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The respondents must pay the costs of the hearing on the preliminary issues in the District Court, and the costs of the appeal to the Judicial Commissioner, but there will be no order as to the costs of this appeal.

Appeal allowed and case remanded.

Solicitor for the appellants : *Edward Dalgado.*
Solicitors for the respondents : *T. L. Wilson & Co.*
J. V. W.

CIMINAL REVISION.

Before Harington and Coxe JJ.

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April 10

BASANTA KUMARI DASI

v.

MAHESH CHANDRA LAHA.

Dispute concerning land—Ijmali property—Claim by co-sharers to exclusive possession of specific plots—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145.

A Magistrate has jurisdiction, under s. 145 of the Criminal Procedure Code, in the case of *ijmali* land, where each party claims to be in exclusive possession of specific portions of the same.

Under s. 145 the question for the Magistrate's decision is not whether the parties have a title to possession jointly, or a title to possession separately, but whether either of them is in actual possession. Co-sharers in an *ijmali* estate may by express or tacit arrangement be each separately in actual possession of specific or demarcated portions of the same, and s. 145 applies to such a case.

When, however, the parties are found to be not constructively but actually in joint possession, the section has no application.

° Criminal Revision No. 58 of 1913, against the order of L. B. Dass, Deputy Magistrate of Dacca, dated Dec. 2, 1912.

Makhan Lal Roy v. *Barada Kanta Roy* (1) explained and distinguished.

Per HARINGTON J. Where a party alleges exclusive possession and acquiesces in the hearing of the case on that footing, he cannot afterwards be heard to say that the whole proceedings are bad because the land is *ijmali*.

On the report of the Sub-Inspector of thana Shabhar, the Additional District Magistrate of Dacca drew up a proceeding under s. 145 of the Criminal Procedure Code, on the 30th August, 1912, between Mohesh Chandra Laha and others as the first, and Basanta Kumari Dasi as the second, party. It appeared that the parties were members of a wealthy family in the district, consisting of three branches, living in the family dwelling house, each, however, occupying specific portions thereof. In the zenana quarters there were two small plots of open space generally used for storing fuel and for other domestic purposes, and each party claimed to be in exclusive possession of the same. On the 11th September the case was transferred to Babu L. B. Dass, Deputy Magistrate of Dacca, who, after holding an enquiry, declared the first party to be entitled to the possession of the two plots until evicted therefrom in due course of law, and ordered possession to be delivered to him accordingly. The second party thereupon moved the High Court and obtained the present Rule.

Babu Harendra Narayan Mitter (with him *Babu Bhudeb Chandra Roy*), in support of the rule. The parties are undivided members of a Hindu joint family and live in their joint family house. The disputed plots are contained in the compound of the dwelling house. Each party is entitled to joint possession of these plots and s. 145 does not apply: *Makhan Lal*

(1) (1906) 11 C. W. N. 512.

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Roy v. *Barada Kanta Roy* (1). The words "evicted" in clause (*6*) of s. 145 and "ousted" in Schedule V, Form XXII are not applicable to *ijmali* property. The parties having joint rights the one cannot bring a suit to eject the other.

Mr. P. L. Roy (with him *Babu Atulya Charan Bose* and *Babu Ramani Mohan Chatterjee*), showed cause. The case cited is distinguishable. The Magistrate has to enquire only into the fact of "*actual* possession," irrespective of the rights of the parties to possession. If co-sharers are in actual possession of specific portions of *iimali* land, the Magistrate has jurisdiction under the section : *Guru Das Kundu Chowdhry* v. *Kedar Nath Kundu Chowdhry* (2).

Cur. adv. vult.

HARINGTON J. This Rule was issued at the instance of the second party in a proceeding under section 145 calling upon the District Magistrate and the opposite party to show cause why the order made under that section should not be set aside having regard to the case of *Makhan Lal Roy* v. *Barada Kanta Roy* (1).

The facts are that the first and second party are members of the same family and reside in the *ijmali* family dwelling house, each occupying a specific portion of the house.

The dispute which has given rise to a likelihood of a breach of the peace relates to two plots, Nos. 1 and 2, which are within the premises, and are bounded as shown in the proceedings.

