Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Trevelyan, and Mr. Justice Rampini.

1893 Dec. 11.

BECHU SHEIKH, 2ND PARTY (PETITIONER), *v.* DEB KUMARI DASI AND ANOTHER, 1ST PARTY (OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1882), s. 145—"Parties concerned in dispute"—Death of one of original parties—Substitution of party without fresh proceeding under s. 145—Possession at time of institution of proceeding or at time of final order—Criminal Procedure Code, s. 537.

In a proceeding under s. 145 of the Code of Criminal Procedure recorded on 27th April 1893, *A.* and *B.* were respectively made first and second parties, and were ordered to put in statements of their claims to the land in dispute, which they accordingly did. *B* died on 24th May 1893. In his statement filed on the 31st May, *A.* disclaimed any interest in the land, but stated that his mother, *D. K.* (who had been a party concerned in the dispute which led to the original proceeding), was the owner and in possession of it. On 1st June *B. S.* applied to be substituted as a party in place of his father *B. D. K.* and *B. S.* were made parties without any fresh proceeding under s. 145 of the Code. The case was heard on 27th June and 7th July, and on 17th July the Magistrate found as regards the possession in favour of *D. K. Held* by PETHERAM, C.J., and TREVELYAN, J. (RAMPINI, J. dissenting), that since the possession to be enquired into was the possession at the time of the initiation of the proceedings, the words "parties concerned in the dispute" meant parties concerned at that time: there was no power in such a proceeding to introduce parties who were not concerned in the original dispute. No order could therefore be made against *B. S.*, and the proceedings were bad as against him.

Per RAMPINI, J.—The preliminary proceeding under s. 145 of the Code may, and in many cases must, partake of the character of a general citation to all the parties concerned in the dispute to appear, and it is not for the Magistrate to confine his final order as to possession to the parties whom he may have named in the preliminary proceeding. The Magistrate had power to substitute the name of *B. S.* for that of his father without commencing the proceedings *de novo*. The alteration in s. 145 of Act X of 1882, the present Criminal Procedure Code, of the language of s. 530 of the old Code, Act X of 1872, implies that the

* Criminal Revision No. 521 of 1893, against the order passed by Babu Jagge Bundho Khan, Deputy Magistrate of Faridpur, dated the 17th July 1893.

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Magistrate is to decide on the possession, not at the time of the initiation of the proceedings, but at the time of recording the evidence. If there was any error in the proceedings, it was one cured by s. 537 of the Code.

THE following were the facts of this case :—

In the year 1891 a dispute arose as to the possession of a piece of chur land bounded on the north by a *halut*, on the south by *belbharti* land, on the east by a piece of water known as Dhole Samudar, and on the west also by *belbharti* land within the jurisdiction of the Kotwali police in pergana Jelalpore in district Faridpur, and a proceeding under section 145 of the Code of Criminal Procedure was recorded by Babu Ganendra Nath Lahiri, one of the Deputy Magistrates at Faridpur. Khondkar Hasmat Ali *alias* Kokra Mia and others were made the 1st party and Deb Kumari Dasi and others the 2nd party, and on the 12th May 1891 an order was made under section 146 of the Code in respect of the said land. Badaruddin Sheikh, the father of the petitioner, Bechu Sheikh, had been in possession as a *jotedar* for a large number of years of land lying towards the east of the land which formed the subject of the said order under section 146 of the Code, and which land was gradually increasing in size by accretion, his original *jote* being towards the south of the said accreted land.

