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which terminated in the sale of the holding were fraudulent and collusive, and dismissed the suit.

The plaintiff now appeals, making both the parties, defendants, respondents. It has been pressed before us that the Subordinate Judge is wrong in the view he took, that there was no cause of action against the defendant first party, and that he should have proceeded to decide the question whether the suit for arrears of rent and the sale of the holding in execution of the decree in that suit were fraudulent and collusive or not.

We think that the Subordinate Judge is in error in saying that the plaintiff had no cause of action as against the defendant first party. Whether the proceedings were fraudulent and collusive, is we think the main question upon which the decision of the case turns. The Subordinate Judge should have entered into [286] that question and decided it. It is perfectly clear that if the proceedings in the rent decree and the execution sale were *bona fide*, the plaintiff can certainly get no relief against either defendant. His rights are entirely gone. This is admitted by the learned pleader for the appellant. On the other hand, if the proceedings were fraudulent and collusive, we think that the plaintiff has a right to some relief. As against the defendant second party, his rights are either to be paid off or to bring the mortgaged property to sale in execution of the mortgage lien; and it appears to us that if the defendant first party entered into collusive proceedings with the defendant second party and caused a transfer of the holding to him, then the plaintiff's mortgage lien should not be held to be destroyed, but should be held to continue to subsist upon the land, although it has now passed to the hand of the defendant first party. This view of the case is in no way inconsistent with the ruling in the second appeal No. 1894 of 1887, decided on the 31st July 1888 by Wilson, J. and a member of this Bench.

Under the circumstances, we must set aside the decree of the lower Appellate Court and remand the case to that Court to be decided in accordance with these observations. If the proceedings referred to by the Subordinate Judge were *bona fide*, the plaintiff has no right : if they were not *bona fide*, then the plaintiff will have the same right against the defendant No. 1 as he would have against the defendant second party. And we may observe that this relief is covered by the fourth prayer in the plaint in which the plaintiff prays that if the sale be allowed to stand, then it may be declared that the mortgage property is not free from the liabilities and that the plaintiff's dues form a charge upon the property in suit.

The costs of this appeal will abide the result.

Appeal allowed: case remanded.

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32 C. 287 (=2 Cr. L. J. 202.)

[287] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

BHOLANATH SINGH *v.* WOOD.*

[28th July, 1904.]

Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145—Parties—Manager—Title—Possession—Encroachment.

* Criminal Revision, No. 716 of 1904, against the order of J. N. Roy, Joint Magistrate of Midnapore, dated June 16, 1904.

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The fact that the manager, and not his employer the zemindar, has been made a party to a proceeding under s. 145 of the Criminal Procedure Code is a mere irregularity, or at most an error of law, which does not affect the Magistrate's jurisdiction.

Dhondhai Singh v. *Follet* (1) referred to.

Where a party claims no easement or customary right, any intermittent acts of encroachment on his part, such as cutting a few trees or filching some underwood, would not affect the title or possession of the superior landlord.

Framji Cursetji v. *Goculdas Madhowji* (2), *Agency Company* v. *Short* (3) referred to.

[Ref. 36 I. C. 876=18 Cr. L. J. 44.]

RULE granted to Bholanath Singh, the petitioner (second party).

This was a proceeding under s. 145 of the Criminal Procedure Code with respect to 6,000 bighas of jungle lands adjoining the mouza of Kalmapukhuria. Bholanath Singh, the second party, holds a settlement of the mouza under the Nawab of Murshidabad, the manager of whose estate, J. B. Wood, was made the first party.

The mouza was originally given to Bholanath's ancestor for the purpose of maintenance, and comprised arable lands of an area of less than 500 bighas. The petitioner claimed the whole [288] of the jungle as part of the mouza known as the Kalmapukhuria jungle; whilst the first party alleged that it was called the Benasuri jungle, and was *khas* to the Nawab like all other jungles in the pergana.

