the settlement binding on the land without communicating his order fixing the assessment to the person presumably owning the land or by communicating it to a mere dummy who has nothing to do with the land. Had it been the intention of the Legislature to provide by the section that the Collector should, before fixing the assessment, enter into a sort of preliminary discussion with the superior holder &c., it would have used apt language to express that intention, such as we find in the Bombay Summary Settlement Act or in Bengal Reg. II of 1819, the provisions of the latter of which require the Collector, before assessing any land to the land revenue, to deliver to the owner thereof a statement of the grounds on which his land appears to the Collector liable to assessment and to examine his title deeds. No such provisions are to be found in Bombay Act II of 1876. It may be desirable that the Collector should hold a preliminary inquiry before fixing the assessment and hear what the owner of the land sought to be assessed has to say. Such a procedure may enable him to exercise his discretionary power justly and reasonably and avoid unnecessary litigation. But in the absence of anything in the Act clearly requiring the Collector to adopt that procedure or declaring that his action shall be *ultra vires* if he does not follow it, I do not think we can hold that the discretionary power vested in the Collector by section 8 is subject to any such restriction as Mr. Rivett-Carnac has asked us to impose upon it.

Decree confirmed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.

NAGAPPA (ORIGINAL PLAINTIFF), APPLICANT, *v.* SAYAD BADRUDIN AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

1901. *December 4.*

Mámlatdár—Possessory suit—Jurisdiction—Previous order of Magistrate under section 145, Criminal Procedure Code (Act V of 1898).

On the 22nd of December, 1900, a Magistrate passed an order under section 145 of the Criminal Procedure Code (Act V of 1898), deciding that, on the 20th of

* Civil Application No. 84 of 1901, Extraordinary Jurisdiction.

1901.

NAGAPPA v. SAYAD BADRUDIN.

October, 1900, one Sayad Martooza was in actual possession of certain land. On the 6th of March, 1901, the plaintiff brought this suit against the defendants (of whom the said Sayad Martooza was one) to recover possession of the said land, alleging that on the 10th of October, 1900, the defendants had wrongfully dispossessed him of it. The Mámlatdár held that having regard to the Magistrate's order of the 22nd of December, 1900, he had no jurisdiction to hear the suit. On application to the High Court,

Held (remanding the case for disposal), that the Mámlatdár had jurisdiction to try the case.

Lillu v. *Annaji*(1) distinguished.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order passed by Ráo Sáheb N. N. Nadkarni, Mámlatdár of Ankola in the Kárwár District, in a possessory suit.

On the 20th of October, 1900, the First Class Magistrate at Kárwár made an order under section 145 of the Criminal Procedure Code (Act V of 1898) whereby he decided that one Sayad Martooza, one of the defendants in this suit, was in actual possession of the land now in question.

On the 6th of March, 1901, the plaintiff filed this possessory suit in the Court of the Mámlatdár of Ankola in the Kárwár District, alleging that on the 10th of October, 1900, the defendants (of whom Sayad Martooza was one) had forcibly dispossessed him of the said land.

The Mámlatdár held that under section 10(2) of the Mámlatdárs' Act (Bombay Act III of 1876) he had no jurisdiction to try the suit. He passed the following order:

On questioning the plaintiff I understand that this very land was declared to be in the possession of one Sayad Martooza by the First Class Magistrate of Kárwár only some two months back under section 145 of the Criminal Procedure Code. A Magistrate's decision under section 145 of the Criminal Procedure Code is conclusive evidence of possession (*Lillu* v. *Annaji*, I. L. R. 5 Bom. 387), and moreover the plaintiff was a party to the proceedings. Therefore, I return the plaint as out of my jurisdiction under section 10 of the Mámlatdárs' Courts Act.

(1) (1881) 5 Bom. 387.

(2) Section 10 of the Mámlatdárs' Courts Act (Bom. Act III of 1876):

10. If it appear to the Mámlatdár that the subject of the plaint is not within his jurisdiction, he shall return the plaint in order to its being presented in the proper Court.

Against this order the plaintiff preferred an application to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), contending that the Mámlatdár erred in holding that he had no jurisdiction to entertain the suit and that an order passed by a Magistrate under section 145 of the Criminal Procedure Code was not a bar to a possessory suit in the Mámlatdár's Court.

A *rule nisi* was issued requiring the defendants to show cause why the order passed by the Mámlatdár should not be set aside.

Nilkanth A. Shiveshvarkar for the applicant (plaintiff) in support of the rule:—The Mámlatdár was clearly in error in holding that he had no jurisdiction to take cognizance of our suit. Section 10 of the Mámlatdárs' Act relates to the local area of the jurisdiction of a Mámlatdár. If the property in dispute is situate within his division of a district, a Mámlatdár cannot decline to entertain a possessory suit with respect to such property.

