

(1973) 08 PAT CK 0006

In the Patna High Court

Jal Dhari Mahto and Others

APPELLANT

Vs

Mosst. Rudia and Others

RESPONDENT

Date of Decision : 10-08-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 145

Criminal Procedure Code, 1898 (CrPC) — Section 107, 143, 145, 146, 162

Evidence Act, 1872 — Section 167

Prevention of Corruption Act, 1988 — Section 5

Citation : (1974) CriLJ 1216

Hon'ble Judges : S.N.P. Singh, J;K.B.N. Singh, J

Bench : Division Bench

Judgement

S.N.P. Singh, J.—The four applications in revision are directed against the final order passed in four different proceedings u/s 145 of the Code of Criminal Procedure. These applications have been heard one after another as a common question of law has been raised in them and they are, therefore, being disposed of by this common judgment.

2. In Criminal Revision No. 2586 of 1969 the petitioner is the first party to the proceeding. The subject-matter of the proceeding was 13.50 acres of land situate at village Tangra, Police Station Belhar, in the district of Bhagalpur. The learned Magistrate had referred the case to the Civil Court u/s 146(1) of the Code of Criminal Procedure to decide the question of possession as he himself was unable to decide as to which of the parties was in possession. The learned Munsif of Banka by his order dated the 24th of July, 1969, came to the finding that Mosst. Rudia, the second party was in possession of the disputed land and sent the records of the case to the Magistrate for the needful. The learned Magistrate on receipt of the records declared Mosst. Rudia, the second party, to be in possession of the disputed land in conformity with the decision of the Civil Court on the 21st of August. 1969. The petitioner has filed the application in revision challenging the validity of the order of the Magistrate. in the supplementary affidavit filed in this Court it has been stated that 6 or 7 affidavits were sworn

before Sri j. Ram Magistrate, or before some other Magistrate who was not in seisin of the proceeding at any time. The validity of the order of the Magistrate has been challenged on the ground that the findings of possession have been recorded by the Munsif on the basis of affidavits which were sworn before a Magistrate who was not in seisin of the case.

3. In Criminal Revision No. 196 of 1970 the members of the first party to the proceeding have challenged the validity of the Magistrate, 1st, Class, Bhabua, dated the 28th of October, 1969, declaring the members of the second party to the proceeding to be in possession of the disputed land. The subject-matter of the dispute was 0.68 decimal of plot No. 156 and 0.32 decimal of plot No. 157 of village Ghatayan, P.S. Kudra. in the district of Shahabad. In support of their respective cases both the parties filed affidavits of witnesses and a number of documents. The learned Magistrate upon a consideration of the written statements, affidavits and documents filed by the parties declared the second party to be in possession of the disputed laad. In the supplementary affidavit filed in this Court it has been stated that the case was transferred by the Sub-Divisional Magistrate, Bhabua, on the 14th of November 1968, to Shri A. Singh, Magistrate, 1st, Class, Bhabua. It has further been stated that before the case was transferred to the court of Sri A. Singh, Magistrate, 1st Class, Bhabua, all the affidavits of the first party as well as of the second party were sworn in before Shri V. N. Shukla, another Magistrate, and those affidavits were filed in the court of the Sub-Divisional Magistrate, Bhabua. On the above facts a contention has been raised on behalf of the petitioners that the entire order of the Magistrate is vitiated as it is based upon a consideration of the affidavits which were sworn in before a Magistrate who was not in seisin of the case.

4. In Criminal Revision No. 876 of 1970 the petitioners, who were the first party to the proceeding, have challenged the validity of the order of the Magistrate dated the 2nd of March, 1970, declaring the members of the second party to the proceeding to be in possession of the disputed land. The subject-matter of the proceeding was a number of plots of village Mathatanr, Police Station Sarath, in the district of Santal Parganas. The learned Magistrate had made a reference to the Civil Court to decide the question of possession u/s 146(1) of the Code of Criminal Procedure. The reference was heard by the Subordinate Judge of Deoghar. The learned Subordinate Judge by his order dated the 6th of December, 1969, declared the second party to be in possession of the disputed land. On receiving the finding of the Subordinate Judge, the Magistrate by the impugned order dated the 2nd, of March, 1970, declared the second party to the proceeding to be in possession. In the supplementary affidavit filed in the case it has been stated that the members of the second party filed affidavits of nine persons on the 22nd of May, 1968, before the Sub-Divisional Magistrate but those affidavits were not sworn before him but before Shri J.P. Sharma, Magistrate, 1st Class, Deoghar, who was not in seisin of the case. The validity of the order of the Magistrate has been impugned on the ground that the findings of possession have been recorded by the subordinate Judge on the basis of

affidavits which were sworn in before a Magistrate who was not in seisin of the case.

