

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1895
August 14.

SURB NARAIN SINGH (2ND PARTY, PETITIONER) *v.* BIRJ MOHUN
THAKUR (1ST PARTY, OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1882), section 145—Dispute as to the right to realize rent—Share in joint undivided property—Possession, Order of Criminal Court as to.

A dispute as to the right to realize rent in respect, not of the whole sixteen annas, but only of an undivided share of any tract of land, is not a dispute concerning tangible immovable property within the meaning of section 145 of the Criminal Procedure Code.

Ramrunglees Dossee v. Gooroodoss Roy (1), and *Beni Narain v. Achary Nath* (2) approved of.

Pramatha Bhoosun Deb Roy v. Durga Churn Bhattacharjee (3), *Sarhananda Basu Mozumdar v. Pran Sunkar Roy Chowdhry* (4), and *Abhayessuri Debi v. Shidkessuri Debi* (5) distinguished.

THE matter in dispute in this case was the right to collect a four-anna share of the rent of a property which was undivided. The persons in possession of the remaining twelve-anna share were not parties to the case. The Magistrate found that the first party was in possession and made an order under section 145 of the Criminal Procedure Code maintaining him in possession. The petitioner, who was the second party, moved the High Court to set aside the order, on the ground that the subject of dispute being the right to realize rent in respect of an undivided four-anna share, section 145 of the Criminal Procedure Code was inapplicable to the case.

Mr. Hill, and Babu Jogesh Chunder Roy, appeared on behalf of the petitioners.

Babu Umakali Mookerji appeared on behalf of the opposite party.

Babu Umakali Mookerji.—The Magistrate acted properly in instituting proceedings and making an order under section 145 of the Criminal Procedure Code. The dispute was as to the right to collect rent, and it has been held that such a dispute is a dispute concerning tangible immovable property within the meaning of the

* Criminal Revision No. 286 of 1895 against the order passed by J. Jarbo, Esq., Deputy Magistrate of Monghyr, dated the 19th April 1895.

(1) 18 W. R., Cr., 36.

(2) I. L. R., 5 All., 607.

(3) I. L. R., 11 Calc., 413.

(4) I. L. R., 16 Calc., 627.

(5) I. L. R., 16 Calc., 513.

section. See *Pramatha Bhoosun Deb Roy v. Durga Churn Bhatta-charjee* (1), *Sarbananda Basu Mosumdar v. Pran Sunkar Roy Chowdry* (2) and *Abhayessuri Debi v. Shilhessuri Debi* (3). If it be held that section 145 was inapplicable to this case, still the order of the Magistrate would be good as one made under section 147 of the Code.

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Mr. Hill, contra.—In this case the subject-matter of dispute is the right to collect rent in respect of an undivided share. In the cases cited by the other side the parties claimed to be in possession of the entire land by collecting rent. The land in dispute must be capable of being defined by boundaries. The words “tangible immoveable property or the boundaries thereof” in the section, and its whole scope and object, point to that conclusion. All the persons interested in the undivided property are not before the Court, and it would be difficult to say that the parties to the case are claiming the same undivided share. See *Kamrungle Dasse v. Gooroodoss Roy* (4) and *Beni Nurain v. Acharj Nath* (5).

The following judgments were delivered by the Court (MACPHERSON and BANERJEE, JJ.) :—

MACPHERSON, J.—The matter in dispute in this case is the right to collect a four-anna share of the rent of a property which is undivided. Each of the two contending parties asserts a proprietary title to the share in question, and claims to be in possession by collecting from the tenants the rent payable in respect of it. The proprietors or the persons in possession of the remaining twelve-anna share are not parties to the case. The Magistrate has found that the first party is in possession, and has made an order under section 145 of the Criminal Procedure Code maintaining him in possession.

It is contended that this is not a dispute concerning tangible immoveable property, and that section 145 does not apply to the case. Also that the Magistrate’s decision rests really on his view of the rights of the parties.

