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THAKUR SHEO RATAN SINGH v. DEPUTY COMMISSIONER, FYZABAD AS MANAGER, COURT OF WARDS, DEOGAON ESTATE

We are of opinion that the view taken in the case of *B. N. Vyas* v. *Barkhandi Mahesh Pratap Narain Singh* (1) is correct. We therefore answer the question referred to the Full Bench as follows:

The persons referred to in the first proviso to section 2(2) of the United Provinces Agriculturists' Relief Act are subject to the rule contained in the second proviso of that sub-section.

REVISIONAL CRIMINAL

Before Mr. Justice Ziaul Hasan

1938

September, 28

SYED MOHAMMAD NASIR AND ANOTHER (APPELLANTS) *v.* DWARKA SINGH AND ANOTHER (RESPONDENTS)*

Criminal Procedure Code (Act V of 1898), section 145—Procedure contained in proviso to section 145(4), whether mandatory—Magistrate deciding which party in possession at date of order under sub-section (1)—Necessity of finding whether any party dispossessed within two months of order.

Held, that the procedure prescribed in the provisos to sub-section (4) of section 145 of the Code of Criminal Procedure is not mandatory and if a Magistrate chooses to act under sub-section (4), that is to say, decides the question as to which of the parties was in possession at the date of the order made under sub-section 1, it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order.

Mr. *I. A. Abbasi,* for the appellant.

Messrs. *H. Husain* and *H. H. Zaidi,* for the respondents.

ZIAUL HASAN, J.:—This is a reference by the learned District Magistrate of Fyzabad recommending that an order made by a learned Magistrate of that district under section 145 of the Code of Criminal Procedure

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*Criminal Reference No. 45 of 1938, made by H. S. Stephenson Esq., I.C.S., District Magistrate of Fyzabad,

(1) (1938) O.W.N., 836.

be set aside and an order under section 146 be substituted for it.

The facts of the case are that on the 20th of September, 1937, certain Chhutkau Singh and Dwarka Singh who claimed to be in possession of the entire patti Ram Kishun of village Paikuliakalan partly as proprietors and partly as mortgagees made a report to the police against Ram Sumer, Ram Sahai and others stating that they had ejected the accused from certain specific plots of land and had cultivated the plots themselves but that the accused were forcibly cutting away the crops raised by them (the complainants). The police made an investigation, attached the disputed crops (it is said the attachment was made under section 149 of the Code of Criminal Procedure) and made a report to the Sub-Divisional Magistrate for action being taken under section 145 of the Code of Criminal Procedure as there was a danger of breach of the peace. The Sub-Divisional Magistrate transferred the case to an Honorary Magistrate on the 6th of October, 1937. The learned Honorary Magistrate called for a fresh report from the police and directed the police to attach the crops if necessary. The police again attached the crops and on the 11th of November, 1937, made another report recommending action under section 145 of the Code of Criminal Procedure. On this report the learned Honorary Magistrate by his order dated the 19th of November, 1937, ordered the parties to file their written statements by the 29th of November, 1937. As some of the parties were not served with this order, another date was fixed on the 29th of November, 1937, for filing of written statements. On the 7th of December, however, the learned Honorary Magistrate returned the case to the Sub-Divisional Magistrate and on the 10th of December, 1937, the Sub-Divisional Magistrate fixed a date for the parties filing their written statements. The case continued for several months and finally on the 16th of June, 1938, the Sub-Divisional Magistrate passed the final order declaring that the

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complainants, that is, Chhutkau Singh and Dwarka Singh, were in possession and ordering the attached crops to be delivered to them.

Against this order Mohammad Nasir and Ram Sumer filed an application in revision in the Court of the District Magistrate and the latter officer has made this reference with the recommendation mentioned above. The learned District Magistrate seems to think that because more than two months had elapsed in the case since the date of the preliminary order, the learned Sub-Divisional Magistrate was not competent to declare any of the parties to have been in possession and that in the circumstances the only course open to the Sub-Divisional Magistrate was to make an order of attachment under section 146 of the Code of Criminal Procedure. I am of opinion that this is not a correct view of the law. The learned District Magistrate probably had in view the first proviso to section 145(4) which runs as follows:

Ziaul Hasan, J.

> "Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date."

Sub-section (4) to section 145 to which the above is a proviso, is as follows:

> "The Magistrate shall then, without reference to the merits or the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them respectively consider the effect of such evidence, take such further evidence (if any) as he thinks necessary and if possible decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject."

A perusal of the proviso quoted above together with sub-section (4) leaves no room for doubt that the procedure prescribed in the proviso is not mandatory and that if a Magistrate chooses to act under sub-section (4),

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that is to say, decides the question which of the parties was in possession at the date of the order made under sub-section 1, it is not necessary to see whether or not any of the parties has been dispossessed within two months next before the date of the order. As in the present case the learned Sub-Divisional Magistrate had decided on the evidence before him that the complainants were in possession, no question arises as to who was in possession two months before the passing of the preliminary order.

Ziaul Hasan, J.

There is in my opinion no ground for interference with the order of the Sub-Divisional Magistrate and I therefore reject the reference.

Reference rejected.

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice R. L. Yorke

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September, 28

RANI SURAJ KUER AND OTHERS (APPLICANTS) *v.* **RAJA DEO SINGH** AND OTHERS (OPPOSITE PARTY)*

Civil Procedure Code (Act V of 1908), order XLV, rule 15—Execution of decree of His Majesty in Council—Prayer for preparation of memo. of costs, whether includes prayer for transmission of order to court concerned—Direction for execution, if to be added to transmission order.

Where in an application for execution of an order of His Majesty in Council the prayer simply is that the memo. of costs be directed to be prepared, *held*, that this prayer includes also the prayer for transmission of the order to the court concerned. The usual procedure adopted by the Chief Court is that when such an application is made, it is sent to the office for necessary action and the office then prepares the memo. of costs and transmits it to the court concerned without any further direction or orders of the Court.

In transmitting an order of His Majesty in Council for execution under order XLV, rule 15(2), it is not necessary to give any directions for the execution of the decree particularly when they were not asked for.

*Civil Miscellaneous Application No. 529 of 1938 in P. C. A. No. 4 of 1934.