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order is allowed to stand, the position will remain the same as would be effected by a reconsideration. I think, therefore, that although I do not quite like to allow an order which I feel is without jurisdiction to stand, the sensible course is not to interfere, and I therefore agree with my learned brother.

Application refused.

BUCKNILL, J.

REVISIONAL CRIMINAL.

Before Adami and Ross, J.J.

1921

Nov. 13.

CHULAI MAHTO

v.

SURENDRA NATH CHATTERJI.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145 *and* 148—*lands alleged by one party to be identifiable and by the other party to be unidentifiable—possession found to be with latter—first party estopped from alleging land to be unidentifiable—kabuliyats executed by one party in favour of another party but not acted upon—latter not estopped from denying first party's possession—pleader-commissioner deputed to survey disputed lands and report—whether report admissible.*

A mere survey of the lands in dispute after enquiry from all the parties as to what land is in dispute does not amount to a "local enquiry" within the meaning of section 148 of the Code of Criminal Procedure, 1898. Therefore there is nothing in the section to prevent the court from deputing a pleader-commissioner to make such survey and to report, but the report cannot be taken into evidence in a proceeding under section 145 without calling the pleader-commissioner, and even then it is admissible only for the purpose of proving that he surveyed the lands pointed out to him by the parties as being the lands in dispute, and of shewing which those lands were.

* Criminal Revision No. 388 of 1921, against an order of Babu Girish Chandra Dutt, Deputy Magistrate of Bhagalpur, dated the 20th July, 1921.

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Achambit Das v. *Sarada Prasad*(1), referred to.

Where, in a proceeding under section 145, the first party contended that the lands were not identifiable and the third party contended that they were identifiable, and eventually the first party was found to be in possession, *held*, that the third party could not be heard to say that the lands mentioned in the proceeding could not be identified.

Marsden v. *Wardle*(2) and *Kulada Kinkar Roy* v. *Danesh Mir*(3), approved.

Where *kabuliyats* have been executed by one party to proceedings under section 145, in favour of another party, and it is found that the *kabuliyats* have never been acted on, the latter party is not estopped from adducing evidence to shew that they are in possession.

The facts of the case material to this report were as follows :—

In village Dildarpur there was a dispute under section 145 of the Code of Criminal Procedure, 1898, between the *mustajir* of the village and the proprietor, concerning the possession of 378 *bighas* of land. Those proceedings under section 145 terminated in favour of the *mustajir* by the High Court's order of the 22nd March, 1917. Before that order was made the proprietors settled the lands in dispute with certain tenants and after the High Court's order some of these tenants executed fresh *kabuliyats* in favour of the *mustajir* on payment of *salami* to him. The other tenants did not execute fresh *kabuliyats* and the *mustajir* settled the lands held by them with other persons who were induced by his agent to execute and register *kabuliyats* in his favour on the 18th, 20th and 21st October, 1919. On the 20th October, 1919, the tenants who had been settled on the land by the proprietor and who had executed *kabuliyats* in favour of the *mustajir* filed a petition before the Divisional Commissioner who ordered a local inquiry. The Subdivisional Officer held an inquiry on the 31st October, 1919. The present

(1) (1911) 12 Ind. Cas. 88. (2) (1854) 3 E. & B. 695.
(3) (1906) I L. R. 33 Cal. 33.

third party did not appear and there was no evidence that the *kabuliyats* executed by them were ever acted upon. The enquiry resulted in a proceeding under section 107 being instituted against the persons who had presented the petition to the Divisional Commissioner. On the 6th May, 1920, they filed petitions undertaking not to go on the disputed lands until they had obtained a civil court decree in their favour and the proceeding under section 107 terminated in favour of the *mustajir*.

In the present proceeding under section 145 the *mustajir* was the first party and the persons who had executed *kabuliyats* in his favour constituted the third party.

In his written statement the first party denied that any trace of the disputed lands as described in the police report could be found in the village or that they were identifiable. On his application a pleader-commissioner was appointed to identify the lands specified in the proceedings and to report to the court The commissioner accordingly went to the lands and submitted a map and report. He was also examined as a witness in the case and, after his cross-examination, the first party contended that as the report shewed that the lands stated in the police report on which the proceeding had been instituted had not been fully identified the proceeding should be cancelled. The court, however, proceeded to record evidence in the case and eventually declared the first party to be in possession.

The third party petitioned the High Court and the matter was placed before Das, J. on the 27th September, 1921. His Lordship directed the matter to be placed before a Division Bench.

