.
(9) (1902) I. L. R., 24 All., 315.
(10) (1917) 1 Patna L. J., 336.

Matukdhari Singh, came to the conclusion that the dispute really existed about 19 bighas of land in Sherwa as well as about the land in Jafar Khani. The parties consented (*vide* paper No. 9A on the record) that an inquiry should be held in respect of both the lands in Sherwa and in Jafar Khani. After considering the evidence produced by both the parties, the learned Magistrate decided that Jaisri was in possession at the date on which he issued his order of the 8th of September, 1916, and he issued an order declaring Jaisri to be entitled to possession thereof until evicted therefrom in due course of law and forbidding all disturbance of his possession until such eviction (*vide* his order, dated the 7th of December, 1916).

The opposite party Matukdhari Singh applied to the High Court in revision against the order of the 7th of December, 1916, on the grounds that the Magistrate had no jurisdiction to entertain a proceeding under section 145 in the circumstances of the case; that the Magistrate erred in giving possession of the whole holding to Jaisri, and that the Magistrate had not decided the question of possession, which was with the applicant.

Mr. *M. L. Agarwala*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite parties.

KNOX, A. C. J. :—Babu Anrudh Lal Mahendra, a Magistrate of the first class at Mirzapur, was satisfied from a police report that a dispute likely to cause a breach of the peace existed concerning certain lands situate in Jafar Khani within the local limits of his jurisdiction. He made an order in writing, No. 3A on the record, stating the ground of his being so satisfied and requiring the parties concerned in the dispute to attend his court on the 25th of September, 1916, and to put in written statements of their respective claims stating the fact of the actual possession of the subject of dispute. It has not been suggested that the order was not properly served as required by law, and it may be taken therefore that the notices were originally issued in respect of about 4 bighas 19 biswas of land in Jafar Khani; but the Magistrate, on reading the written statement and petitions of Matukdhari Singh, came to the conclusion that the dispute really existed about 19 bighas of land in Sherwa as well as about the land in Jafar Khani. The parties consented (*vide* paper

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No. 9A on the record) that an inquiry should be held in respect of both the lands in Sherwa and in Jafar Khani. After considering the evidence produced by both the parties, the learned Magistrate decided that Jaisri was in possession at the date on which he issued his order of the 8th of September, 1916, and he issued an order declaring Jaisri to be entitled to possession thereof until evicted therefrom in due course of law [and forbidding all disturbance of his possession until such eviction (*vide* his order, dated the 7th of December, 1916).

The opposite party Matukdhari Singh is now asking this Court to interfere in revision with the order of the 7th of December, 1916, on the grounds that the learned Magistrate had no jurisdiction to entertain a proceeding under section 145 under the circumstances of the case; that the learned Magistrate erred in giving possession of the whole holding to Jaisri, and that the learned Magistrate had not decided the question of possession, which was with the applicant. So far as can be judged from the record, which was sent for, the proceedings of the learned Magistrate were proceedings carefully and specifically taken under Chapter XII of the Code of Criminal Procedure. Nothing was shown in the application to this Court which threw doubt upon this procedure, and I am inclined to doubt whether this Court had any power to send for these proceedings and to inquire into them.

In *Jhingai Singh* v. *Ram Partap* (1) it was held, following *Maharaj Tewari* v. *Har Charan Rai* (2), that "as the law at present stands, where the proceedings below are in intention, in form and in fact proceedings under Chapter XII of the Code of Criminal Procedure by a Magistrate duly empowered to act under that Chapter, this Court has no power to send for those proceedings either under the Code or under section 15 of the Indian High Courts Act of 1861." The court refused to go into the question where, after being properly seised of the case, the learned Magistrate went out of his way and passed an order which he had no jurisdiction to pass. In *Maharaj Tewari* v. *Har Charan Rai* (2) a Division Bench of this Court held that when a Magistrate having jurisdiction in this behalf with great

(1) (1908) I. L. R., 31 All., 150. (2) (1903) I. L. R., 26 All., 144.