Each party claims to be in possession of the plots in dispute to the exclusion of the other.

For the petitioner it is contended on the authority of *Makhan Lal Roy* v. *Barada Kanta Roy* (1), that,

(1) (1906) 11 C. W. N. 512. (2) (1911) I. L. R. 38 Calc. 889.

as the land is *iimali*, no order can be made under section 145.

For the respondent it is argued that an order can be made under the section, if it be found that either party is in actual possession of the disputed plots, whether the land is *iimali* or not.

The case relied on by the petitioner was one which related to a dispute as to some huts which had been erected on land in the joint possession of the parties. The huts had been recently built. The judgment can be supported on the ground that the Court has found that the huts were built on land which was not in the exclusive possession of either party. If that be so, and the huts were not in possession of either party to the exclusion of the other, the order under section 145 could not be made.

I am not prepared to hold that the decision involves the wider proposition contended for by the learned vakil for the petitioner. No doubt there are expressions in the judgment which support the proposition, but it is not necessary as a ground for the decision.

The learned vakil argued that the section was only applicable where the parties had conflicting titles to the land in dispute, and that sub-section (*6*) providing that the party in possession was to retain possession until "evicted" in due course of law was conclusive to show that no order could be made when the parties to the dispute were jointly entitled to the land, as one joint tenant could not evict another; the party out of possession, therefore, would be for ever debarred from getting possession of the land to which he was entitled jointly with the other party.

In my opinion this argument is a fallacious one. No doubt the party out of possession could not maintain ejectment against his co-owner in possession. If

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he sued claiming a declaration of his title and joint possession, and obtained a decree, he would not under that decree be able to evict the other party. But if he sued for partition, established his title to a share of the property in dispute, got his share partitioned by metes and bounds and adjudged to him, that would, in my opinion, amount to an eviction of the other party in due course of law from that portion of the lands in dispute to which the plaintiff was found entitled.

It is a fallacy, therefore, to say that sub-section (*6*) makes it impossible to apply section 145 in cases where the parties are jointly entitled to the land because a joint owner out of possession cannot evict a joint owner in possession. He can evict him from his share of the lands not by a suit in ejectment but by a suit for partition.

I am disposed to think that sub-section (*6*) was purposely drafted, as it is, so as to make it impossible for a joint owner out of possession to get put in under a decree giving him joint possession, as such a proceeding would most probably bring about the very breach of the peace which section 145 is designed to prevent.

On reading the terms of section 145 I think it is clear that the question whether the parties have a title to possession jointly, or have a title to possession separately, cannot be considered. Under sub-section (*1*) the Magistrate is to call on the parties to put in their claim "as respects the fact of actual possession", and the Magistrate, without reference to the claims of such parties to a right to possess the subject in dispute . . . . . shall . . . . . if possible, decide whether any and which of the parties was at the date of the order "in such possession of the said subject." "Such possession" can only mean the "actual possession" referred to in sub-section (*1*).

The question for the Magistrate is, therefore, actual possession, and actual possession only. Co-sharers in an estate may by express or tacit arrangement be each separately in actual possession of specified and demarcated portions of the estate. What is there then to prevent the application of the section? How can the question whether the land is *ijmali* or partitioned affect the question, who is in actual possession of it? Take a hypothetical case: Suppose A and B are jointly entitled to possession of a defined plot of ground. A alleges he is in possession to the exclusion of B. B alleges he is in possession. They are entitled to joint possession: if the Magistrate finds that both A and B are actually enjoying the joint possession to which they are entitled, then, of course, he cannot make an order under section 145 in favour of one against the other; but if he finds that one is in actual possession and the other not in possession, I cannot see why he should not make an order under section 145. There is nothing in the form of the order given in Schedule V, Form XXII, rendering it inapplicable.

In short, in my view, the question whether the parties have a joint title to the land is one which the Magistrate cannot investigate under section 145. The only question for him is whether either party has actual possession, and if he finds that one party has actual possession of a defined area, and the other party has not, he can make an order irrespective of the titles of the parties. In my opinion, therefore, the circumstance that the lands were *ijmali* does not affect the case.

