REVISIONAL CRIMINAL.

Before Jwala Prasad, J.

GOBIND RAM MARWARI

v.

BASANTI LAL MARWARI.*

1927.

Dec., 19.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 144 *and* 145—*proceeding under section* 144, *whether is a judicial proceeding order based on—ex-parte local inspection and evidence, legality of —bona fide dispute as to possession—magistrate, duty of, to institute proceedings under section* 145—*provision, whether mandatory.*

A proceeding under section 144, Code of Criminal Procedure, 1898 is a judicial proceeding.

In a proceeding under section 144 the magistrate made a preliminary order and called upon the parties to show cause on a certain date. The parties appeared on that date and showed cause and also gave evidence. Thereafter the magistrate held a local inspection behind the backs of the parties and took down the statements of certain villagers. Subsequently he made the order under section 144 absolute solely on the strength of the statements of these witnesses.

Held, that the procedure adopted by the Magistrate was illegal and that the parties having shewn cause he was bound to dispose of it judicially and not by holding an ex-parte local inspection and examining witnesses behind the backs of the parties.

Abdud Missir v. *Satruhan Dus* (1), followed.

Where, in the course of a proceeding under section 144, a bona fide dispute as to the possession of the property in question is disclosed, the magistrate is bound to strat at once a proceeding under section 145, Code of Criminal Procedure, 1898.

Shebalak Singh v. *Kamaruddin Mandal* (2), referred to.

*Criminal Revision no. 740 of 1927, from an order of W. G. Lacey, Esq., I.C.S., District Magistrate of Bhagalpur, dated the 28th September, 1927, upholding the order of the Subdivisional Magistrate of Banka, dated the 11th September, 1927.

(1) (1927) 8 Pat. L. T. 755. (2) (1923) I. L. R. 2 Pat. 94, F. B.

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This was an application against an order of the Magistrate, dated the 11th September, 1927, making absolute a preliminary order under section 144 of the Code of Criminal Procedure against the petitioners. The order was confirmed by the District Magistrate by his order of the 28th September, 1927.

The subject-matter of the dispute consisted of about 75 or 76 bighas of bakasht lands which belonged originally to one Parmeshwar Chaudhri. The contention of the 1st party was that the land in dispute was settled with one Chaman Chaudhri by a registered deed on the 15th November, 1922, who came into direct possession of the land in dispute and gave some portion of it on usufructuary mortgages, settled some portion and remained in khas cultivation of the rest of the portion. On the 17th July, 1927, he sold the entire disputed land to the 1st party by means of a registered deed for a consideration of Rs. 4,000. On the strength of these transactions the 1st party claimed to be in possession of the land directly and through the mortgagees.

The contention of the 2nd party was that the land in dispute appertained to the milkiat share of three annas of Parmeshwar Chaudhri in the village; that 2 annas 14 gandas of it was sold in execution of a decree obtained by the 2nd party against Parmeshwar Chaudhri and others. The decree was dated September, 1925, and the dakhaldehani was obtained in April, 1926. On the strength of this Court sale and dakhaldehani the 2nd party contended that they were in direct possession of the land in dispute. They impugned the transaction set up by the 1st party as being farzi and collusive.

According to the police report of the 5th August, 1927, both the parties were collecting lathials to commit a breach of the peace in connection with the transplantation of paddy crop which was then standing on the land. Upon the report of the Sub-Inspector the

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Magistrate by his order of the 6th August, 1927, directed notice to issue upon both the parties under section 144 of the Code of Criminal Procedure, directing them "not to come near the plots in question" and not to do anything in respect thereof that may cause a breach of the peace. He called upon the parties to show cause, if any, on or before the 16th August, 1927. In the meantime the Sub-Inspector submitted a complete report promised in his first report. In this report the Sub-Inspector summarised the documentary evidence adduced on behalf of the parties as well as the oral evidence as regards the actual possession of the land respectively claimed by the parties. He concluded his report in the following words:—

"In fact both parties in order to overcome one another have managed to secure numerous documents in their possession. Inquiries disclose that the possession over the land is disputed, and both parties in order to take forcible possession are ready to create disturbance and break the peace. I, therefore, pray that both parties may be ordered to produce their respective claims which should be decided once for all under section 145, Criminal Procedure Code."

While submitting this report to the Subdivisional Officer, the Inspector endorsed the opinion of the Sub-Inspector that action under section 145 be taken.

On the 11th August, 1927, the Subdivisional Magistrate disposed of the police report noting thereon that he had already taken action on the previous report, meaning the proceeding adopted by him under section 144 of the Code of Criminal Procedure.

On the 16th August both parties showed cause. On 25th August the Magistrate heard arguments and perused the documents produced by the parties and reserved the passing of the final order after "considering the question thoroughly."

On 10th September the Magistrate went to the locality and

"got hold of 18 men of Telia and seven of Matukichak and asked them to state the truth."

These persons stated to the Magistrate that Basanti Lal Marwari of the 2nd party was in posses-

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sion and the tenants paid rent to him, and that the 1st party did not get possession over the land directly or through tenants. Solely on the strength of the statement of these witnesses the Magistrate came to the conclusion that the 1st party was not in possession of the land and that he had knowingly "purchased litigation," and accordingly he made the order absolute under section 144. The order in question did not refer in any way to the arguments or the documentary evidence produced by the parties and referred to by the Magistrate in his order of the 25th August.