S. N. Sahay, for the petitioners: The Magistrate appointed a pleader-commissioner who held a local inquiry and submitted a report which is more or less in the form of a judgment. The only local enquiry permissable under Chapter XII of the Code of Criminal Procedure Code is one by a Magistrate under section

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148. To hold that the Magistrate could, in a proceeding under Chapter XII, appoint a pleader or any one else, to hold an inquiry would have the effect of adding the words "or any other person" after the words "may depute any Magistrate" in section 148, Criminal Procedure Code. The next point is that the opposite party's case has been that the lands of these proceedings cannot be identified at all. The petitioners' case on the other hand has been throughout that the boundaries of the lands of these proceedings are those given in their *kabuliyats* and that they are identifiable. If the Magistrate holds that the lands specified in these proceedings are not identifiable he cannot declare the possession of the opposite party. The only alternative is to start fresh proceedings stating the correct boundaries.

Lastly, the petitioners were inducted on to the lands by means of *kabuliyats* executed by them on the representations of possession made by the *karpardaz* of the opposite party. The opposite party is therefore estopped from alleging now that, on the date when the *kabuliyats* were executed, they were not in possession and therefore could not give possession to the petitioners.

C. C. Das (with him *Gour Chandra Pal* and *Satya Sunder Bose*) for the opposite party. Counsel's argument appears sufficiently from the judgment.

ADAMI, J.—The petitioners were the third party to proceedings drawn up by the Deputy Magistrate, Bhagalpur, under section 145, Criminal Procedure Code; they apply to have the order passed in favour of the first party to those proceedings set aside.

It appears that after, the proceedings under section 145, showing the boundaries of the lands in dispute, had been served on all the parties, the first party in their written statement declared that the disputed 378 *bighas* of land with the boundaries as shown in the proceedings could not be identified, nor was there any trace of such

lands to be found in village Dildarpur. On the 18th February, 1921, the Deputy Magistrate passed the following order :—

"First party states that the lands are not at all identifiable; the other parties assert that they are identifiable. The first party offers to pay the cost of a survey-passed pleader-commissioner for identifying the lands as per proceedings drawn up and report to this Court. I think this is reasonable and I direct the first party to deposit Rs. 100 and then I shall appoint a commissioner".

A Commissioner was appointed and went to the lands in dispute and submitted a map and report on the 10th of April. Copies of the report were furnished to the parties and the pleader-commissioner was examined and cross-examined as a witness, and after his cross-examination on the 14th of May the Vakil for the first party contended that as the report showed that the land bounded as shown in the proceedings was not identifiable the proceedings should be cancelled. The other parties apparently resisted the contention. The Deputy Magistrate passed the following order :—

"Heard the parties on the contention of the learned Vakil of the 1st party that the pleader-commissioner having reported that the lands are not fully identifiable according to the boundaries given in the proceedings, the same, *i.e.*, the proceeding should be cancelled. I hold that the pleader-commissioner's report and evidence are only evidence and not a final judgment and that it is liable to be challenged by the parties who are entitled to produce further evidence in Court. I therefore decide to go into the evidence in the case".

On subsequent dates the witnesses produced by the three parties respectively were examined, and the Deputy Magistrate then delivered judgment declaring the first party to be in possession of the disputed lands.

The chief contention raised by Mr. *S. N. Sahay* on behalf of the petitioners is that the Deputy Magistrate dealing with a case under section 145, Criminal Procedure Code, has no jurisdiction to direct a pleader-commissioner to hold a local enquiry, and cannot receive in evidence a report drawn up by the commissioner after completing the inquiry. He argues that Chapter XII of the Code of Criminal Procedure furnishes a complete code of procedure for the prevention of breaches

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of the peace arising out of disputes as to immovable property, and that the only provision in that Chapter allowing any delegation is that contained in section 148 which runs :—

"Whenever a local inquiry is necessary for the purposes of this Chapter, any District Magistrate or Subdivisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions consistent with the law for the time being in force as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid. The report of the person so deputed may be read as evidence in the case";

so that the Magistrate who has drawn up proceedings is precluded from deputing any one other than a Magistrate to hold any local inquiry whatever. He urges that, if there is, in the opinion of a party, the necessity to have the lands demarcated or surveyed and an inquiry made locally, that party should privately engage its own man to make the survey and inquiry and then put him into the witness-box and examine him like any other witness, and let him be cross-examined, for the Court is likely to give more weight to the evidence of an officer appointed by itself to do work locally than to that of a witness produced by one of the parties.

Now, if the question were whether a Magistrate who has drawn up proceedings under section 145, Criminal Procedure Code, is empowered to delegate any of his judicial functions to any person other than a Magistrate, or if such person were directed to report who was in possession of certain lands. there could, I think, be no doubt that the answer would be in the negative. Here, however, the direction was merely "to survey the disputed lands and report within 15 days". All the person had to do was to ascertain from the parties what lands were in dispute and then to survey the lands pointed out and to draw up a map and report what he had done. This was a ministerial act; whether the duty of survey was entrusted to a

pleader-commissioner or to an *amin* makes no differences; stress cannot be laid on the fact that the person selected to do the work bore the title of pleader-commissioner.