care and precision laid the proper foundation for his proceedings under Chapter XII of the Code of Criminal Procedure, then, by the amendment which was introduced by the Code of Criminal Procedure (1898) into section 435, this Court had no power to call for record of these proceedings. An attempt was made to contend that this Court could under section 15 of the Charter Act and the powers of superintendence thereby given set aside the order of the Magistrate passed under Chapter XII of the Code of Criminal Procedure. This Court declined to do so, inasmuch as it found that the jurisdiction given to it under clause 29 of the Letters Patent contained the express provision "that the proceedings in all criminal cases other than those brought before this Court in the exercise of its ordinary original criminal jurisdiction shall be regulated by the Code of Criminal Procedure or by such further and other laws in relation to the Code of Criminal Procedure as may have been or may be made by the Governor General in Council" (see page 147). Another Division Bench of this Court in *Sayeda Khatun* v. *Lal Singh* (1) followed the cases just quoted above and entirely agreed with the view expressed in those cases. The case of *Babban Singh* v. *Baldeo Singh* (2) is also a case in point upon this question, in which it was laid down that once it was established that a Magistrate had acted with jurisdiction this Court had no further concern with the matter. The remarks of the present learned CHIEF JUSTICE in *Har Prasad* v. *Pandurang* (3) are very important. He held that it would be a matter of great regret if on purely technical grounds the spirit and intention of the Code of Criminal Procedure be ignored. See also *Baldeo Baksh Singh* v. *Raj Ballam Singh* (4).

So far back as the year 1886 a Full Bench of this Court in *Muhammad Suleman Khan* v. *Fatima* (5) had occasion to consider what this Court could and what it could not do in the exercise of its powers of superintendence under section 15 of Statute 24 and 25 Vic. C., 104. The case before the Full Bench was a suit of a civil nature. The Judges of the Full Bench,

(1) (1914) I. L. R., 36 All., 233.
(2) (1906) 4 A. L. J., 91.
(3) Weekly Notes, 1905, p. 260.
(4) (1905) 2 A. L. J. 274.
(5) (1886) I. L. R., 9 All., 104.

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who were disposed to extend the jurisdiction of the Court to its furthest limit, held that what was stated in section 622 of the Code of Civil Procedure as it then stood (1886) might properly be accepted "as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance and in which their decisions are declared by law to be final." This precedent is cited merely to show that the view taken by this Court whether in civil or in criminal cases has been in accord for years passed and may be termed the *cursus curiae* of the Court in this matter.

The learned counsel for the applicant referred me to a case recently decided by a learned Judge of this Court, viz. *Nathu Ram* v. *Emperor* (1). In that case it was held with reference to an order of attachment purporting to have been made under section 145 of the Code of Criminal Procedure that this Court had power to interfere, not under section 435 of the Code of Criminal Procedure but under section 107 of the Government of India Act. I asked the learned counsel to point out wherein section 107 of the Government of India Act differed from or extended the jurisdiction which had been conferred upon this Court by section 15 of the Charter Act. He was unable to point out any words containing difference or extension of jurisdiction. The case, moreover, is one in which this Court held that the Magistrate had not shown that he was satisfied that there was likely to be a breach of the peace unless action was taken under section 145 of the Code of Criminal Procedure. This ground would in itself have been sufficient without invoking section 107. Reference is made in the precedent just cited to the case *In re Nathu Mal* (2), in which STANLEY, C. J., held "that under the Code of 1898 the revisional powers of the Court in proceedings under Chapter XII were withdrawn, and therefore, the Court is not empowered to exercise revisional jurisdiction in such proceedings unless in cases where the Magistrate had acted without jurisdiction." Much stress was laid in argument upon the words given at page 317 and which are as follows :—"If an order purporting

(1) (1917) 15 A. L. J., 270. (2) (1902) I. L. R., 24 All., 315.

