

6 only they will sell them for the balance of the decretal amount due after giving credit for the sum of Rs. 15,500 paid to them by defendant no. 4. If, however, they return the money to the appellant within the time prescribed, the decretal amount will increase to that extent. Having regard to the circumstances of the case there will be no order as to costs.

1931.

BIBI  
MERDATUN-  
NISSA  
BEGAM  
v.  
SEWAK  
RAM.

ADAMI, J.—I agree.

FAZL ALI, J.

*Appeal allowed.*

### CRIMINAL REFERENCE.

*Before Macpherson and James, JJ.*

NANDKESHWAR PRASAD SAHI

v.

SITA SARAN SAHI.\*

1932.

August, 30.

*Code of Criminal Procedure, 1898 (Act V of 1898), sections 145 and 146—dispute concerning land, one party claiming joint possession while the other claiming exclusive possession—sections, whether applicable.*

A dispute between two parties one of whom claims joint possession while the other claims exclusive possession over the disputed land and contests the opposite party's right is within the contemplation of section 145 (and, therefore, of section 146), Code of Criminal Procedure, 1898.

*Sham Lal Mahto v. Rajendra Lal*(1), not followed.

*Tarujan Bibi v. Asamuddi Bepari*(2) and *Krista Alhadini Dasi v. Radha Syam Panday*(3), distinguished.

The only condition for a proceeding under section 145, terminating in a finding under sub-section (4) and an order under sub-section (6) or an order under section 146, is that

\* Criminal Reference no. 42 of 1932, made by J. G. Shearer, Esq., I.C.S., Sessions Judge, Muzaffarpur, in his letter no. 1014, dated the 30th June/2nd July, 1932.

(1) (1920) 1 Pat. L. T. 594.

(2) (1900) 4 Cal. W. N. 426.

(3) (1902) 7 Cal. W. N. 118.

1932.

NAND-  
KESHWAR  
PRASAD  
SAHI  
v.  
SITA  
SARAN  
SAHL.

the magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute " of their respective claims as respects the fact of actual possession of the subject of dispute ", and he is to determine whether any and, if so, which of the parties was at the date of the order initiating proceedings in such possession of the said subject. Because one set of persons claim exclusive possession over the major portion of the land while another set of persons claim to be in joint possession along with them of the entire land, the dispute may be difficult to decide, but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area.

The facts of the case material to this report are stated in the judgment of the Court.

MACPHERSON AND JAMES, JJ.—This is a reference by the learned Sessions Judge of Muzaffarpur in respect of an order under section 146 of the Code of Criminal Procedure.

The dispute was between parties, one of which claimed exclusive possession over the major portion of the land in controversy and the other of which claimed to be entitled to joint possession along with the first party of the entire land.

The learned Sessions Judge has recommended that the order passed by the Magistrate under section 146 to this Court be set aside, relying upon the decision in *Sham Lal Mahto v. Rajendra Lal*<sup>(1)</sup> which is substantially in *pari materia*.

The matter first came before a single judge who referred it to a Division Bench so that the decision relied upon might be considered. It was the decision of a single judge and appears to be based upon a

(1) (1920) 1 Pat. L. T. 594.

similar decision of another single judge who perhaps failed to appreciate that the decisions on which he relied, are not really to the purpose. The two decisions in question are based upon two cases decided by the Calcutta High Court: *Tarujan Bibi v. Asamuddi Bepari*(<sup>1</sup>) and *Krista Alhadini Dasi v. Radha Syam Panday*(<sup>2</sup>). In *Tarujan Bibi v. Asamuddi Bepari*(<sup>1</sup>) the magistrate had found that both parties were entitled to joint possession of the land in dispute; but he directed that one of them should hold actual possession until evicted by due course of law. The court pointed out that the order that only one of the parties should be maintained in possession was not based on any finding that he and he alone had actual possession when cognizance of the matter in dispute was taken under section 145. In his explanation to the Court the magistrate said that both parties were in joint possession, so that it was manifest that the order evicting one of them under section 145 in the absence of a finding that his joint possession had been obtained by the recent use of force, could not be maintained.

In *Krista Alhadini Dasi v. Radha Syam Panday*(<sup>2</sup>) the first party had purchased the property at a sale in execution and had obtained delivery of possession. The second party claimed that their share in the property was unaffected by the sale; and the magistrate attached the property under section 146 of the Code of Criminal Procedure. In his judgment he said that the second party's claim from the beginning was restricted to an undivided *share* in the land. It was pointed out by Stevens and Mitter, JJ. that the written statement of the second party asserted a claim not to an undivided share but to undivided possession; and the learned Judges remarked that if their claim was merely to an undivided *share* the order of the

1932.

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NAND-  
KESHWAR  
PRASAD  
SAHI  
v.  
SITA  
SARAN  
SAHI.