I cannot hold that the mere survey of the lands after inquiry from all the parties as to what land was in dispute amounted to a "local inquiry" within the meaning of section 148. It was a mere ministerial act.

It is to be noted that section 148 gives the special privilege to a report made by a Magistrate under its provisions, that such report may be taken into evidence without calling the Magistrate to prove it. In the present case no such privilege was claimed and the pleader-commissioner was called as a witness and examined and cross-examined.

If Mr. *Sahay's* contention were correct a Magistrate who had drawn up proceedings under section 145 would in almost every case be unable to get a map prepared of the disputed lands, for there are few if any Magistrates who are competent to carry out a survey and prepare a map. Directions to draw up a map of the disputed land in proceedings under section 145 have been frequent in the past and there is no decision to be found showing that the power to issue such directions has been disputed except the case of *Achambit Das* v. *Sarada Prasad*(1) where it was held that the Court has power to depute a *kanungo* to demarcate disputed lands in proceedings under section 145.

In the present case the pleader-commissioner was examined and cross-examined by the present petitioners without objection by them as to his delegation, and I hold that the Court was fully empowered to refer to his evidence, and to the map he prepared. His report

(1) (1911) 12 Ind. Cas. 88.

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should not have been admitted in evidence except for the purpose of proving that he surveyed lands pointed out to him by the parties as being in dispute and showing which those lands were, but a perusal of the judgment shows that the Court did not rely on this report; the case was decided on the evidence as to possession given by the parties and the only reference made to the commissioner or his report is the remark, after the finding that boundaries mentioned in *kabuliyats* relied on by the present petitioners were entered therein without a visit to the lands,

"No wonder therefore that the pleader-surveyor found that the boundaries given in the *kabuliyats* of the tenants (3rd party) could not be identified on the spot".

Even if the report had been wrongly relied on, that would not amount to an error in, or want of jurisdiction which would warrant an interference of this Court.

I hold that there was no defect as to jurisdiction in the direction to the pleader-commissioner to survey the disputed lands and report.

It is next contended that, as the first party asserted from the first that the lands could not be identified, the Deputy Magistrate could not award them possession of lands which did not exist. This is not a question of jurisdiction, and, apart from this, the petitioners throughout asserted that the lands mentioned in the proceedings could be identified, and they cannot now be allowed to assert the contrary; they "choose to wait and take the chance of judgment in their favour, and cannot now be heard to complain of excess of jurisdiction." [*Marsden* v. *Wardle* (1), *Kuloda Kinkar Roy* v. *Dayesh Mir* (2)].

A third point taken is that some plots within the disputed area awarded to the first party have admittedly been in possession of other persons who are not parties to the proceedings. It is argued that the Court

(1) (1854) 3 E. & B. 695 (701). (2) (1906) I. L. R. 33 Cal. 36 (46).

had no power to award possession of those plots, but it is difficult to find how this affects the petitioners; it is a matter between the first party and those who were admittedly in possession.

The fourth point argued by the learned Counsel for the petitioners, namely, that the petitioners were induced to execute *kabuliyats* in favour of the first party by their properly constituted agent and that therefore the first party were estopped from giving evidence to show that they, and not the petitioners were in possession, raises no question of jurisdiction, and apart from this, the finding being that effect was not given to the *kabuliyats*, they do not stand in the way of evidence being given to show what the actual possession was at the time proceedings were taken.

I would dismiss the application.

Ross, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

RAKHYAPAL SINGH

v.

LAL BIR SURJODAY SINGH DEO.*

1921

Nov. 22.

Central Provinces Land-Revenue Act, 1881 (*Act XVIII of* 1881), *sections* 76, 132(h) *and* 153—*Cesses determination of rate of, and of* zamindar's *right to—levy of cesses sanctioned by Board of Revenue—rates not so sanctioned—whether cesses recoverable.*

Where, under section 76 of the Central Provinces Land-Revenue Act, 1881, the Settlement Officer has determined and recorded the village cesses which are leviable in accordance with village custom and the rates at which they are so leviable,

* Circuit Court, Cuttack. Appeal from Appellate Decree Nos. 46 and 47 of 1920, from a decision of Babu Radha Kanta Ghose, Sub-Judge of Sambalpur, dated the 19th August, 1920, confirming a decision of Babu Sarjyamani Das, Munsif of Hargarh, dated the 21st November, 1919.