In 1892 the petitioner along with other men, who were mostly *burgaets* of Badaruddin Sheik, was arrested and prosecuted, on the complaint of the manager of the said attached land under section 146 on charges under sections 447 and 389 of the Penal Code, for taking paddy from the land lying towards the east of the attached land, the allegation of the prosecution being that land formed a part of the attached land; but the petitioner and the other accused were acquitted on the ground that though they had been arrested while on the land and actually taking away the paddy, the land was not a part of the attached land, and that they had been from before in possession of the same, and the cutting and taking away of the crop were not unlawful. In December 1892 one Abinash Chandra Sikdar and others having attempted to disturb the possession of the petitioner and his father, Badaruddin Sheikh, and there having been a dispute which might have led to a breach of the peace,

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proceedings under section 107 of the Code of Criminal Procedure were instituted, the said Abinash Chandra Sikdar being one of the parties, and Badaruddin was on the 31st January 1893 directed by the Deputy Magistrate to execute a bond with a surety to keep the peace for one year; but on application to the District Magistrate against the said order he was pleased to direct the order of the Deputy Magistrate to be cancelled, holding that Badaruddin was in possession of the land to the east of the attached land.

On the 27th April the Magistrate of the district recorded the following proceeding under section 145 of the Code:—

"Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under section 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute:—

First party—Abinash Chandra Sikdar of Kanaipur, station Faridpur.
Second party—Badaruddin of Kafura, station Faridpur."

In accordance with this order, Badaruddin, on 17th May 1893, filed a written statement in which he claimed to be in possession of the land in dispute. Badaruddin died on 24th May 1893. On the 31st May, Abinash Chandra filed a written statement in which he disclaimed any right to, or possession of, the land, but stated that his mother, Deb Kumari Dasi, was the owner and in possession of the same, and she was made a party and allowed to put in a written statement claiming the land and alleging her continued possession. On the same day one Bolaki Sheikh applied to be made a party to the proceedings, and he was also made a party and put in a written statement also claiming the land and alleging possession of it. On the 1st June Bechu Sheikh on his own petition was made a party in place of his father

Badaruddin. Deb Kumari, Bechu, and Bolaki Shaikh were made parties without any fresh proceedings under s. 145 of the Code.

On the 17th July the Deputy Magistrate made the following order, holding that Deb Kumari was entitled to possession:—

"Having analyzed and weighed the evidence adduced by the three parties, it appears to me clear that the first party is in possession of the disputed land through her tenants, and the second and third parties only laid claims, and false claims, as appears from the record of the case. I have also examined carefully the document filed by the parties, and find that on 26th Kartic 1296 B.S., the first party gave an *amulnama* to Kangali Kuran and others, and that on 29th Pous 1297 B.S., the above-named tenants executed a *kabuliat* to the first party. The first party, it seems to me, has been in possession of the land in dispute, and the second and third parties are trying to forcibly take possession of the same by setting up false claims. Under these circumstances I am fully satisfied of the actual possession of the first party. I therefore order that the first party, Deb Kumari Dasi and her tenants Kuran Kangali and others, would be entitled to retain possession of the land bounded as follows:—West by attached land, south by Kafura and Dariapur, east by Sib Nath Chowdhry's ghat, a line drawn from Sib Nath Chowdhry's ghat towards the north, and north by the chur land of Deb Kumari Dasi, until evicted therefrom by due course of law, and I forbid all disturbance of such possession until such eviction."

The *Advocate-General* (Sir *Charles Paul*) for the petitioner.

Mr. *C. P. Hill* and Babu *Girja Shunker Mozumdar* for Deb Kumari Dasi.

Babu *Nogendra Nath Mitter* for Bolaki Sheikh.

The *Advocate-General* (Sir *Charles Paul*) for the petitioner:—I submit no order can be made in favour of or against any person ed in the initiatory proceeding drawn up by the Magis- t. It is true my client asked to be made a party on the death of his father, but on a question of jurisdiction consent or waiver is immaterial. It has been so held in numerous cases. See *Regina* v. *Gibson* (1), *Queen* v. *Bhola Nath Sen* (2), *Government of Bengal* v. *Heera Lall Doss* (3), *Hossein Buksh* v. *Empress* (4). Section 537, Criminal Procedure Code, has no application in a matter of this description. The inquiry as to possession

(1) 16 Cox C. C., 181.
(2) I. L. R., 2 Calc., 23.
(3) 17 W. R. Cr., 39.
(4) I. L. R., 6 Calc., 96; 6 C. L. R., 52.