5. In Criminal Revision No. 2687 of 1970 the fourth party to the proceeding has challenged the validity of the order of the Magistrate dated the 29th of September, 1970. The subject-matter of the proceeding was 21.60 acres of land of village Mahramchak, P.S. Barhiya, in the district of Monghyr. The learned Magistrate had made a reference to the Civil Court u/s 146(1) of the Code of Criminal Procedure for deciding the question of possession. The learned Munsif, 1st Court, Monghyr, by his order dated the 9th of September, 1970 found that on the relevant date the 5th party was in possession of 8 bighas of land, the second party was in possession over 5 bighas of land and the first party was in possession over 19 bighas of land. The impugned order dated the 29th of September, 1970, was passed by the Magistrate in conformity with the findings of the Civil Court. In the supplementary affidavit filed in this Court it has been stated on behalf of the petitioners that none of the affidavits of any party was sworn before the Magistrate who was in seisin of the case. As stated in paragraph 2 of the supplementary affidavit, affidavits were sworn before Sri J. Pathak and Sri B. N. Lall, Magistrate, 1st Class, Monghyr, who were never in seisin of the case but were simply in charge of affidavits. Thus, in this case also the validity of the order of the Magistrate has been impugned on the ground that the findings of possession have been recorded by the Munsif on the basis of affidavits which were sworn before a Magistrate who was not in seisin of the case.

6. The common point which has been raised in the four applications is based on two decisions of this Court in the cases of Mahendra Pd. Sinha v. Bhagirath Lai 1971 PLJR 157 and Mahesh Thakur v. Lakshman Pd. Thakur 1971 PLJR 317. In Mahendra Pd. Sinha's case one of the points which was urged on behalf of the petitioners was that the Magistrate wrongly accepted the affidavits of witnesses which were sworn before Magistrates, who were never in seisin of the case, and as such the entire order of the Magistrate based upon such affidavits was fit to be set aside. The learned single Judge, who decided that case, accepted that contention and held that those affidavits were not admissible and they should not have been read as evidence in the proceeding. The order of the Magistrate was accordingly set aside and the case was remanded for a fresh decision in accordance with law. A direction was given to the court below that it would give opportunity to the parties to put in proper affidavits of witnesses on whom they relied. In Mahesh Thakur's case a Bench of this Court took a similar view and it was held that the affidavits which are to be put in before a Magistrate who is dealing with the proceeding u/s 145 of the Code of Criminal Procedure must be sworn before him.

7. On behalf of the Opposite Parties of the four revisional applications a common point has been raised to the effect that no prejudice having been caused to the petitioners by the acceptance of the affidavits sworn before Magistrates who were not in seisin of the proceedings, the final orders passed in the proceedings

should not be interfered with. Reliance is placed on the provisions of Section 537 of the Code of Criminal Procedure. Since this point was not canvassed in the two cases referred to above, all the four revisional applications have been referred to the Division Bench for hearing.

8. In Mahendra Prasad Sinha's case, referred to above, Mr. Justice B. P. Sinha held that affidavits to be used in the proceeding u/s 145 of the Code of Criminal Procedure are not of formal nature but of substantive nature. Therefore, Section 510-A cannot be invoked so as to make Section 539-AA applicable to such affidavits. Affidavits of witnesses meant for use u/s 145 of the Code, therefore, have to be sworn before the Magistrate before whom the proceedings is pending. In Mahesh Thakur's case, referred to above, also a Bench of this Court gave the same reasoning for holding that the affidavits which are to be put in before a Magistrate who is dealing with the proceeding u/s 145 of the Code must be sworn before him.