The order passed by the First Class Magistrate of Kárwár is no bar to our suit in the Mámlatdár's Court. We filed the possessory suit on the 6th of March, 1901. Under section 15, clause (*a*), of the Mámlatdárs' Courts Act, the Mámlatdár had to determine whether we were in possession at any time within six months prior to the 6th of March, that is, from the 6th of October, 1900. The order of the Magistrate was passed on the 20th of October. Even the Mámlatdár, therefore, under section 15 had jurisdiction to determine whether we had been in possession at any time between the 6th of October to the 20th of October. If we were in possession at any time within six months prior to the time the suit was filed, we are entitled to get redress in the possessory suit. The ruling in *Doulat Koer* v. *Rameswari Koeri*[1] shows that section 145 of the Criminal Procedure Code enables a Magistrate to pass a temporary order with respect to possession of property and that the order remains in force until the right to hold the property is determined by any competent Court. We submit that the Mámlatdár's Court is a competent Court to determine such right.

Sitaram S. Patkar for the opponents (defendants) showed cause:—The Magistrate found that on the 20th of October, 1900,

(1) (1899) 26 Cal. 625.

1901.

NAGAPPA v. SAYAD BADRUDIN.

Sayad Martooza, one of the defendants in the present suit, was in possession. Section 145, clause 5, of the Criminal Procedure Code lays down that an order passed by a Magistrate under that section is conclusive and final. Therefore the order being conclusive as to the fact of possession, the Mámlatdár was justified in holding that he had no jurisdiction to disturb that order. We rely on *Lillu* v. *Annaji*.[1]

Clause 4 of section 145 of the Criminal Procedure Code distinctly lays down that the order of the Magistrate shall have reference to the state of affairs two months prior to the passing of the order. Therefore, the order of the Magistrate being passed on the 20th of October, 1900, would be final as to possession not only on the 6th of October, but two months prior to the 20th of October. There was, therefore, no forcible dispossession by us on or about the 6th of October, 1900.

Shiveshvarkar in reply :—Under clause 4 of section 145 of the Criminal Procedure Code it is discretionary with a Magistrate to pass an order with regard to the possession for the previous two months. He may do so if he chooses.

JENKINS, C.J.:—We are asked in the exercise of our revisional powers to set aside the order of a Mámlatdár on the ground that he failed to exercise a jurisdiction vested in him by law.

The petitioner sued for possession of certain lands, alleging that he had been dispossessed on the 10th of October, 1900. The Mámlatdár returned the plaint under section 10 of the Mámlatdárs' Act, as it appeared to him that its subject was not within his jurisdiction. The ground of this decision was that a Magistrate had previously, under section 145 of the Criminal Procedure Code, 1898, decided that Sayad Martooza, one of the defendants in this suit, was in actual possession of the land now in suit; that such finding was conclusive; and so the suit was not maintainable.

It is necessary here to state a few of the material dates. It was on the 20th of October, 1900, that the Magistrate made his order under sub-section 1 of section 145, and it was on the 22nd of December that the order deciding the fact of actual possession

(1) (1881) 5 Bom. 387.

was passed. The present suit was commenced on the 6th of March, 1901.

Now the issue the Mámlatdár had to decide was "whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed." The finding under section 145 directly had reference to the condition of things on the 20th of October, so that if matters rested there, the Magistrate's finding, even if conclusive in a civil suit, would not have necessitated a finding adverse to the plaintiff on the issue I have cited. But, then, it is argued that the proviso to sub-section 4 of section 145 indirectly gives the Magistrate's finding an extended operation, and involves the result that not only was Martooza in possession on the 20th of October, but that the plaintiff had not been forcibly and wrongfully dispossessed within two months before that date, and that this not only disproves the plaintiff's allegation of dispossession on the 10th of October, but necessitates a negative answer to the issue. In this connection the opponent has relied on the decision of West, J., in *Lillu* v. *Annaji*.[1] No doubt that learned Judge did there express the opinion that "the decision of a Magistrate under the Code of Criminal Procedure is conclusive as to the possession." That was a decision under section 530 of Act X of 1872, which provides that the Magistrate, after satisfying himself as to the fact of actual possession, "shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until that time." Now it is important to notice that the Act requires the Magistrate to find as to the fact of actual possession on the date of second and not of the preliminary order, and in that respect differs from the present Act. This, I think, affords an explanation of West J.'s opinion, and this is made the more apparent by what is to be found at page 392 of the Report. The learned Judge there says: "Now the Magistrate in 1874 adjudged that Lillu was in possession, and gave, or secured, him possession even if he had it not before." It is, I think, clear that the learned Judge had this in mind when he expressed the

(1) (1881) 5 Bom. 387.