It does not appear to be disputed that Har Bullabh Narain

(1) I. L. R., 11 Calc., 413.

(2) I. L. R., 15 Calc., 527.

(3) I. L. R., 16 Calc., 513.

(4) 18 W. R., Cr., 36.

(5) I. L. R., 5 All., 607.

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Singh is entitled to and in possession of an eight-anna share of the mouzals in question, and assuming that the Thakurs, the first party in the present case, are entitled to four annas of the remaining eight-annas under the decrees of 1869 and 1892, it is by no means clear how the case stands as regards the other four annas. The second party claims a four-anna share by purchase from Jhanki Prasad, who is said to be a brother-in-law of Lutchmi Prasad, in December 1894. Jhanki Prasad was a party to the suit of 1869, but not to the suit of 1892, and Lutchmi Prasad was a party to the suit of 1892 but not to the suit of 1869. Lutchmi Prasad appears originally to have claimed an eight-anna share by purchase from Lutchmi Narain many years ago, and Lutchmi Narain and his brother Kesat were the vendors of the Thakurs. It is very possible that the purchase of the second party from Jhanki Prasad in 1894 is set up to defeat the decree which the Thakurs obtained in 1892 against Lutchmi Prasad and Lutchmi Narain. But it is unnecessary to go into a history of the alleged rights of the parties, only some of whom are before us, as I am clearly of opinion that section 145 of the Code of Criminal Procedure cannot apply to this case. This Court has held in *Pramatha Bhoosun Deb Roy v. Durga Churn Bhattacharjee* (1), *Sarbananda Basu Mozumdar v. Pran Sunkar Roy Chowdry* (2) and *Abhayessuri Debi v. Shidhessuri Debi* (3), that a dispute as to the right to collect rent is a dispute concerning tangible immoveable property within the meaning of section 145, but in all those cases the contending parties claimed respectively to be in possession of the entire land which was the subject of dispute by collecting the entire rent payable therefor from the tenants who were in actual occupation. The land which was in dispute could be defined by boundaries; the dispute in effect was as to that land, but the parties claimed to be in possession, not by actual occupation, but by collecting the rent from the occupiers. I know of no case in which it has been held that a right to collect a share of the rent of an undivided property is a dispute concerning tangible immoveable property, and it is clear, I think, that it cannot be held to be so.

(1) I. L. R., 11 Calc., 413.

(2) I. L. R., 15 Calc., 527.

(3) I. L. R., 16 Calc., 513.

To bring a case under section 145, the property, which is the subject of dispute, must be capable of being accurately defined, the words are "tangible immoveable property or the boundaries thereof," and the whole scope and object of the section point to the same conclusion. The Magistrate, without reference to the rights of the parties, is to determine which party is in actual possession of the subject-matter of dispute, that is to say, the tangible immoveable property, and he is to maintain in possession the party found to be in such possession and forbid all disturbance of possession until he is evicted in due course of law.

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The dispute in the present case cannot be said to be a dispute concerning land within the meaning of the section. Neither party claims to be in possession of the whole of the land in respect of which the rent, a share of which is in dispute, is payable, nor of any definite portion of it, and the possession of the tenants is only partially their possession. The land for which the whole rent is payable is not the subject of dispute, and the dispute cannot be said to relate to any definite part of it.

Obviously also the application of section 145 to a case like this might give rise to considerable complication. All the persons interested in the undivided property are not before the Court, and it would be difficult to say, without at least going into the question of title, that the parties to the case are claiming the same four-anna share. To maintain them in possession of that share would not also necessarily exclude the other or put an end to the dispute.

We must, therefore, hold that section 145 does not apply to a case in which the dispute is as to the right to collect a share of the rent of an undivided property, and on that ground set aside the order maintaining the first party in possession.

The only cases in point which we have been able to find are *Ramrungle Doss v. Gooroodoss Roy* (1) and (under section 318 of the old Code) *Beni Narain v. Acharj Nath* (2). Both support the view now taken.