9. Mr. Prem Lall, learned Counsel appearing for the Opposite Party in Criminal Revision No. 196 of 1970, raised a contention to the effect that in the two cases, referred to above, proper meaning has not been given to the word "formal" occurring in Section 510-A of the Code of Criminal Procedure and as such these cases may be referred to a larger Bench for a reconsideration of the question whether the affidavits, which are verified by a Magistrate who is not in seisin of the proceeding at the affidavits are sworn, are admissible or not and whether they can be read as evidence in the proceeding. In my opinion, there does not appear to be any cogent ground for differing with the view expressed in the two cases and for referring these cases to a larger Bench.

10. The only point, therefore, which, in my opinion, requires consideration is whether the irregularity in the admission of affidavits because they were sworn in before Magistrates, who were not in seisin of the proceeding, has completely vitiated the orders of the Magistrate in all the four applications or it is such an irregularity which is curable under Section 537 of the Code of Criminal Procedure unless prejudice is shown to the petitioners.

11. Section 537 of the Code of Criminal Procedure reads as follows:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account:

(a) of any error, omission or irregularity in the complaint summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b) of any error, omission or irregularity in the charge, including any mis-joinder of charges, or

(c) of the omission to revise any list of jurors in accordance with Section 324, or

(d) of any mis-direction in any charge to a Jury unless such error, omission, irregularity, or mis-direction has in fact occasioned a failure of justice.

Explanation: In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the facts whether the objection could and should have been raised at an earlier stage in the proceedings.

In the case of *Pulukuri Kottaya v. Emperor* AIR 1947 PC 67 : 48 CriLJ 533 while considering the scope of Section 537 of the Code of Criminal Procedure, as it stood before the amendment, their Lordships of the Judicial Committee made the following observation;

When a trial is conducted in a manner different from that prescribed by the Code as in *Subrahmania Aiyar v. Emperor* (1901) 28 I.A. 257 (PC) the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured u/s 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in AIR 1927 44 (Privy Council) where failure to comply with Section 380, Criminal P.C. was held to be cured by Sections 535 and 537. The present case falls u/s 537, and their Lordships hold the trial valid notwithstanding the breach of Section 162.

In the case of *Willie (William) Slaney Vs. The State of Madhya Pradesh*, their Lordships of the Supreme Court considered the scope of Section 537 of the Code. Bose, J. after quoting the above mentioned passage from the judgment of the Privy Council in AIR 1947 PC 67 : 48 CriLJ 533 observed as follows:

Now it is obvious that the question of curing an irregularity can only arise when one or more of the express provisions of the Code is violated. The question in such cases is whether the departure is so violent as to strike at the root of the trial and make it no trial at all or is of a less vital character. It is impossible to lay down any hard and fast rule but taken by and large the question usually narrows down to one of prejudice. In any case, the courts must be guided by the plain provisions of the Code without straining at its language wherever there is an express provision.

Further His Lordship made the following observation:

...Except where there is some thing so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature

of the charge to him and so forth.

These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once.

Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

12. On a plain reading of Section 537 it is clear that it applies to all proceedings under the Code of Criminal Procedure including the proceeding u/s 145 of the Code. The only point, therefore, which falls for consideration is whether the admission in evidence of the defective affidavits, namely, affidavits sworn before a Magistrate who is not in seisin of the proceeding, goes to the root of the jurisdiction of the Magistrate deciding the proceeding and vitiates the entire proceeding or it is curable u/s 537 of the Code. As there is no direct decision on the point under consideration, I would refer to some of the cases which were relied upon by the Bar in support of the proposition that the admission of defective affidavits is curable u/s 537 of the Code and it does not vitiate the entire proceeding.

13. I would first refer to the case of Banwari Vs. State of Uttar Pradesh, on which strong reliance has been placed in support of the above proposition. In that case the Sessions Judge while conducting three separate trials on the basis of the three commitment orders had recorded evidence in one case only. It was contended before the Supreme Court that the amalgamation of three sessions trials into one was not warranted by the provisions of the Code of Criminal Procedure and that the above error in the mode of trial is not curable. Their Lordships of the Supreme Court held that the procedure of recording evidence with respect to the offences which were the subject of different sessions trials in the proceedings of one sessions trial alone is not warranted by the provisions of the Code of Criminal Procedure. Every trial must proceed separately with the result that every proceeding, including the recording of evidence, in each trial should be separate. Their Lordships however, took the view that the procedure which was adopted by the Sessions Judge did not relate to the competency of the Court to try the various offences at one trial and as such the defect did not vitiate the trial in view of Section 537 of the Code.

