

[153] the lower Courts have not acted in the exercise of their jurisdiction illegally or with material irregularity. In our opinion the Subordinate Judge had exercised a jurisdiction not vested in him by law by returning the plaint, and has failed to exercise a jurisdiction vested in him by law by refusing to accept the plaint and to try the suit, and the District Judge has erred in law in confirming his decision. Both have also acted illegally in the exercise of their discretion, the Subordinate Judge by returning the plaint to the petitioner for presentation to another Court for reasons which are not justified under the provisions of the law, and the District Judge in confirming that decision for reasons not covered by any provisions of the Code of Civil Procedure.

We therefore make the Rule absolute and direct that the order of the Subordinate Judge dated the 19th of January, 1904, as well as the order of the District Judge confirming that order, be set aside.

The plaint has been filed before us on behalf of the petitioner. We direct that it be sent down to the Court of the Subordinate Judge of Chupra with directions to entertain it and to allow the suit to proceed in his Court according to law.

Rule absolute.

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[154] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

UMATAL FATIMA v. NEMAI CHARAN BANERJEE.*
[10th June, 1904.]

Division of Crops, order for—Jurisdiction of Magistrates—Criminal Procedure Code (Act V of 1898), s. 144—Irrevocable order.

An order for division of crops between the tenants and a rival zemindar does not come within the purview of s. 144 of the Criminal Procedure Code; nor is a Magistrate empowered to make an order of an irrevocable nature under that section.

RULE granted to Musammat Umatal Fatima, the petitioner.

The petitioner was originally the holder of a mokarari tenure of certain villages. The tenure consisted of two distinct holdings, which she held separately under different proprietors. The rent of one of these, constituting eight annas of the whole, having fallen in arrear a decree was obtained against her, and her interest therein was put up for sale in execution thereof. To save the tenure from sale, the objector, Nemaï Charan Banerjee (who was a money-lender by profession and a creditor of the petitioner's), paid up the decretal amount, and was subsequently, on his application, put into possession as a mortgagee, under s. 171 of the Bengal Tenancy Act.

Some litigation between the parties followed, the last proceeding before the date of the order complained of being an execution case before the Subordinate Judge of Gaya.

The Subordinate Judge after reviewing the facts of the case, on the 1st March, 1903, recorded a finding that each party was in possession of a moiety of the mokarari of the villages, and effect was given to his order accordingly. A further question of the claims of Nemaï Charan Banerjee

* Criminal Revision No. 533 of 1904, against the order of Banka Behari Bukshi, Deputy Magistrate of Gaya, dated May 2, 1904.

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under an alleged thika patta' which was repudiated by the petitioner, was expressly left undetermined, in order that recourse might be had by the [155] claimant to his remedy in a regular suit. On the 25th January, 1904, a report was made by the police to the District Magistrate, Mr. Forrester, alleging that "both parties were ready to dispute and quarrel." On the 1st February the District Magistrate issued a notice under s. 144 of the Criminal Procedure Code on the petitioner to appear before him through her agent and show cause on the 18th February. On this date after hearing both parties and examining the papers filed on either side, he recorded an order in these terms :—

"It is clear from the papers filed and the arguments before me that for this Court to interfere now would result in an interference with the orders of the Civil Court."

He further added :—

"On the whole it seems best for the Court not to interfere at all, but order will issue to the police to see that no overt act which will affect the possession of either party is committed."

On the 25th February a fresh report was submitted by the police before the Deputy Magistrate, who thereupon initiated a proceeding against the objector under s. 107 of the Criminal Procedure Code on the 11th of April. This proceeding was resumed before the District Magistrate, who, referring to his previous order of 1st February, declined to continue the proceeding and discharged the Rule on the 20th April.

On the 18th April a fresh police report had been submitted on which the District Magistrate passed the following order :—

"See order under section 144, C. P. C. The police are to help neither party and merely to take care that nothing is done by either party except under order of the Civil Court."