to be made under section 145 is made without jurisdiction there is no doubt this Court can exercise its powers under section 15 of the Charter Act." But the learned CHIEF JUSTICE went on to say :—"The Magistrate has acted within his powers, and if anything has been done by him to which objection can be taken, it was at the most an irregularity, and this Court is precluded from interfering by the express provisions of the Act of 1898." It was contended that where a Magistrate who might have begun proceedings properly under section 145 had purported to go on and pass an order which could not be passed under section 145, this Court could interfere under section 15 of the Charter Act. If this was what the learned CHIEF JUSTICE intended, his observations in the case were clearly *obiter dicta.*

A stronger case cited to me was *Parmeshwar Singh* v. *Kailashpati* (1). This was a case tried by a Special Bench of the Bihar High Court. CHIEF JUSTICE CHAMIER considered that the cases which had been cited to him, specially those of the Calcutta High Court taken as a whole, laid down the rule "that a High Court can and will interfere in a case under Chapter XII of the Code where the Magistrate has acted without jurisdiction or has exceeded his jurisdiction. The learned CHIEF JUSTICE went on to say that the policy of the Indian Legislature in connection with the proceedings under Chapter XII of the Code is shown by a provision under section 435 of the Code of Criminal Procedure (1898) which prevents the High Courts as courts of revision under Chapter XXXII of the Code from sending for the record of proceedings under Chapter XXII." The result, according to him, is that "the High Courts in India which have no statutory power of superintendence cannot send for records of proceedings which were in substance and in fact proceedings under Chapter XXII of the Code and were conducted by a Magistrate who had jurisdiction." There the learned CHIEF JUSTICE leaves the question and does not show how when a High Court cannot send for a record of proceedings it can consider what proceedings were taken. Is it to act upon arguments and affidavits and in short upon something other than the actual record of proceedings? I find it impossible to

(1) (1917), Patna L. J., 336.

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arrive at any such conclusion and such a view is undoubtedly opposed to what has been the *cursus curiae* of this Court. Where a Magistrate has not laid proper foundation for his proceedings this Court has sent for the record and interfered. As instances I may refer to *Pitambar Lal* v. *Sarda Prasad* (1) *Mahadeo Kunwar* v. *Bisu* (2), *In re T. A. Martin* (3), *In re Dyawappa Basgunda Patil* (4) and *Jhengar* v. *Baijnath* (5).

The result is that I hold that this Court is precluded from interfering in the present case. The proceedings were proceedings of a Magistrate of the first class and were very carefully taken under Chapter XII of the Code of Criminal Procedure. He committed no irregularity, and if afterwards he erred in any way that is a matter which cannot be interfered with by this Court in revision under the law as it stands. He intended to exercise jurisdiction under Chapter XII; he did exercise jurisdiction, and he was entitled to do so. The application is dismissed.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

ZAIB-UN-NISSA BIBI (PLAINTIFF) *v.* MAHARAJA PARBHU NARAIN SINGH AND OTHERS (DEFENDANTS).*

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Mortgage—Suit for redemption—Major portion of mortgaged property purchased by mortgagee—Suit by one only of the heirs of the mortgagor to redeem the whole of the remaining share in the mortgaged property.

Out of the original 16 annas of a village which was the subject of a usufructuary mortgage, the mortgagee acquired by purchase 13 annas and 4 pies. After the death of the mortgagor, one of his heirs sued to redeem the whole of the remaining 2 annas and 8 pies. The other heirs were made parties to the suit as *pro formâ* defendants and consented to the plaintiff redeeming the whole of the remaining share. *Held* that, notwithstanding this, the

* Second Appeal No. 162 of 1916, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 25th of August, 1915, modifying a decree of H. A. Lane, Subordinate Judge of Mirzapur, dated the 12th of May, 1914.

(1) (1912) 10 A. L. J., 465.
(2) (1903) I. L. R., 25 All., 537.
(3) (1904) I. L. R., 27 All., 206.
(4) (17) Bom., L. R., 362.
(5) (1913) 11 A. L. J., 586.