14. The next case to which a reference may be made is the case of M.C. Sulkunte Vs. State of Mysore, . The appellant of that case had been convicted of an offence u/s 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act. It was contended before the Supreme Court that the sanction to investigate the

offence given by the Magistrate was not proper inasmuch as he had not recorded any reason as to why he had given permission to an Inspector of Police. Their Lordships of the Supreme Court held that although the investigation had been done by an officer below the rank of a Deputy Superintendent of Police, that cannot be a ground to set aside the conviction unless it is shown that there has been miscarriage of justice as a result of an irregular investigation.

15. In the case of G.P.L. Narasimha Raju and Others Vs. State of Andhra Pradesh, their Lordships of the Supreme Court accepted the view taken by the Andhra Pradesh High Court that if certain irregularities are committed by the Police Officer in recording the statements of witnesses that by itself will not be a sufficient ground to quash the proceeding unless the accused is prejudiced because of those irregularities.

16. I would now refer to a Bench decision of the Allahabad High Court in the case of Lalta Ram and Others Vs. Dalip Singh, . That was a case arising from a final order passed in a proceeding u/s 145 of the Code of Criminal Procedure. The Magistrate, who was in seisin of the proceeding, while passing the preliminary order had not directed the parties to file affidavits in support of their respective cases but had directed them only to file their written statement. On the date fixed for hearing the parties adduced oral evidence and on a consideration of that evidence the Magistrate decided the proceeding in favour of one party. The point for consideration before the Bench of the Allahabad High Court was whether the defect in the procedure adopted by the Magistrate was curable under u/s 537 of the Code. It was held that the applicants were not prejudiced because of the recording of the statements of witnesses and the irregularity in the proceeding was curable. Although the Bench decision of the Allahabad High Court is not a direct authority on the point under consideration, that decision supports the contention which has been advanced on behalf of the Opposite parties in the four criminal revisions.

17. Now I would consider some of the cases which were cited by learned Counsel appearing for the petitioners in the four cases in support of the opposite view.

18. The first case to which a reference may be made is the case of Chandra Deo Singh Vs. Prokash Chandra Bose and Another, . In that case the point for consideration was whether the dismissal of a complaint by a Magistrate without giving reasons as required by Section 203 of the Code of Criminal Procedure is an error of a kind which goes to the root of the matter or is an error which is curable u/s 537 (a) of the Code. Their Lordships of the Supreme Court held that "giving of reasons is a pre-requisite for making an order of dismissal of a complaint and absence of the reasons would make the order a nullity". It was further observed as follows:

Even assuming, however, that the rule laid down in Willie (William) Slaney Vs. The State of Madhya Pradesh, applies to such a case, prejudice is writ large on the face of the "order". The complainant is entitled to know why his complaint

has been dismissed with a view to consider an approach to a revisional Court. Being kept in ignorance of the reasons clearly prejudices his right to move the revisional Court and where he takes a matter to the revisional court renders his task before that court difficult, particularly in view of the limited scope of the provisions of Sections 438 and 439, Code of Criminal Procedure.

The decision of the Supreme Court in that case, in my opinion, is not of any help in deciding the point under consideration.

19. I would next refer to a decision of a learned single Judge of the Allahabad High Court in the case of Govind Vs. State and Others, . In that case the affidavit of a certain person verified by an Oath Commissioner had been filed in a proceeding u/s 145 of the Code of Criminal Procedure. It was held that the admission in evidence of the affidavit in question vitiated the proceeding. It is significant to note that in that case, however, the learned single judge did not consider the provisions of Section 537 of the Code of Criminal Procedure and record any finding that prejudice was caused to the aggrieved party by the admission of the defective affidavit in evidence.

20. In the case of Krishna Chandra Naik and Others Vs. Sk. Makbul and Others, a Bench of the Orissa High Court held that the affidavits in the 145 proceeding sworn to before another Magistrate who had no concern with the proceeding were not proper affidavits and they should be rejected. In that case also the provision of Section 537 was not considered and the question of prejudice was not gone into.