1901.

NAGAPPA v. SAYAD BADRUDIN.

Sayad Martooza, one of the defendants in the present suit, was in possession. Section 145, clause 5, of the Criminal Procedure Code lays down that an order passed by a Magistrate under that section is conclusive and final. Therefore the order being conclusive as to the fact of possession, the Mámlatdár was justified in holding that he had no jurisdiction to disturb that order. We rely on *Lillu* v. *Annaji*.[1]

Clause 4 of section 145 of the Criminal Procedure Code distinctly lays down that the order of the Magistrate shall have reference to the state of affairs two months prior to the passing of the order. Therefore, the order of the Magistrate being passed on the 20th of October, 1900, would be final as to possession not only on the 6th of October, but two months prior to the 20th of October. There was, therefore, no forcible dispossession by us on or about the 6th of October, 1900.

Shiveshvarkar in reply :—Under clause 4 of section 145 of the Criminal Procedure Code it is discretionary with a Magistrate to pass an order with regard to the possession for the previous two months. He may do so if he chooses.

JENKINS, C.J.:—We are asked in the exercise of our revisional powers to set aside the order of a Mámlatdár on the ground that he failed to exercise a jurisdiction vested in him by law.

The petitioner sued for possession of certain lands, alleging that he had been dispossessed on the 10th of October, 1900. The Mámlatdár returned the plaint under section 10 of the Mámlatdárs' Act, as it appeared to him that its subject was not within his jurisdiction. The ground of this decision was that a Magistrate had previously, under section 145 of the Criminal Procedure Code, 1898, decided that Sayad Martooza, one of the defendants in this suit, was in actual possession of the land now in suit; that such finding was conclusive; and so the suit was not maintainable.

It is necessary here to state a few of the material dates. It was on the 20th of October, 1900, that the Magistrate made his order under sub-section 1 of section 145, and it was on the 22nd of December that the order deciding the fact of actual possession

(1) (1881) 5 Bom. 387.

1901.

NAGAPPA v. SAYAD BADRUDIN.

was passed. The present suit was commenced on the 6th of March, 1901.

Now the issue the Mámlatdár had to decide was "whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property or use claimed up to any time within six months before the suit was filed." The finding under section 145 directly had reference to the condition of things on the 20th of October, so that if matters rested there, the Magistrate's finding, even if conclusive in a civil suit, would not have necessitated a finding adverse to the plaintiff on the issue I have cited. But, then, it is argued that the proviso to sub-section 4 of section 145 indirectly gives the Magistrate's finding an extended operation, and involves the result that not only was Martooza in possession on the 20th of October, but that the plaintiff had not been forcibly and wrongfully dispossessed within two months before that date, and that this not only disproves the plaintiff's allegation of dispossession on the 10th of October, but necessitates a negative answer to the issue. In this connection the opponent has relied on the decision of West, J., in *Lillu* v. *Annaji*.[1] No doubt that learned Judge did there express the opinion that "the decision of a Magistrate under the Code of Criminal Procedure is conclusive as to the possession." That was a decision under section 530 of Act X of 1872, which provides that the Magistrate, after satisfying himself as to the fact of actual possession, "shall issue an order declaring the party or parties to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until that time." Now it is important to notice that the Act requires the Magistrate to find as to the fact of actual possession on the date of second and not of the preliminary order, and in that respect differs from the present Act. This, I think, affords an explanation of West J.'s opinion, and this is made the more apparent by what is to be found at page 392 of the Report. The learned Judge there says: "Now the Magistrate in 1874 adjudged that Lillu was in possession, and gave, or secured, him possession even if he had it not before." It is, I think, clear that the learned Judge had this in mind when he expressed the

(1) (1881) 5 Bom. 387.

1901.

NAGAPPA v. SAYAD BADRUDIN.

view on which reliance is placed. What he meant was that there was no gainsaying the fact of possession; for it was actually given when the order was passed, whatever may have been the fact before. The decision, therefore, is no authority for the proposition that a finding by a Magistrate under the present Act as to the fact of actual possession at the date of the preliminary order is conclusive as to the possession for a period of two months prior to that date, so as to preclude a Mámlatdár from enquiring into the matter in a suit duly instituted under the Mámlatdárs' Act. When regard is had to the purpose of proceedings under section 145 and the mode in which they are necessarily conducted, I should have been very loth to hold otherwise.

The result is that, in my opinion, the Mámlatdár has misconceived the effect of the Magistrate's order and that the case must be remanded that he may deal with it according to law. The rule, therefore, must be made absolute and the costs will abide the result.

