

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

KOCHAI FAKIR

v.

ROMESH CHANDRA BISWAS.*

1908

January 29.

Criminal Procedure Code (Act V of 1908) s. 145—Possession—Dispute concerning land—Jurisdiction of Magistrate—Proper question for determination—Actual possession—Decision based not on oral evidence, but on settlement proceedings.

The only question, which a Magistrate has to decide in a proceeding under s. 145 of the Criminal Procedure Code is, as to who is in actual possession of the disputed land.

Where the Magistrate, while holding that the oral evidence of actual possession was in favour of one party, proceeded to discuss and decide as to the legal effect, under the Bengal Survey Act, of a recent order of an Assistant Settlement Officer, passed in an inquiry into a boundary dispute between the parties, awarding possession to the opposite party, and also as to the maintainability under the circumstances of proceedings under s. 145 of the Code, the civil remedies available to the defeated party, the legality of the above order and his power to set the same aside, and directed the first party to be maintained in possession in accordance with such order:—

Held, that the Magistrate had acted without jurisdiction in going into these matters instead of determining the question of actual possession on the evidence in the case.

Upon the receipt of a report from the Sub-Inspector of Kotwali thana, dated the 18th May 1907, the Deputy Magistrate of Faridpur drew up a proceeding under s. 145 of the Code, on the 21st instant, making Romesh Chandra Biswas the first party, and the petitioners the second party.

It appeared that one Ataur Rahman, an Assistant Settlement Officer, had held an inquiry under the Bengal Survey Act, (Bengal Act V of 1875), and by his order, dated the 3rd March 1907, had awarded possession to the first party, and that the order was upheld by the Settlement Officer on the 4th September 1907.

* Criminal Revision No. 6 of 1908 against the order of Asaduzzaman, Deputy Magistrate of Faridpur, dated the 5th December, 1907.

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The petitioner did not appeal against these orders to the Commissioner of the Division.

An amin went to the spot, measured the land and demarcated the boundary line with bamboo pegs.

The parties appeared before the Deputy Magistrate and produced their witnesses. The Magistrate found that the oral evidence as to actual possession was in favour of the petitioner, but he held that this did not conclude the case, having regard to the order of the Assistant Settlement Officer. He then framed four "issues" viz., (i) what is the effect of the order of the Assistant Settlement Officer? (ii) is the present proceeding at all maintainable? (iii) what remedy is the second party entitled to? and (iv) even if the order were not in accordance with law, has this Court any authority to set it aside?

On the first question he held that under s. 41 of the Bengal Survey Act the order had the force of a Civil Court decree and was in force at the date of the initiation of the s. 145 proceedings. As to the second he thought that the Magistrate had no jurisdiction to take proceedings under s. 107 or s. 145 of the Code in respect of land disputes in areas under settlement, having regard to Reg. VII of 1822, s. 34, Reg. IV of 1828, s. 4, and s. 42 of the Bengal Survey Act. On the third point he was of opinion that the petitioner had not exercised his right of appeal, and he discussed his remedy with reference to ss. 58, 59 and 62 of the Act. As to the last question he found that the order was not in accordance with law, but he held that a Criminal Court was, nevertheless, bound by it.

He, therefore, on the 5th December 1907, directed the first party to be maintained in possession, following the order of the Assistant Settlement Officer.

*Mr. Stokes and Babu Bidhu Bhusan Ganguli, for the petitioner.
 Babu Promotho Nath Sen and Babu Bimal Chandra Das Gupta,
 for the opposite party.*

RAMPINI AND SHARFUDDIN JJ. This is a Rule calling upon the District Magistrate of Faridpur and also upon the opposite

party to show cause why the order of the Deputy Magistrate, dated the 5th December 1907, should not be set aside.

The order complained against is one passed by Moulvi Asaduzzaman, Deputy Magistrate, first class, ostensibly under section 145 of the Criminal Procedure Code.

It has been impugned by the second party, the petitioner before us, on the ground that it was passed without jurisdiction.

We consider that this case is another illustration of the way in which the provisions of section 145 of the Code of Criminal Procedure are abused by litigants in the mofussil and misunderstood by Magistrates, who usurp jurisdiction and decide questions of a civil nature. The learned Deputy Magistrate in this case has not enquired into the question of actual possession, as he was bound to do under the provisions of section 145. He has devoted a large amount of time and trouble to discussing questions, which are entirely foreign to the enquiry, which he had to make. He deals with this proceeding, as if it were a civil case. He has framed four "issues" for his consideration and decision. He says:—"These facts suggest the following important issues and I would accordingly proceed to decide them, "(i) what is the effect of the order of Moulvi Ataur Rahman A. S. O ? (ii) is the present proceeding at all maintainable ? (iii) what remedy is the second party entitled to ? (iv) even if the order of the A. S. O. were not in accordance with law, has this Court any authority to set it aside ?

Then he goes on to point out that the order of the Settlement Officer evidently has the force of a Civil Court's decree, and was so in effect, when these proceedings under section 145 were instituted. And he adds:—"I am of opinion that, having regard to the provisions of section 34 of Regulation VII of 1822 and section 4 of Regulation IV of 1828 and section 42 of the Survey Act, Magistrates should not take proceedings under section 145 or section 107 of the Criminal Procedure Code regarding land disputes in areas under settlement. The jurisdiction evidently belongs to the Settlement Officer, and the only question is whether the same provisions would apply when the settlement is under the Bengal Tenancy Act. I am not free from doubt on the point, but it would probably be better both for the Settlement

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Department and the Magistrate, if an authoritative decision on the point could be had, as there is now hardly any decided case bearing on the point."

Then he winds up as follows:—"Viewing the case as a whole, I am for giving effect to the order of the settlement department for the reasons stated above, and I accordingly direct that the first party be maintained in possession of the land in dispute, until evicted therefrom in due course of law."

We do not consider it advisable for us to comply with the suggestion of the learned Deputy Magistrate that we should decide the point, which he has set forth in the above passage. The only question he had to decide in this case was that, which is laid down in section 145 of the Criminal Procedure Code, namely, who was in actual possession of the land in dispute. He has not found that and, therefore, his order is entirely without jurisdiction. The only passage in his judgment in which he deals with the question of actual possession is the one, in which he says:—

"The oral evidence as to actual possession is certainly in favour of the second party, and I may say has been corroborated by the witnesses of the first party."

After coming to this opinion he proceeds in his final order to declare the first party to be in possession, whereas he has distinctly said that the oral evidence is that the second party is in possession.

The order complained against is, therefore, without jurisdiction.

We make this Rule absolute and set it aside.

Rule absolute.

E. H. M.