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must be limited to the time when the proceedings commenced, according to a series of decisions of this Court beginning with *In the matter of the petition of Pirthiram Chowdhry* (1) and ending with *Ambler* v. *Pushong* (2). I have on several occasions argued that the inquiry ought to be directed to the time when the Magistrate gives his decision, but this Court has not accepted that view.

I contend, further, that the Code does not provide for intervenors coming in in a proceeding of this nature. See *In the matter of the petition of Kunund Narain Bhoop* (3).

Mr. *C. P. Hill, contra* :—It has not been shown that the petitioner has been prejudiced. He applied to be made a party on the death of his father, and on his application being granted, he adduced evidence to prove his possession. No objection was taken before the Magistrate as to his want of jurisdiction, and as this is a proceeding of a *quasi* criminal nature, he ought to be precluded from taking this objection now. In any case, s. 537, Criminal Procedure Code, would cure the defect, if any. A proceeding under s. 145, Criminal Procedure Code, must be more or less in the nature of a general citation,* and there is authority for the proposition that intervenors have the right to come in. See *Annondo Moyee Debee* v. *Luchmun Pershad Gogo* (4). The contrary view might deprive a real owner from proving his claim and otherwise prejudicially affect him. The decision in *In the matter of the petition of Kunund Narain Bhoop* (3) was under s. 530 of the Code of 1872, the provisions of which were different from those of s. 145 of the present Code.

Then, as regards the scope of the inquiry, the Magistrate should consider who was in possession at the time of passing final orders, or at any rate at the time of recording evidence. The introduction of the word 'then' in the present Code shows this.

The case was heard before TREVELYAN and RAMPINI, JJ., who differed in opinion, and it was referred to the Chief Justice, who agreed with TREVELYAN, J.

* In this connection see the case of *Ram Chandra Dass* v. *Monohur Roy*, I. L. R., 21 Calc., 29, which however was not cited in argument.—Rep. note.

(1) 20 W. R. Cr., 51.
(2) I. L. R., 11 Calc., 365.
(3) I. L. R., 4 Calc., 650.
(4) 2 C. L. R., 264.

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The following judgments were delivered :—

TREVELYAN, J.—On the 26th of April 1893 the Magistrate of Faridpur recorded a proceeding under section 145, Criminal Procedure Code, regarding certain lands situate in his district.

This proceeding was as follows :—Whereas it appears from the report of the Sub-Inspector of the Kotwali police station, dated the 26th April 1893, that a dispute likely to cause a breach of the peace exists between the parties named below, with regard to the possession of a piece of newly-formed chur land in Dhole Samudar, measuring about 275 bighas, and bounded on the north by Dhole Samudar, east by Dhole Samudar, south by Dhole Samudar and Badaruddin's undisputed land, and west by the land attached by the Magistrate under section 146, Criminal Procedure Code, and that both parties claiming to be in possession and to have cultivated the land are about to use force and other unlawful means to enforce their respective claims, I therefore direct that the following persons be summoned to attend the Court of Babu J. B. Khan, Deputy Magistrate, on a day to be fixed by him, in person or by pleader, and to put in written statements of their respective claims as respects the fact of actual possession of the land in dispute :—

First party—Abinash Chandra Sirdar of Kanaipur, station Faridpur.

Second party.—Badaruddin of Kafura, station Faridpur.

Notices were issued in accordance with this proceeding.

On the 17th of May Badaruddin filed a written statement claiming the property in dispute.

On the 24th of May, Badaruddin died.

On the 31st May, Abinash Chandra Sikdar filed a written statement disclaiming any interest in the land in dispute, and asserting that his mother, Deb Kumari Dasi, was the owner and in possession thereof.

On the same day Deb Kumari put in a written statement claiming the property and disputing the right of the second party.

On the 1st of June Sheikh Bechu, the son of Badaruddin, presented a petition asking to be substituted in the proceeding in the place of his father. An order was made accordingly, but no fresh proceeding was recorded. Evidence was taken, and on the 17th

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of July 1893, the Deputy Magistrate who tried the case made an order in favour of the first party, who is described in his order as "Deb Kumari Dasi, mother of Abinash Chandra Sikdar." The second party was described in such order as "Badaruddin Sheikh, deceased, and his son, Bechu Sheikh."