There is another reason why this ground should not be allowed to prevail. The objection was not taken by the petitioner at the outset. Having alleged an exclusive possession, and acquiesced in the

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hearing of the case on that footing, she cannot now be heard to say that the whole proceedings were bad because the land is *ijmali*.

But notwithstanding my view on the points argued, I felt at first some difficulty in maintaining the order. The Magistrate has contrived to word it in such a way as to look as though he had considered title to possession, instead of actual possession. But a perusal of the body of the judgment shows that he directed his mind to the fact of actual possession: he finds in express terms actual possession, and that is sufficient, notwithstanding the somewhat unfortunate wording of the last paragraph.

The Magistrate's attention is directed to Schedule V, Form XXII, which shows how an order ought to run.

The Rule must be discharged.

COXE J. This was a Rule to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside having regard to the decision in the case of *Makhan Lal Roy* v. *Barada Kanta Roy* (1).

So far as the facts alone are concerned, this case and the case cited seem to me indistinguishable. In both cases it was common ground between the parties, and it was found by the Magistrate that the lands in dispute were not in the joint possession of the parties. In both cases, however, it was found that the land in dispute belonged to the family dwelling house of the parties, and in the case cited the learned Judges held that section 145 did not apply to such a case. Perhaps I may say, as one of the Judges that issued this Rule, that we granted it in order that the case cited might be carefully reconsidered.

(1) (1906) 11 C. W. N. 512.

Its importance is beyond question, as no property is so apt to occasion a breach of the peace as the property of an undivided or incompletely divided family.

Now, I fully agree that when property is found as a fact to be, not constructively, but actually in the joint possession of the parties, the section cannot apply. An order for joint possession would obviously rather encourage than prevent a breach of the peace But when it is found that the property as a fact is not actually in joint possession, it appears to me immaterial whether the parties have a joint title to it or not. The case cited, however, can in my opinion be distinguished because the learned Judges in that case found distinctly that the parties were in joint possession. Speaking with the utmost respect, I cannot agree that this Court was entitled under the Charter to arrive at that finding in opposition to the finding of fact of the Magistrate and the pleadings of the parties, or indeed in opposition to the finding of the Magistrate alone. But having arrived at that finding the rest of the decision was inevitable.

It has been argued that the use of the word "evicted" in the last sub-section of section 145, and of the word "ousted" in Form XXII, shows that the section was not intended to apply to property to which the parties had a joint title, inasmuch as in such a case the remedy of the defeated party would be a suit, not for eviction, but for joint possession. My learned brother has pointed out that this does not necessarily follow, and has explained the introduction of the word "evicted" into the section. Unless this explanation is accepted, it appears to me that we are forced to the conclusion that the use of the words "evicted" and "ousted" must be a mere oversight in drafting. It must be admitted that so slight a slip might be made. On the other hand, it is inconceivable that the

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Legislature really intended to exclude from the operation of section 145 the very property which is most prolific of disputes leading to a breach of the peace. I agree, therefore, to discharge the Rule.

E. H. M. *Rule discharged.*

CRIMINAL REVISION.

Before Imam and Chapman JJ.

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April 30.

SHEWDHAR SUKUL

v.

EMPEROR*.

Dishonestly receiving stolen property—Receipt of property—Production of the railway receipt, payment of freight and taking of formal delivery—Property not actually removed, or attempted to be removed, from railway premises—Penal Code (Act XLV of 1860), s. 411.

Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter:

Held, that the goods had come to be not merely in the potential possession of the consignee, but actually within his power and unrestricted control, though he had not removed them from the station where they were then lying, nor made any attempt to do so, and that he had received them within s. 411 of the Penal Code.

Reg. v. *Hill* (1) distinguished.

ON the 14th December 1912, a box, No. 8570, containing certain cloths, marked 1058, was received by the firm of Ramkissen Jaiparmal, of 201, Harrison Road, and taken to their godown in Shama Bai's Lane, where

* Criminal Revision No. 442 of 1913, against the order of R. D. Chatterjee, Fifth Presidency Magistrate, Calcutta, dated Feb. 26, 1913.

(1) (1849) 3 Cox C. C. 533 : 1 Den. C. C. 453.