The Magistrate found that Bholanath and his tenants had been taking fuel from the jungle, and that the former may have cut one or two trees near about, and that possibly such encroachment was forgiven or passed over. His conclusion upon the question of possession was as follows :—

"I come to the finding that Bholanath has been in possession of some of the jungle in question. I am unable, however, to determine the extent of the jungle to which his possession has been acquiesced in so far, but I am sure that the area of such jungle could not have been very much: certainly nothing like the area he claims now. I am unable, therefore, to make an order in his favour. Regard being had to the nature of Bholanath's tenure, to the small area of arable lands in his mouza, which were the only lands his ancestors enjoyed, to the fact that all jungles in the pargana has been always *khas* to the zemindar, that the zemindar never settled the jungle with any tenant and that he resisted any extensive encroachment or cutting even when permission was given, to the nature of the dispute now between the parties which has continued for the last ten years, and to the position and influence of the first party which has the power to enforce its opposition against a small landholder like Bholanath, I am convinced that in the main the first party has really been in possession of the major portion of the jungle lands in dispute now. I find, therefore, the first party to be in possession. I order that the first party do remain in possession until evicted by a Court of competent jurisdiction."

The petitioner then obtained this Rule calling upon the District Magistrate and the opposite party to show cause why the order of the Joint Magistrate dated the 16 June 1904, giving possession of the whole of the disputed property to the first party, should not be set aside on the grounds, *first* that the Joint Magistrate had no jurisdiction to make such an order after finding that the second party was in possession of a portion of the disputed property; and *secondly*, that the deputy Magistrate had no jurisdiction to make the manager a party instead of his employer, the zemindar.

Mr. *Jackson* (Babu *Dasharathi Sanyal* with him) showed cause. The question of the Magistrate's jurisdiction to make the manager a party to these proceedings instead of his employer, the zemindar, [289] is

(1) (1903) I. L. R. 31 Cal. 48.
(2) (1892) I. L. R. 16 Bom. 338.
(3) (1888) L. R. 13 App. Cas. 793, 799.

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concluded by the Full Bench decision in *Dhondhai Singh* v. *Follet* (1). The principle there laid down is equally applicable to the present case. Defect of party is not a question of jurisdiction : *Krishna Kamini* v. *Abdul Jubbar* (2). It may be an error of law which does not affect the Magistrate's jurisdiction. As regards the second point, the Magistrate did not find that the second party was in actual possession of any part of the disputed land. The mere fact that he cut a few trees, or encroached upon a small portion of the jungle, does not show that he was in actual possession of it : see *Framji Cursetji* v *Goculdas Madhowji* (3), and the observations of Lord Macnaghten in *Agency Company* v. *Short* (4).

Mr. *Donogh* (Babu *Joy Gopal Ghose* with him), for the petitioner. Possesssion could only be determined in such a case by evidence of acts of possession : *Jagat Kishore Acharjya* v. *Khajah Ashanullah* (5). The Magistrate has found that the petitioner has exercised such rights of possession from year to year over the portion of the jungle adjoining his village, while the first party is in possession of the major portion. In effect, he finds both parties in possession of some part, without being able to determine the extent in either case. He cannot give possession of the whole of the jungle to one party upon such a finding : *Katras-Jherriah Coal Company* v. *Sibkrishta Daw* (6). He ought to have proceeded under s. 146 of the Criminal Procedure Code. Moreover, the order could not be made in favour of the manager when the zemindar was within his jurisdiction : *Behar Lall Trigunait* v. *Darby* (7) ; *Brown* v. *Prithiraj Mandal* (8). The ruling in *Dhondhai Singh* v. *Follet* (1) applies only to the case of a proprietor resident out of British India.

PRATT AND HANDLEY JJ. The parties to this case under section 145 of the Criminal Procedure Code are J. B. Wood, Manager of the Nawab of Murshidabad, first party, and Bholanath **[290]** Singh, second party. The latter holds from the Nawab an istemrari settlement of Kalma Pukhuria mouza, and this case relates to the possession of some 6,000 bighas of jungle adjoining that mouza. By his written statement Bholanath Singh does not claim any rights in the nature of an easement or customary right but avers that the jungle is part of his istemrari property, and that he has always possessed it as such.