BANERJEE, J.—I am of the same opinion. The petitioner, who was the second party in a proceeding under section 145 of the Criminal Procedure Code in the Court below, asks us to

(1) 18 W. R., Cr., 36.

(2) I, L. R., 5 All., 607.

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set aside the order made under that section in favour of the first party, on the ground that the subject of dispute being the right to realize rent in respect of an undivided four-anna share of certain villages, section 145 of the Criminal Procedure Code was inapplicable to the case. Certain other grounds were also urged before us, but it is unnecessary to consider them, as our decision upon the ground mentioned above is sufficient for the disposal of the case.

The subject of dispute is an undivided four-anna share in two villages in the occupation of ryots, which the petitioner claims under a purchase from an alleged former proprietor, and the other side claims under a decree in a suit to which neither the second party nor his vendor was a party, each side asserting that he is in possession by receipt of rent in respect of the four-anna share. Now, no doubt, it has been held in several cases, and it may now be taken as settled law, that a dispute as to the right to collect rents is a dispute concerning tangible immoveable property, and that possession by receipt of rent is actual possession within the meaning of section 145 of the Code of Criminal Procedure. See *Pramatha Bhoosun Deb Roy v. Durga Churn Bhattacharjee* (1), *Sarbananda Basu Mozumdar v. Pran Sunkar Roy Chowdhry* (2), and *Abhayessuri Debi v. Shidhessuri Debi* (3). But the dispute in those cases was with reference to the entire sixteen annas of the rent, each party claiming to be in possession of the land by receipt of rent to the exclusion of his adversaries; and the question still remains whether a dispute as to the right to realize rent in respect, not of the whole sixteen annas, but only of an undivided share of any tract of land, is a dispute concerning tangible immoveable property within the meaning of section 145. I do not think that the cases cited determine, or were meant to determine, that question; and I am of opinion that, whether we look to the letter or to the spirit of section 145, the question must be answered in the negative.

The section speaks of a dispute "concerning any tangible immoveable property or the boundaries thereof," thereby clearly

(1) I. L. R., 11 Calc., 413.

(2) I. L. R., 15 Calc., 527.

(3) I. L. R., 16 Calc., 513.

indicating that the tangible immoveable property contemplated by the section is such as can have boundaries predicated of it, or, in other words, is such as is defined by certain boundaries. But an undivided share in any land can have no boundaries. Nor will it do to say that a dispute as to the right to realize rent in respect of an undivided share in any land is a dispute as to the whole of the land, which has defined boundaries and is tangible immoveable property, as that would make the entire sixteen annas interest in that land the subject of dispute, which is contrary to the case supposed.

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And if the letter of the law is opposed to the contention of the other side its spirit is still more so. The object of section 145 of the Code of Criminal Procedure is to put a stop to disputes likely to create a breach of the peace concerning any tangible immoveable property, by retaining in possession the party who is found to be in possession at the date of the institution of the proceedings, and by forbidding all disturbance of such possession, that is by maintaining the possession of one of the contending parties and keeping off the others. But no such order can be made in a case where the dispute relates only to an undivided share of some tangible immoveable property, and it may be, as very often is the case, that the contending parties are each in undisputed possession of a certain other undivided share in the same property. In the very case before us, the contention of the first party during the argument was that the ostensible second party on the record is only a *benami-dar* for Lutchmi Prasad, who is entitled to four annas but is unjustly trying to take possession of another four annas belonging to the first party. In such cases, no order made under section 145 can keep the party claiming a share in excess of what he admittedly has, out of possession of the tangible immoveable property, the only effect of the order being to regulate the mode in which the contending parties are to hold possession. That is a very different thing, and evidently section 145 does not contemplate the making of any such order. Again, the inefficacy of an order under section 145 in such a case to preserve peace will be evident from another consideration. Supposing that an order could be made under that section, declaring one or both of