S. Sinha (with him *H. L. Nandkeolyar* and *D. L. Nandkeolyar*), for the petitioner.

S. P. Verma (with him *Kali Prasad Sukul* and *Rai T. N. Sahay*), for the opposite party.

JWALA PRASAD, J., (after stating the facts set out above proceeded as follows:) The Magistrate was clearly wrong in passing his order solely upon the statement of witnesses examined ex-parte and behind the backs of the parties and without having given any notice to them of the local inspection that he held. Such a procedure is not sanctioned by law and has been rightly condemned by Sen, J. in *Adbud Missir* v. *Satruhan Das* (1). The learned District Magistrate has justified the procedure adopted by the Magistrate upon the ground that the proceeding under section 144 is not a judicial proceeding. The District Magistrate also is in error in this view. Section 144 no doubt empowers a Magistrate to pass an ex-parte order in an urgent and immediate urgency, and the party against whom such an order is passed is entitled to apply to the Magistrate to rescind or alter the order made by him, and the Magistrate is bound to consider the cause shown by the party. Clause (5) of section 144 makes it imperative by saying that

> "the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing."

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The order passed by the Magistrate is subject to the revisional jurisdiction of this Court under sections 435 and 439 of the Code which implies that the proceeding adopted by the Magistrate under section 144 is a judicial proceeding and the order passed by him is a judicial order. In the present case the Magistrate by his order of the 6th August, while directing notice under section 144 to issue, called upon the petitioners to show cause, if any. The petitioners having shown cause the Magistrate was bound to dispose of it judicially, and not in the manner in which he has done by holding an ex-parte local inspection and examining witnesses behind the backs of the petitioners. A judicial proceedings is one

"in the course of which evidence is or may be legally taken on oath [Section 4(*m*)]."

This in itself is sufficient to vitiate the order of the Magistrate and to set it aside. He, however, has committed a further error in deciding and practically upholding the possession of a party under the cloak of an order in a proceeding under section 144, when according to the police report the possession was a disputed fact between the parties. On the 6th August, 1927, the Magistrate might have been justified in directing an immediate order under section 144 to issue when there was a report submitted to him of a likelihood of a breach of the peace. He ought to have stayed his hands and drawn up a proceeding under section 145 when on the 9th of August the Sub-Inspector submitted his further and complete report stating in the words already quoted that the possession over the land is disputed. The Magistrate has not come to any finding. In fact, he did not direct his attention to come to a finding that the 1st party was clearly in the wrong and was threatening to usurp the rights of the 2nd party and that the latter was in actual possession of the land in dispute and that the claim of the 1st party was a mere pretext and not a bona fide one. Upon the police report, which alone was the foundation of the proceeding under section 144 adopted by the

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Magistrate, it was a clear case for adopting a proceeding under section 145 of the Code under which it was the bounden duty of the Magistrate, when there was a dispute regarding land tending to a breach of the peace, to enquire into the fact of actual possession of the subject-matter in dispute. The word "shall" in section 145 is mandatory, and what was pertinent and permissible in the initial stage of the police report, namely, to prevent a breach of the peace by an urgent order under section 144 ceased to be so and the mandatory obligation under section 145 was cast upon the Magistrate by the second report of the police disclosing a bona fide dispute as to possession of the property, to start at once a proceeding under section 145 of the Code. The law is clear and has been set at rest and the appropriate procedure to be adopted under the different sections 107, 144 and 145 relating to the stoppage of a breach of the peace has been fully laid down in the Full Bench decision of this Court in *Shebalak Singh* v. *Kamaruddin Mandal* (1).

Yet another important fact seems to have been overlooked by the Magistrate that the dakhaldehani upon which the 2nd party claims to have entered in possession of the land in April, 1926, related to the zamindari share in the village of the judgment-debtors Parmeshwar Chaudhri and others, namely, 2 annas 14 gandas. It included no doubt the kamat and the nijjote and other kinds of land. They, however, would go with the zamindari interest but were not specifically mentioned and described in the dakhaldehani in order to identify them with the bakasht land of 75 or 76 bighas in dispute in the present case. In other words, the Civil Court dakhaldehani did not specifically refer to the lands in dispute which might or might not have passed into the hands of the 2nd party purchaser. The case of the 1st party is that the lands in dispute were settled with Chaman Chaudhri in 1922, three years before the decree even of the

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2nd party, what to speak of the dakhaldehani in April, 1926. It is further the case of the 1st party that Chaman Chaudhri had mortgaged portions of the land in dispute and settled some portions with tenants and was in khas possession in respect of the remaining. These contentions of the parties could not be appropriately decided in a summary proceeding under section 144. I refuse to go into the merits of the case.

I set aside the order of the Magistrate, dated the 11th September, 1927, and of the District Magistrate, dated the 28th September, 1927. Although the order has spent itself by reason of lapse of two months, yet it is a case in which the order being prejudicial and not coming properly within the scope of section 144 must be set aside. The Magistrate will in case of his being satisfied that there is still an imminent danger to a breach of the peace within the words of section 145, inquire into the dispute under that section.

S. A. K.

Rule made absolute.

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

HIRA LAL SINGH

v.

MATUKDHARI SINGH.*

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Bengal Tenancy Act, 1885 (*Bengal Act VIII of* 1885), *section* 120—*malik's zerait, what is*—"*bakasht malik or thikedar*," *meaning of*—*tenant given the right to cultivate, whether is a raiyat*—*section* 5.

The term "bakasht malik or thikedar" means "in cultivating possession of the malik or thikedar" and applies

*Second Appeals nos. 1035 and 1047 of 1925, from a decision of H. R. Meredith, Esq., I.C.S., District Judge of Monghyr, dated the 18th May, 1925, reversing a decision of Babu Tulsi Das Mukharji, Subordinate Judge, 1st Court, Monghyr, dated the 22nd December, 1923.