21. It is not necessary to refer to any other case. In my considered opinion, the admission of defective affidavits by a Magistrate in seisin of the proceeding u/s 145 of the Code of Criminal Procedure does not go to the root of his jurisdiction to decide the proceeding. Admission of an affidavit sworn in before a Magistrate, who is not in seisin of the proceeding, is not so violent a departure as to strike at the root of the enquiry and to render it no enquiry at all. If a final order is passed in the proceeding and reliance is placed on such defective affidavits, it has to be seen in each case whether prejudice has been caused to the aggrieved party. In none of the four revisional applications there is anything to show that the petitioners objected to the admission of such affidavits at any stage before the Magistrate. On the contrary the petitioners of all the four revisional applications themselves filed affidavits in support of their claim of possession which were sworn in before Magistrate who were not in seisin of the proceedings. No question of prejudice, therefore, can arise in any of the four cases.

22. As I have already stated, in three out of the four cases the Magistrates had made references to the Civil Court u/s 146(1) of the Code of Criminal Procedure to decide the question whether any and which of the parties was in possession of the subject of dispute and passed the final orders u/s 145 in conformity with the findings of the Civil Court.

23. In the case of Raja Singh and Another Vs. Mahendra Singh and Others, it was

held that when a revision is preferred against the order of the Magistrate under Sub-Section (1-B), not only the operative order of the Magistrate but the entire proceeding including the findings of the Civil Court are before the Court and the High Court can in appropriate cases interfere with the findings of the Civil Court if they are in flagrant violation of the well recognised principles of law. That Full Bench decision was considered by another Full Bench of this Court of five Judges in the case of Dewani Choudhary and Others Vs. Chaturi Manjhi and Others, and the view expressed in Raja Singh's case was approved by the majority of the Judges. Can it be said that the finding recorded by a Civil Court u/s 146(1-A) of the Code of Criminal Procedure on the question of possession on the basis of some of the defective affidavits involves flagrant violation of the legal Principles or principles of natural justice so as to justify an interference by this Court with the finding? In my opinion, it does not. That is another ground for not interfering with the final orders passed in three of the cases, namely, Criminal Revision Nos. 2586 of 1969, 876 of 1970 and 2687 of 1970.

24. In Criminal Revision No. 196 of 1970 the final order in the proceeding was passed by Shri V. N. Shukla, Magistrate, 1st Class, Bhabua. As stated in the supplementary affidavit filed in this Court, all the affidavits of the first party as also the affidavits of the second party were sworn in before Shri V. N. Shukla and were filed in the court of the Sub-Divisional Magistrate, Bhabua. Subsequently it appears that the proceeding was transferred to the court of Shri V. N. Shukla. Thus the proceeding was decided by a Magistrate in whose Court the affidavits on behalf of both the parties were sworn in. If the case is remanded with a direction that the affidavits filed by parties should be verified against before the Magistrate who is in seisin of the proceeding the result would be that those affidavits would again be verified and sworn in before Shri V. N. Shukla if he has not been transferred from Bhabua. This would result only in unnecessary harassment to the parties and lead to injustice. That is another ground for not interfering with the final order of the Magistrate passed in Criminal Revision No. 196 of 1970.

25. Now I will proceed to consider whether there is any other valid ground for interfering with the final orders passed by the Magistrates in the four cases.

26. In Criminal Revision No. 196 of 1970 it was contended by Mr. Janeswar Singh, learned Counsel appearing for the petitioners, that there were materials before the Magistrate to show that the Opposite Party had been dispossessed from the land in dispute two months prior to the initiation of the proceeding, and as such the Magistrate wrongly declared the opposite party (Second Party) to be in possession of the disputed land. Learned Counsel in support of his contention referred to a complaint petition dated 30-11-1970 filed by Ram Briksh Singh (Opn. Party No. 1) and the evidence of Ram Ekbal Singh on behalf of the complainant in the complaint case. In the complaint petition which was filed on 30-11-1970, it was simply stated that the accused persons were cutting the southern ridge of the field of the complainant as a result of which the

complainant had suffered a loss of Rs. 70/- In his cross-examination Ram Ekbal Singh had made a statement to the effect that the accused persons after amalgamating the plot had raised crops and had ultimately removed the crops. In my opinion, it is very difficult to hold that the members of the second party were completely dispossessed from the disputed land two months prior to the initiation of the proceeding. The learned Magistrate upon a full consideration of the materials placed before him came to the conclusion that the members of the second party were in possession of the disputed land and that finding cannot be interfered with in revision.