MACPHERSON  
AND  
JAMES, JJ.

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(1) (1900) 4 Cal. W. N. 426.

(2) (1902) 7 Cal. W. N. 118.

1932.

NAND-  
KESEWAR  
PRASAD  
SAHI  
v.  
SITA  
SARAN  
SAHI.

MACPHERSON  
AND  
JAMES, JJ.

Deputy Magistrate was bad in view of the decision in the case of *Tarujan Bibi v. Asamuiddi Bepari*<sup>(1)</sup>, in which it was held that "section 145 of the Code of Criminal Procedure contemplates a dispute between two parties each of which asserts the right to hold actual possession of the property as against the other and not a dispute between parties claiming to hold joint possession and neither contesting such right". The learned Judges did not say that section 145 did not contemplate a dispute between two parties one of whom claimed joint possession, while the other claimed exclusive possession and contested the opposite party's right; but they distinguished between a claim to an undivided share and a claim to undivided possession, and treated the magistrate's order as bad because he dealt with the claims to shares rather than with the claims to possession. They went on, however, to point out that even if there had been a claim on each side to exclusive possession, the order of the magistrate would have been wrong, because the first party had been put in possession of the property by the civil court; and it would be the duty of the criminal court to uphold the status of the first party as established by the civil court. If any person had been wrongfully dispossessed as the result of the execution proceedings, he would have an opportunity of making an application in the proper form to have the matter dealt with by the civil court. On the views expressed by the learned Judges, it would appear that the proper order for the learned magistrate would have been in that case to declare the first party entitled to possession; but they contended themselves with setting aside the order attaching the land under section 146 of the Code of Criminal Procedure. It does not appear that this decision affords any justification for the view that although the possession of a party who has been placed in possession by the civil court must

(1) (1900) 4 Cal. W. N. 426.

be protected against an opposite party claiming exclusive possession, the criminal courts are to be powerless to make any order under section 145 if the opposite party should merely allow the claim of the first party to possession of an undivided share. Nor does it afford justification for the view that the provisions of section 145 do not apply to a case in which one party claims exclusive possession, and a breach of the peace is likely to ensue, from that party's attempting to exclude another party who has hitherto enjoyed joint possession, or to resist the attempt of the other party to disturb his possession by enforcing a claim to joint possession with himself.

1932.

NAND-  
KESHWAR  
PRASAD  
SAHI  
v.  
SITA  
SARAN  
SAHI.

MAGPHERSON  
AND  
JAMES, JJ.

All that was actually decided in *Krista Alhadini Dasi v. Radha Syam Panday*<sup>(1)</sup> was that the provisions of section 145 ought not to be applied to defeat the effect of delivery of possession by the Civil Court. For the rest, the learned Judges merely observed that where each of the parties admitted the right of the other to an undivided share, both being in joint possession, the provisions of section 145 would not apply; and the Magistrate ought not to attach the property because he could not determine the respective shares; (nor to determine the shares, because this is rather a question of title than of possession, in the sense of the term as used in the Code of Criminal Procedure). But when one party claims definite possession of certain land with definite exclusion of the other, the case is altogether different. The dispute is here regarding possession, in the strictest sense of the term.

In our opinion this reference must be discharged. We are unable to accept as correct the view of the law which found favour in the decisions of this Court which have been referred to. The only condition for

(1) (1902) 7 Cal. W. N. 118.

1932.

NAND-  
KESHWAR  
PRASAD  
SAHI  
v.  
SITA  
SARAN  
SAHI.

MACPHERSON  
AND  
JAMES, JJ.

a proceeding under section 145, terminating in a finding under sub-section (4) and an order under sub-section (6) or an order under section 146, is that the magistrate should be satisfied on information before him that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his jurisdiction. Thereupon he is to call for written statements from the parties concerned in the dispute of their respective claims as respects the fact of actual possession of the subject of dispute and he is to determine whether any and which of the parties was at the date of the order initiating proceedings in such possession of the said subject. The jurisdiction of the Magistrate to initiate proceedings under section 145 is subject only to the limitations provided in the section itself. It is altogether wrong to graft limitations upon the enactment which the legislature has not placed there. In the present instance and in instances of a like kind there exists a dispute likely to cause a breach of the peace concerning the actual possession of land. Because one set of persons claim exclusive possession over the major portion of it while the other set of persons claim to be in joint possession along with them of the entire land, the dispute may be difficult to decide (though it need not be if the Magistrate remembers what he has to decide and does not wander away into complicated or but dimly relevant questions of civil right), but it is in principle no less a question of disputed actual possession than if each party claimed exclusive possession of the entire area. In our judgment there is nothing in section 145 or elsewhere in the Code of Criminal Procedure which renders it inapplicable to the case referred and similar cases.

We, therefore, discharge the reference.

*Reference discharged.*