Bechu Sheikh has applied to us to set aside this order on two grounds. The first ground is, that the boundaries given in the order do not accord with those given in the order initiating proceedings. As to this it is agreed that, if the order is in other respects good, it may be amended by altering the boundaries to those mentioned in the order initiating proceedings.

The second ground is, that as Bechu Sheikh was not mentioned in the order initiating proceedings, and, his father being then alive, could not have then been concerned in the dispute, no order could be made against him without a fresh order initiating proceedings being drawn up.

It is contended that his application to be made a party cannot give jurisdiction, and that he is competent to take this objection.

It is also objected that the substitution of Deb Kumari for her son vitiates the final order. As Deb Kumari was concerned in the dispute which led to the original proceeding, and was actually mentioned in the proceeding, this objection is not, in my opinion, a valid one. I think, however, that it is clear that no order can be made against Bechu Sheikh. The cases beginning so far back as *In the matter of the petition of Pirthiram Chowdhry* (1) under the old Code and ending with *Ambler* v. *Pushong* (2), and the cases which have followed it under the new Code, show that the possession to be inquired into is the possession at the time of the initiation of the proceeding. As far as I know, the Court has always taken this view of the section, and in a very recent case Mr. Justice Prinsep and I, when invited to do so by the Advocate-General, declined to refer the question to a Full Bench. These cases, I think, show clearly that the Magistrate's inquiry must be devoted only to the state of affairs in existence at the time of the initiation of the proceedings. The reasoning which led to these decisions would equally show that the words "parties concerned in such dispute" must mean parties concerned at the time of the initiation of the proceedings.

(1) 20 W. R. Cr., 51. (2) I. L. R., 11 Calc., 365.

There is no power to substitute father for son, or in any way to introduce parties who were not concerned in the original dispute. In civil cases the Courts have no power, apart from statutory provisions, to revive suits on the death of parties. Much less would they have the power in cases conducted under a criminal procedure. If the power to substitute be held to apply, there seems to be no reason why all the provisions of the Civil Procedure Code should not equally apply, and if these powers of Civil Courts are to be here introduced, they might equally apply to the cases of offences.

Authority is not wanting for the conclusion at which I have arrived. In *In the matter of the petition of Kunund Narain Bhoop* (1), Mr. Justice Ainslie says:—"There is no provision in the Criminal Procedure Code for allowing an intervenor to come in in the middle of proceedings held by a Magistrate under section 530. As to such third party, the Magistrate has no information of any dispute likely to lead to a breach of the peace between him and any one else, and, therefore, the only ground upon which he can enter upon an inquiry as to the possession of such third party at the date of the commencement of the pending proceedings, is wanting. As to anything of later date he may take such steps in a separate proceeding as circumstances call for and the law allows."

We were referred to a decision of Mr. Justice Markby and Mr. Justice Prinsep, in *Annondo Moyee Debee* v. *Luchmun Pershad Gogo* (2), as enunciating a contrary proposition. That case is not in the least opposed to the case of *Kunund Narain Bhoop*. No person was there substituted for a deceased person. There is merely an *obiter dictum* that it would have been probably more regular to have postponed the case so as to have enabled some representative of the deceased to appear: at the most this is an *obiter dictum* in a case which was not argued and in which no one appeared.

I am equally clear with regard to the other question argued. I do not think Bechu Sheikh's action in any way justified the order made against him.

(1) I. L. R., 4 Calc., 650, at p. 654.
(2) 2 C. L. R., 264.

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It has been frequently held in this Court that a Magistrate has no jurisdiction under section 145 unless there be in existence an initiatory proceeding in compliance with the law showing that there are grounds for supposing that a dispute exists, and that such dispute is likely to cause a breach of the peace.

