

32 C. 552 (=2 Cr. L. J. 347=1 C. L. J. 432.)

[552] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

1905
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CRIMINAL
REVISION.

BANWARI LAL MUKERJEE v. HRIDAY CHAKRAVARTY.*

[20th January, 1905.]

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*Jurisdiction—Magistrate—Criminal Procedure Code (Act V of 1898) s. 145, cls. (1), (6)
—Omission to record initiatory order—Arbitration, reference to—*

Where proceedings under s. 107 of the Criminal Procedure Code were instituted against the parties, and on their appearance the Magistrate, considering that the dispute came within s. 145 of the Code, treated the case as one instituted under the latter section, and adjourned it for the evidence of their respective claims to actual possession, without recording an order under sub-section (1) :—

Held, that the drawing up of a formal order under sub-section (1) was absolutely necessary to the initiation of proceedings under s. 145, and the omission to do so rendered them bad for want of jurisdiction.

Section 145 does not contemplate that the question of actual possession should be delegated, even by the consent of the parties, to arbitration. It directs the Magistrate himself to receive the evidence produced by the parties, and to come to a decision in consideration thereof.

[Fol. 16 M. L. T. 52=24 I. C. 967=1914 M. W. N. 798=15 Cr. L. J. 559=1 L. W. 493 ; Ref. 1 Pat. L. W. 748=1917 Pat. 251 ; 2 Pat. L. J. 86; 69 I. C. 159.]

RULE granted to Banwari Lal Mukerjee and another.

Upon the receipt of a police report, dated the 28th June 1904, stating that there was a dispute between Hriday Chakravarti, Akhoy Chakravarti and others of the first party, and Banwari Lal Mukerjee and others of the second party, regarding the possession of certain land known as Chiru Kanali, in consequence of which there was a likelihood of a breach of the peace, the Deputy Commissioner of Manbhum instituted proceedings under s. 107 of the Criminal Procedure Code, and issued warrants for the arrest of Hriday and Akhoy, under s. 114 of the Code. On the 16th July, when the case came on for hearing, the pleaders for both parties raised the contention that the case should be heard under s. 145 and the question of actual possession decided. Thereupon the Deputy Commissioner, after looking into some [553] documents produced by the first party, passed an order in these terms :—

“ In regard to a plot of land called Chiru Kanali. This is a dispute under section 145 of the Criminal Procedure Code. The first party produce evidence to show that they have paid rent in fraction for the Chiru Kanali land, mouza Manbazar. The land is surrounded on all sides by Sitalpore village lands recently acquired by the second party by purchase. *Prima facie* the lands must be in possession of the first party rightly or wrongly, and the second party claim the plot as being included within their purchase. The second party will produce evidence in support of their claim on the 30th July.”

On the last mentioned date the petitioners having produced some documents in support of their claim, the Deputy Commissioner directed both parties to produce any other evidence they wished to offer on the 12th of August. The case was not taken up till the 17th instant, when a joint petition was filed praying for a reference of the matter to arbitration, which was granted by the Court ; the 20th being fixed as the last day of the award. On the 18th instant, however, the petitioners applied to the Deputy Commissioner to cancel the order of reference to arbitration upon

* Criminal Revision, No. 1221 of 1904, against the order of J. Lang, Deputy Commissioner of Manbhum, dated August 26, 1904.

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the ground of an alleged apprehension that their witnesses would not depose in their favour before the arbitrators through fear of the *ambas* of the zamindar of Manbazar who, it was stated, were conducting the case for the opposite party. This application was refused, and the arbitrators proceeded with their enquiry, which was held *ex parte* owing to the refusal of petitioners to cross-examine the witnesses of the first party, or to produce their own evidence, and submitted their award on the 21st instant in favour of the first party.

On the 26th instant the Deputy Commissioner passed the following order :—

" In this case I have perused the statements put in by the accused. I have heard the parties and received the evidence, which they have adduced before me. I have considered the effect of that evidence, and I am of opinion that the first party, who produces his rent receipts from the Manbazar *Raj*, is in actual possession. The arbitrators, to whom the parties referred their dispute, have made an award in support of my finding. It is hereby ordered under section 145 (6) of the Criminal Procedure Code that the first party retain possession till legally evicted.

The petitioners then obtained the present Rule on the District Magistrate and the opposite party to set aside the said order.