The Nawab claims the jungle as *khas*, and on this the Magistrate observes "one thing is clear, viz., that all jungles in the pergana are *khas*. This is admitted by the second party. No jungle is settled with any tenant."

In the result the Magistrate finds that the second party had encroached on some of the jungle close to his mouza, and that he may have cut a few trees, but that any extensive encroachment would have been at once noticed and resisted. He concludes that "in the main the first party has really been in possession of the major portion of the jungle lands in dispute," and as the extent of the second party's encroachment was uncertain and indefinite, he adjudges possession of the entire jungle to the first party.

The points raised before us on behalf of the second party are—

(i) that the Magistrate had no jurisdiction to make the manager a party instead of his employer the zemindar,

(1) (1903) I. L. R. 31 Cal. 48.
(2) (1902) I. L. R. 30 Cal. 155.
(3) (1892) I. L. R. 16 Bom. 338, 341.
(4) (1888) I. L. R. 13 App. Cas. 793, 799.
(5) (1889) I. L. R. 16 Cal. 281.
(6) (1894) I. L. R. 22 Cal. 297.
(7) (1894) I L. R. 21 Cal. 915.
(8) (1897) I. L. R. 25 Cal. 423.

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(ii) that on his findings the Magistrate was bound either to apportion the possession of the jungle, or, if unable to do so, to attach the whole under s. 146 of the Criminal Procedure Code.

As regards the first contention we are of opinion that the course adopted by the Magistrate was a mere irregularity, or at most an error of law which does not affect his jurisdiction. That was the view expressed by some of the Judges in the Full Bench case of *Dhondhai Singh* v. *Follet* (1); and though that case referred to the manager of a landlord beyond the jurisdiction, the observations to which we allude are general enough to cover a case like the present one. 32 C. 287=2 Cr. L. J. 202

As regards the second point, we think that, though the Magistrate's reasoning may not be altogether correct, his order is right and should not be interfered with. It is found that the [291] jungle is the *khas* property of the Nawab, and, therefore, as the second party claims no easement or customary right, any intermittent encroachment on his part would not affect the title or possession of the superior landlord, as was stated in *Framji Cursetji* v. *Goculdas Madhowji* (2): "In this country such a user excites no particular attention. It is neither meant to denote, nor understood as denoting, a claim to the ownership of the land."

Here it was easy for the second party to cut a few trees or filch some underwood without attracting notice, and such acts would not oust the landlord's possession, as was observed by Lord Macnaghten in *Agency Company* v. *Short* (3): "The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner. . . . ."

The result is that the Rule must be discharged.

Rule discharged.

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32 C. 292(=9 C. W. N. 647=2 Cr. L. J. 204.)

[292] CRIMINAL REVISION.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

RATAN MONI DEY *v.* KING EMPEROR.*

[4th January, 1905.]

Illegal gratification, attempt to obtain—Penal Code (Act XLV of 1860), s. 161—Demand of 'dusturi' by civil Court peon.

A demand of *dusturi* by a civil Court peon from the plaintiff, as a motive or reward for serving the summonses on his witnesses without an identifier, amounts to an attempt to obtain an illegal gratification within s. 161 of the Penal Code.

Empress of India v. *Baldeo Sahai* (4) followed.

Queen-Empress v. *Ramakka* (5) distinguished.

RULE granted to Ratan Moni Dey.

A civil suit had been instituted in the Court of the Second Munsif of Sylhet by the firm of Surungmal Lapchand, of which one Chuni Lal Patwa,

* Criminal Revision No. 1128 of 1904, against the order of B. B. Newbould, Sessions Judge of Sylhet, dated Sept. 27, 1904.

(1) (1903) I. L. R. 31 Cal. 48.
(2) (1892) I. L. R. 16 Bom. 338, 341.
(3) (1888) L. R. 13 App. Cas. 793, 799.
(4) (1879) I. L. R. 2 All. 253.
(5) (1884) I. L. R. 8 Mad. 5.