As Mr. Justice Ainslie points out in the case of *Kunund Narain Bhoop*, at page 652 of the report: "In many cases it has been held that a proceeding such as is required by section 530 (of the old Code) is a *necessary preliminary*." In the case of *Kasi Kishor Roy* v. *Tarini Kant Lahiri* (1), in dealing with the Act of 1861, Mr. Justice Norman says: "Now, it has been pointed out in many cases before this Court, more particularly in the case of *Dewan Elahi Newaz Khan* v. *Sulurunnissa* (2), that it is a condition precedent to the powers of a Magistrate to take up and decide a case under section 318, that he should decide judicially that he is satisfied that a dispute likely to induce a breach of the peace exists, and that he should record a proceeding stating the grounds of his being so satisfied. Unless, and until, he shall have decided that preliminary matter, he has no jurisdiction to take up the case and decide the question of possession under section 318": see also *In the matter of the petition of Kishore Mohan Roy* (3). There is no practical difference on this question between the Criminal Procedure Code of 1861 and the present one. As far as I am aware, this has been always held to be a question of jurisdiction. That being so, jurisdiction cannot be given by consent, waiver, or application.

It might be equally argued that a person who had not committed an offence could ask to be tried in the place of one who had committed it but had died; where the dispute is as to property it might suit a person who was charged and wanted to be so tried.

I do not think that the Magistrate had any power to decide any question with regard to a person who was not concerned in the dispute at the time of the initiation of the proceeding, and I would make this rule absolute.

As my learned colleague differs from me, the case must be referred to a third Judge.

(1) 3 B. L. R. A. Cr., 76, at p. 78. (2) 5 W. R. Cr., 14.

(3) 19 W. R. Cr., 10.

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RAMPINI, J.—The rule in this case was obtained by the petitioner Sheikh Bechu on two grounds: (1) that the land dealt with in the final order was not the land in respect of which the initiatory proceeding was drawn up; (2) that the parties with regard to whom the final order was made were not the parties mentioned in the Magistrate's preliminary proceeding.

My learned colleague and I agreed that the first of these objections may be met by altering the order of the Magistrate declaring possession and by restricting it to the land described in his preliminary proceeding.

The circumstances under which Deb Kumari and the petitioner became parties to the proceeding are detailed in my learned colleague's judgment, and I need not recapitulate them. I would only add that there was a third party, named Bolaki, made a party to the proceedings, and that the evidence was recorded by the Magistrate on the 27th June and 7th July, and his final order was passed on the 17th July.

Now, it has been said that no order under section 145, Criminal Procedure Code, can be made in favour of, or against, any person not named in the initiatory proceeding drawn up by the Magistrate. I am unable to agree to this. No grounds for such a contention are to be found in the provisions of section 145. The section is worded in very general terms. All that would seem to be necessary to give the Magistrate jurisdiction is that he should be satisfied that a dispute likely to cause a breach of the peace exists regarding certain tangible immoveable property or the boundaries thereof; and his duty is then to make an order in writing, stating the grounds of his being so satisfied, and calling on the parties concerned to put in written statements of their respective claims as to actual possession. The section does not say that the Magistrate must in his proceeding name or describe the parties concerned in the dispute in any way, and it seems to me that it would be unreasonable to expect a Magistrate to do so. In most cases he does not know who the parties concerned in the dispute are until they appear before him. He has no means of knowing this. All he knows, and all I think he need concern himself with, is the fact of the dispute and the likelihood of a breach of the peace; and it is for the parties who claim possession

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to come forward and represent to the Magistrate their claims to the land. In short, I am of opinion that the preliminary proceeding referred to in section 145 may, and in many cases must necessarily, partake of the character of a general citation to the parties concerned in the dispute to appear before him; and that it is not necessary for the Magistrate to confine his final order to the parties whom by way of supererogation he may have named in his preliminary proceeding.

To hold otherwise would seem to me to lead to this, that any mistake made by the Magistrate in the preliminary proceeding about matters of which he can know nothing until informed by the parties, cannot be corrected by him, and must vitiate the entire proceedings.