On the 19th April Babu Banka Behari Bukshi, the Deputy Magistrate, whose order was the subject of the Rule obtained, initiated proceedings under s. 144 of the Criminal Procedure Code against both parties. After several hearings an order was passed on the 2nd May, in which after reviewing the whole of the matters which had been previously contested in the Civil Courts, he came to the following conclusion :—

"Musammat Fatima has no right to claim the share of the crops raised by the tenants and which are stored in the khalian (granary), and that as [156] Mokuridar she is entitled to the rent according to the 'thika patta' from the 'thikadar.' The crops in the khalian to be divided between the tenants and Nema Charan Babu, vide the order in the Tenancy Act case."

It was against this order that Musammat Umatal Fatima obtained this Rule, on the ground that such a proceeding was without jurisdiction.

My. Jackson (Babu Dasarathi Sanyal and Babu Atul Chandra Dutt with him) shewed cause. There is nothing wrong about the Magistrate's order. He was bound to enquire into the questions involved in the dispute between the parties. In order to do this it was open to him to examine the records of the previous litigation which had passed between them. He came to the conclusion that the second party had no right to a share of the crops, and that the first party had ; and he made his order accordingly.

The order directing the division of the crops is not a part of the order made in the case. It is really an order made in another proceeding held by him under the Tenancy Act, in another capacity. That order is merely referred to in this, and is not intended to form a part of

it. The addition of this at the end would not vitiate an order which is otherwise right and proper.

Mr. Donogh (Babu Atulya Charan Bose and Babu Prokash Chandra Sarkar with him), for the petitioner. The Judgment of the Subordinate Judge in the execution case shows that each party was entitled to possession of eight annas of the mokarari of the villages. The effect of the execution proceedings was to carry out this arrangement. But the effect of the Deputy Magistrate's order is to give possession of the whole sixteen annas to the opposite party. The question of Nemaï Charan Banerjee's rights under the alleged thika patta was never determined by the Subordinate Judge. He expressly left the matter open, as he did not consider himself competent to deal with it. But the Deputy Magistrate has in effect decided it. He has assumed a jurisdiction which the Subordinate Judge refrained from assuming.

A Magistrate has no authority to assume the functions of a Civil Court : see *Daimulla Talukdar v. Maharlia Talukdar* (1) and [157] *Kamal Narain Adhikari v. Jotindra Mohan Roy* (2). The Magistrate has, moreover, made an order for the division of the grain stored in the 'khalian' between the objector and the tenants. It is contended that this is a separate order made under the Tenancy Act. That order itself was illegal : section 69 of the Bengal Tenancy Act is only applicable to cases of dispute between landlord and tenant, but not to disputes between rival landlords. The order is also irrevocable in its nature, for when once the grain is distributed it cannot be restored. It is in fact a perpetual injunction, which is unwarranted by law : see *Remjit Singh v. Luchman Prosad* (3) and *Tekait Kunj Behari v. Bhiko Singh* (4). For these reasons I submit, the order is made without jurisdiction and should be set aside.

PRATT and HANDLEY, JJ. We think this Rule must be made absolute. Admittedly the order for division of the crops between the tenants and Nemaï Charan Banerjee does not come within the purview of section 144 of the Criminal Procedure Code.

Moreover, the Deputy Magistrate has adjudicated upon the rights of Nemaï Charan under the thika patta which he was not justified in doing. He was bound to respect the finding and direction of the Subordinate Judge, and to leave Nemaï Charan to establish his title under the thika patta by a regular suit which we understand has been actually instituted ; thirdly, the order of the Deputy Magistrate instead of having force for only two months is of an irrevocable nature, and such as the law does not empower him to make. It is to be regretted that he did not follow the wise lead of Mr. Forrester and refuse to assume the functions of a Civil Court.

We direct that the Rule be made absolute.

Rule absolute.

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(1) (1900) I. L. R. 27 Cal. 918.
(2) (1904) 8 C. W. N. 376.

(3) (1902) 7 C. W. N. 140.
(4) (1900) 5 C. W. N. 829.