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the parties to be entitled to retain possession, that is, to realize rents to the extent of certain shares ; if any of the ryots relinquish their holdings the order will be wholly inapplicable to the land relinquished, and will be ineffectual in preventing dispute. A further difficulty would arise if the contention on behalf of the first party be accepted. Suppose that each of two persons claims to be in *khas* or direct possession of an undivided four-anna share in certain tangible immoveable property, a large garden for instance: the fact of their claiming to be in *khas* possession cannot make section 145 less applicable to the case than it would have been if they had claimed to be in possession by receipt of rent from the tenants holding portions of the garden. Suppose, also, that each of them admits the right and possession of his rival in a six-anna share. In such a case, if the Magistrate finds from the mode in which fruits have been collected, and from other acts of possession, that one of the parties is in possession of the four annas in dispute, and he makes an order retaining him in possession of the same, can the order be of much real efficacy in preventing disputes which must break out afresh every time that a tree has to be planted or a tree or a branch dries up and is cut ? Or, if the Magistrate is unable to satisfy himself as to which party is in possession of the disputed four-anna share, is he to attach the property under section 146, and will such attachment stop dispute or will it not be a fresh source of dispute ? No doubt there may arise cases in which, though the dispute is with reference to undivided shares in immoveable property, the application of section 145 may not be without efficacy in preserving peace. Thus where the rival parties claim to be in possession of a certain undivided share and do not hold any undisputed share, and there is no dispute about the remaining share which is in the possession of a third party, the effect of an order under section 145 will be to exclude one of the contending parties altogether from the property, in the same way as if each had claimed the entire sixteen annas. But though this may sometimes be so there cannot be one construction of the section for some cases and a different one for others.

The view I take of the law is fully supported by the decision of this Court in *Ramrungleee Dossee v. Gooroodoss Roy* (1) and by

(1) 18 W. R., Cr., 36.

that of the Allahabad High Court in *Beni Narain v. Achary Nath* (1). 1895

Babu Umakali Mookerji for the opposite side contended that if section 145 of the Code of Criminal Procedure was inapplicable to this case, still the order made by the Court below might be supported as one made under section 147. I think this contention is untenable for two reasons: *First*, because the point for enquiry under section 147 is very different, being the existence of the right claimed and not the mere fact of possession as it is under section 145; and, *secondly*, because the right to possess an undivided share in any tangible immoveable property does not come within the words "the right to do anything in or upon" any such property.

For these reasons I agree with my learned colleague in thinking that this rule ought to be made absolute and the order of the lower Court set aside.

S. C. B.

Rule made absolute.

FULL BENCH REFERENCE.

Before Sir W. Comer Fetheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Norris, Mr. Justice Ghose, and Mr. Justice Beverley.

ALIMUDDIN KHAN (PLAINTIFF) *v.* HIRA LALL SEN AND OTHERS
(DEFENDANTS).^o

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Land Registration Act (Bengal Act VII of 1876), sections 78, 79 and 81—Suit for arrears of rent—Unregistered proprietor—Bengal Tenancy Act (VIII of 1885), sections 60, 61, 62—Act XXVII of 1860, section 2—Guardians and Wards Act (XL of 1858)—Succession Certificate Act (VII of 1889), section 4—Transfer of Property Act (IV of 1882), section 131.

The plaintiff sued the defendants in the Calcutta Small Cause Court for arrears of rent of certain premises in Calcutta, without having previously caused his name to be registered under the Land Registration Act (Bengal Act VII of 1876), but at the first hearing he produced the certificate of registration, which he had obtained since bringing the suit. The defendants objected that the suit should be dismissed by reason of section 78 of the Land Registration Act.

Held by the majority of the Full Bench, PRINSEP, NORRIS and GHOSE, JJ., (PETHERAM, C.J., and BEVERLEY, J., dissenting), that the certificate of registration having been produced when the suit came on for trial, the trial could proceed.

^o Reference to Full Bench in Small Cause Court Reference No. 9 of 1894.