No doubt the view that the preliminary proceeding is of the nature of a general citation is opposed to that expressed by Mr. Justice Ainslie in the case of *In the matter of the petition of Kunund Naram Bhoop* (1), but it will be observed that Mr. Justice Ainslie's judgment refers to the provisions of section 530 of Act X of 1872, the provisions of which are different from those of section 145 of Act X of 1882. In fact, Mr. Justice Ainslie's judgment may be regarded as an authority in support of the view above expressed by me; for Mr. Justice Ainslie's contention that the Magistrate's order must be confined to the persons named in the preliminary proceeding is to some extent based on the language of section 531 of the old Code, which was to the effect that "if the Magistrate decides that *neither of the parties* is in possession, &c." Mr. Justice Ainslie says:—"Had it been intended that the declaration should operate as universally binding, the words would have been that no party is in possession." But the terms of the section referred to by Ainslie, J. have now been altered, perhaps to obviate this objection of Mr. Justice Ainslie's, and to show that the declaration or citation is intended to be a general one. At all events, the words "neither party is in possession, &c.," have now disappeared. The words of section 146 are, "if the Magistrate decides that *none of the parties* is then in such possession." In other words, the terms of this section are now just such as, according to Mr. Justice Ainslie, would have led him to the conclusion that an

(1) I. L. R., 4 Calc., 650.

order under section 530 or 145 need not be confined to the parties named in the preliminary proceeding.

It follows that in this case, on the view of the provisions of section 145 which I take, neither Deb Kumari nor Sheikh Bechu can be regarded as an "intervenor." They are, in my opinion, to be regarded as parties concerned in the dispute who appeared before the Magistrate as soon as they learned that their interests were affected, and before any evidence had been recorded by him. Bechu, the petitioner, appeared on the 1st June, his father having died on the 24th May.

Now, it has been said that there is no provision for the substitution of Bechu's name in the place of his father. But (i) no procedure of any kind is prescribed in section 145, or in any section of Chapter XII of the Criminal Procedure Code; if a Magistrate is bound to confine himself to the procedure prescribed by section 145 or Chapter XII, it follows that he can dispose of no case under that section or chapter, there being no procedure at all prescribed, *e.g.*, for the issue of notices, the recording of evidence, the summoning of witnesses, or for any step the Magistrate may take in such cases; (ii) though the provisions of the Civil Procedure Code may not be applicable to proceedings under section 145, the subject of such a proceeding is one of a *quasi* civil nature. On the other hand, a proceeding under section 145 is not a criminal trial. There is no "accused." No "offence" has been committed. Therefore, the provisions of the Criminal Procedure Code in their entirety cannot be applicable to such a proceeding. In such a proceeding, it seems to me, much must necessarily be left to the discretion of the Magistrate. The Legislature appears to have intentionally left it unfettered, and it is our duty to give effect to the intentions of the Legislature; (iii) the cases of *Annondo Moyee Debee* v. *Luchmun Pershad Gogo* (1) and *Jitbahan* v. *Bansrup Dhobi* (2) show that on the death of a party to a section 145 proceeding, his heir may be substituted in his stead, and that it is not necessary to commence the proceedings *de novo*.

Then, as to the time which the Magistrate is to have regard to when deciding as to the actual possession of the land, the section

(1) 2 C. L. R., 264. (2) 6 C. L. R., 193.

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says the Magistrate is, if possible, "to decide which of the parties is *then* in possession" of the subject of dispute. In this respect the wording of the section is altered from that of section 530, Act X of 1872. This, therefore, seems to imply that the Magistrate is to consider who is in possession at the time of recording the evidence. But even if the rulings which lay down that the possession which a Magistrate is to find and support is possession at the time of the institution of the proceedings, and not possession at the time of his passing final orders in the matter, be followed, I do not see how this affects this case. Nobody says that there has been any change of possession between the opposing parties, and the rulings cited all refer to such a change of, or such a dispute as to, possession. According to Sheikh Bechu, the petitioner, he and his father have all along been in possession. On the death of his father, he succeeded him as his heir, and according to the civil law he is entitled to regard his father's possession as his own. There has in the case of Bechu been no such change of possession as the rulings cited in my learned colleague's judgment refer to. However this may be, whether there has been a change of possession as regards Bechu, there has been none as regards Deb Kumari, whom the Magistrate has held to have been in possession all along. On the Magistrate's finding she was in possession at the time of the initiation of the proceedings, at the time of the recording of the evidence, and at the time of the Magistrate's final order. The proceedings are therefore quite regular as far as Deb Kumari is concerned. Whether or not the objection would have had any force if the Magistrate's final order had been in favour of Bechu, it would seem to me to have none, when it is Deb Kumari whose possession of the land has been declared.