CHANDAVARKAR, J.:—I am of opinion that the Mámlatdár was wrong in holding that he had no jurisdiction to entertain this suit under the Mámlatdárs' Act because of the order passed by a First Class Magistrate in favour of the defendant under section 145 of the Code of Criminal Procedure. As was pointed out in *Chytun Chunder Roy* v. *Brojo Kant Roy and another*[1] in regard to section 318 of the Criminal Procedure Code of 1861 (Act XXV of 1861), which is reproduced with certain amendments in section 145 of the present Criminal Procedure Code, the object of that section is "to maintain a party in possession, temporarily at least, whether that possession is a wrongful one or not"; while the object of a possessory suit brought under the first paragraph of section 4 of the Mámlatdárs' Act is the same as that of section 15 of Act XIV of 1859, *i.e.*, it is, as was also pointed out in the ruling above cited, "to restore to possession parties dispossessed otherwise than by due course of law." It was held in that case that "the fact of an award having been passed by a Magistrate under section 318 of the Code of Criminal Procedure maintaining a party in possession is" no "bar to a

(1) (1873) 20 Cal. W. R. 12.

possessory action under the provisions of section 15 of Act XIV of 1859." This latter section is now section 9 of the Specific Relief Act, which has been held to confer on a regular Civil Court the same jurisdiction that is conferred on a Mámlatdár by the first paragraph of section 4 of the Mámlatdárs' Act. The principle of that ruling applies to the present suit, and I would hold that the Mámlatdár had jurisdiction to entertain it.

The question that was argued before us at the hearing of the rule in this case was whether the Magistrate's finding under section 145, that the defendant was in possession on the date of his order (the 20th of October, 1900) and declaring him on the 22nd of December, 1900, to be entitled to retain that possession, was so far conclusive that neither the Mámlatdár's Court hearing a suit brought under the Mámlatdárs' Act nor any other Civil Court could go behind it. There is a *dictum* of West, J., in the case of *Lillu* v. *Annaji Parashram* [1] that such finding is conclusive as to the question of the actual possession of the party whom the Magistrate retains in possession from the date of his order until he is ousted in due course of law. I do not think it is necessary in the present case to express any opinion upon that point, for, assuming that it is so, still it cannot prevent the Mámlatdár from going into the question of possession before the date of the Magistrate's order. A Magistrate who acts under section 145 of the Code of Criminal Procedure can not only decide who is in possession on the day when he issued his order under clause (1) of that section, but under the first proviso to clause (4) he can also treat the party forcibly and wrongfully dispossessed within two months next before the date of such order as if he had been in possession at such date. But it was conceded before us that the Magistrate's order relied on for the defendant in the present case was not passed under that proviso. And even if it were, the effect of the proviso is limited—its operation is merely to treat the party in whose favour the Magistrate passes the order "as if he had been in possession *at the date of the order*," not before. That does not preclude the Mámlatdár's Court or any other Civil Court from deciding who was in actual possession before the date of the

(1) (1881) 5 Bom. 387.

1901.

NAGAPPA v. SAYAD PADRUDIN.

order. In the present case the plaintiff alleges that he was wrongfully dispossessed by the defendant on the 10th of October, 1900. He filed his suit in the Mámlatdár's Court on the 6th of March, 1901. Taking it as an ordinary case, not hampered by an order under section 145 of the Code of Criminal Procedure, the plaintiff would have to prove that he was wrongfully dispossessed within six months before the 6th of March, 1901. His allegation that he was in possession on and till the 10th of October, 1900, if proved, would entitle him to a decree. But, it is said, the Magistrate's finding under section 145 comes in his way. The answer to that is that, assuming it to be a conclusive finding which cannot be re-opened in any civil litigation, it is conclusive only to the extent that the defendant was in possession on the 20th of October, 1900, and has been since then in possession. Section 145 did not empower the Magistrate to find who was in possession before that. He could only go into that question incidentally for the purpose of finding who was in possession at the date of his order. It is, therefore, competent to the Mámlatdár to decide whether the plaintiff was in possession before the 20th of October, 1900.

I would, therefore, make the rule absolute and send back the case to the Mámlatdár for disposal according to law. Costs, in my opinion, should abide the result.

Rule made absolute. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

1901, *December* 17.

GANOO AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHRI DEV SIDHESHWAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Ejectment—Notice to quit—Necessity of proving service of proper notice to quit—Land Revenue Code, Bombay Act V of 1879, section 84—Issues to be raised by the Court—Practice—Procedure.

The plaintiffs sued to eject the defendants from certain land, alleging that they were yearly tenants. The defendants (*inter alia*) pleaded that they were

* Second Appeal No. 257 of 1901.