[554] Babu *Digambar Chatterjee* showed cause. The proceedings having been initiated under s. 107 of the Criminal Procedure Code and subsequently converted into an inquiry under s. 145 at the instance of the parties, there was no reason for a separate proceeding under the latter section. In this case there was further no necessity for making a formal order under s. 145, cl. (1). The object of drawing up such a proceeding is to give notice to the parties as to the matter in dispute, and this end was already attained by the order under s. 107. As to the reference to arbitration the Magistrate's judgment shows that he decided the question of actual possession upon the evidence adduced before him ; and he only refers to the award incidentally supporting his finding.

Babu *Jyoti Prasad Sarvadikary* for the petitioners. The recording of an order under s. 145, cl. (1) of the Criminal Procedure Code, is essential to the jurisdiction of the Magistrate : *Queen-Empress v. Gobind Chandra Das* (1), *Manik v. Azimuddi* (2), *Krishna Kamini v. Abdul Jubbar* (3), *Sukru Dosadh v. Ram Pergash Singh* (4). The taking of evidence subsequently cannot give him a jurisdiction, which he does not otherwise possess : *Kali Kissen Tagore v. Anund Chunder Roy* (5). The conditions required by the law must be strictly complied with : see *Nusserwanjee Pestonjee v. Meer Mynodeen* (6). The reference of the case to arbitrators for decision was without jurisdiction : see *Criminal Revision No. 345 of 1900*, dated the 15th June 1900, per Prinsep and Handley, JJ. The petitioners had good grounds for withdrawing from arbitration.

HENDERSON AND GEIDT, JJ. In this case it appears that the police reported that there was a dispute with regard to certain lands and a breach of the peace was likely to take place, upon which proceedings were taken against both parties on 28th June 1904 under section 107 of the Criminal Procedure Code. Subsequently the pleaders for both parties appeared and contended that the proceedings should have been taken under [555] section 145 of the Criminal Procedure Code, and the question of actual possession decided. Accordingly the case was adjourned until the 30th of July in order that the parties might adduce evidence with regard

(1) (1893) I. L. R. 20 Cal. 520.

(2) (1902) 6 C. W. N. 923.

(3) (1902) I. L. R. 30 Cal. 155, 200.

(4) (1902) I. L. R. 30 Cal. 443.

(5) (1896) I. L. R. 23 Cal. 557.

(6) (1855) 6 Moo. I. A. 134, 155.

to their respective claim to possession. On the 17th of August, however, after a certain amount of evidence had been recorded, the matter was on the joint petition of both parties referred to arbitration; but on the following day the second party, the petitioners, made an application to the Court to cancel the reference to arbitration. They stated that their witnesses had been threatened, and they feared that they would not dare to give evidence for fear of the *amlas* of the zamindar of Manbazar, who were looking after the case on the other side. The Magistrate refused to withdraw the case from the arbitrators.

The arbitrators having made an award on the 21st August finding that the first party was actually in possession, the Magistrate on the 26th of August passed an order in which, after stating that he had considered the effect of the evidence, he found that the first party was in actual possession and he went on to state that the arbitrators, to whom the parties had referred their dispute, made an award in support of that finding.

It appears that when the application was made by the pleaders that the matter might be dealt with under section 145, no proceeding was drawn up under sub-section (1) of that section. But from that point it would seem that the proceedings were treated as if they were being had under section 145.

It has been contended before us that, inasmuch as no proceeding under sub-section (1) of section 145 was drawn up, all the subsequent proceedings were without jurisdiction. It has been held in a number of cases that the making of a formal order under sub-section (1) is absolutely necessary to the initiating of proceedings under this Chapter. The question is one of jurisdiction, and we are of opinion that the objection taken is a valid one.

Apart from this, although it may not perhaps be a question of jurisdiction, we think that the Magistrate would have exercised a wiser discretion if, upon the application made by the second party to withdraw from the arbitration, he had cancelled the [556] reference. The procedure laid down by the section apparently does not contemplate that the question as to who is in actual possession should be delegated, even by consent of the parties to arbitrators. The section directs the Magistrate himself to receive the evidence produced by the parties and on a consideration thereof to come to a decision.

Upon the first ground mentioned by us, the Rule must be made absolute and the order set aside.

Rule absolute.

32 C. 557 (=9 C. W. N. 719=2 Cr. L. J. 470.)

[557] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

KASHI NATH BANIA v. EMPEROR.*

[6th February, 1905.]

Opium—Opium, illegal possession of—Opium Act (I of 1878) s. 9, cl. (c)—Potential possession—Possession of railway receipt for an undelivered parcel containing opium—Guilty knowledge.

The possession of a railway receipt by the consignee of an undelivered parcel of contraband opium, under circumstances showing that he was aware of the

* Criminal Revision No. 1276 of 1904, against the order of Bazlul Karim, Third Presidency Magistrate, dated Nov. 29, 1904.