Then, the objection as to the change of parties is one of a highly technical character and one entirely devoid of merit. If it be said that Deb Kumari has wrongly been made a party to the proceedings, then Bechu, the petitioner, is in exactly the same position, or a worse one. If it be Bechu who, it is contended, should not have been made a party, then it is to be remembered he was made a party at his own request. He appeared voluntarily. When he appeared, he raised no objection to the proceedings. As already pointed out, both Deb Kumari and Bechu were made parties before

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any evidence was recorded, and Bechu adduced his evidence and fought the case against Deb Kumari to the best of his ability. It is only after the case has on the evidence been decided against him that he comes forward and impugns their regularity. He is, or at all events in my opinion ought to be, estopped from now raising the plea he does.

Finally, the provisions of section 537, Criminal Procedure Code, are in my opinion applicable to the case. The objection as to the change of parties does not affect the merits of the case. It has not been contended before us that it does so. No failure of justice has been said, or appears, to have taken place. I therefore think that the order of the Magistrate should be altered so as to restrict it to the land described in the preliminary proceeding, and that in other respects the rule should be discharged.

PETHERAM, C.J.—I agree with Mr. Justice Trevelyan, and for the reasons given by him, that this rule should be made absolute. Mr. Justice Rampini thinks that an order of a Magistrate requiring the parties concerned in the dispute to attend his Court and to put in written statements is in the nature of a general citation to all parties concerned in the dispute to appear before him, and that when such an order has been made, the Magistrate may deal with the possession of any person who may appear before him, or indeed, as I think must be the case if this is the correct view of the decision, any person concerned in the dispute, whether such person does appear before him or not, and though no order has ever been made upon him to attend, and though he may never have heard of the order at all. In this view of the section I am unable to agree. As far as I can learn, such a construction has never been acted upon down to the present time, and I do not think it is justified by the words of the section itself.

It is, I think, clear that by "parties concerned in such dispute" in the 1st paragraph of the section, parties claiming to be in possession of the subject-matter of the dispute are intended, inasmuch as what they are required to do is to put in written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and what the Magistrate is empowered to do is to find whether any, and which, of the parties is then

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in possession of the land in dispute. Mr. Justice Rampini thinks that the word "parties" includes any person who up to the time of the commencement of the inquiry, that is, before any of the witnesses are called, sets up a claim to be in possession, and that it is not confined to the individuals to whom the order was addressed by name; but I cannot think that that is the case, as the last paragraph of the section provides that any party so required to attend shall have certain rights, and the language there used seems to me to indicate conclusively that the Legislature were dealing with *individuals* who had been required to attend by the order of the Magistrate, *i.e.*, the persons or parties to whom it was addressed, and not to any member of the public whom it might concern.

Mr. Hill, in showing cause against the rule before me, contended that the order made upon the petition of Bechu, the present applicant, that he should be made a party to the proceedings in the place of his father, was in effect an order made upon him under the section to attend the Court and put in his written statement, and that if there was any irregularity, it was one which had caused no miscarriage of justice and was cured by section 537 of the Code. As to this I think it enough to say that the order of the Magistrate calling on a party to attend and put in a written statement rests on his finding that there exists at the time a dispute likely to cause a breach of the peace, and that at the time to which both the Police report and the finding by the Magistrate upon it related, Bechu was not a person who claimed to be interested in the subject-matter of the dispute at all, and so was not a person who on the basis of that finding could be required to attend the Court of the Magistrate to put in a written statement.

Rule absolute.