27. In Criminal Revision No. 876 of 1970 the subject-matter of the dispute was given in three schedules. According to the case of the petitioners, the plots mentioned in Schedule A were recorded exclusively in possession of Thakur Murmu, one of the vendors, while the plots in schedule B were recorded in exclusive possession of Dugru and Munshu sons of Dujan Murmu and the lands of Schedule C were jointly recorded in the names of various persons including Thakur Murmu and Dugru Murmu. The case of the petitioners was that the first party purchased schedules A and B lands and half share of schedule C land which had been recorded in the names of Thakur Murmu and Dugru Murmu. The land is said to have been purchased in the year 1935. Subsequently there was a partition in the family of the first party. According to the case of the first party, in 1966 a group of Santhals had forcibly harvested and removed the paddy crops from some of the disputed lands. They could not remove the crops from the remaining portion of the disputed land because they had been bound down u/s 107 of the Code of Criminal Procedure, The first party further alleged that they cultivated the land in 1967 due to the protection given by the local police but the second party again took an aggressive attitude when the crops became ready for harvesting. The first party, therefore, sought the protection of the police. The Second Party put forward the case that the first party had never been in possession over the disputed land and the disputed land had been coming in possession of the descendants of the recorded tenants. They put forward various other pleas. The learned Subordinate Judge held that it was impossible for the first party to grow paddy crop over the disputed land in 1967 and they could not have been in possession of the same at the time the proceeding had been started. The learned Subordinate Judge further stated that the case of the first party regarding their possession by dividing the land of Schedule C was inconsistent. The learned Subordinate Judge ultimately came to the finding that although the members of the first party appeared to be bona fide purchasers of the disputed land for value on the basis of a valid sale deed of the year 1935 but actually they were not in possession over any of the disputed land at the time the proceeding u/s 145 of the Code of Criminal Procedure was started. The learned Subordinate Judge further recorded the finding that the members of the first party were not in possession of the land in dispute even two months prior to the start of the proceeding. Further he recorded the finding that somehow or other the second party in collusion with the other Santhals had formed a group

having no fear of the first party and it was for that reason that the Santhals somehow or other forcibly came in possession over the land in dispute several months before the start of the proceeding u/s 143. On these findings he recorded his ultimate finding that the members of the second party were in possession of the disputed land at the time the proceeding was started.

28. Mr. Shree Nath Singh, learned Counsel appearing for the petitioners, submitted that although only opposite party Nos. 2 to 5 had claimed possession, the Subordinate Judge declared, possession in favour of all the five opposite Parties. Secondly he urged that when the Subordinate Judge found that the petitioners were in possession in 1935 he should not have made out a third case and held that the petitioners were dispossessed by the Santhals. Lastly, learned Counsel urged that the Subordinate Judge has committed serious error of records. In my opinion, it is not possible to interfere with the findings of the Civil Court on any of the above grounds. The learned Subordinate Judge has considered all the aspects of the case and it is difficult to hold that he has made out a third case. It was open to the learned Subordinate Judge not to accept the entire case of the first party and to arrive at his own conclusion on the question of possession. In view of the finding of the Subordinate Judge that the Santhals dispossessed the first party, the finding of possession given in favour of opposite party No. 1, who is also a Santhal, cannot be said to be such an improper finding as to justify interference by this Court at the instance of the petitioners. It is only opposite party Nos. 2 to 5 who could make such a grievance. I am not satisfied that any serious error of record has been committed by the learned Subordinate Judge which vitiates his finding on the question of possession. Thus, there does not appear to be any valid ground for interference with the final order of the Magistrate which has been passed in conformity with the findings of the Civil Court.

29. In Criminal Revision No. 2687 of 1970, as I have already stated, the petitioner was the fourth party to the proceeding. He put forward the case that the first party had settled the land in dispute with him in November, 1953 and since then he was in cultivating possession of the same. He has relied on three chittas. The first chitta was dated 10-6-1965. The other two chittas were dated 15-8-1966 and 2-10-1967, respectively, and were said to have been executed by Hazi Md. Liaquote Hussain. The fourth party had also filed certain other documents as also affidavits. The learned Munsif on a consideration of the documents did not accept the case put forward on behalf of the fourth party that he had taken oral settlement of the land in 1953 from Md. Yakub. It cannot be said, in my opinion, that the finding which has been arrived at by the learned Munsif is based upon non-consideration of any materials which were placed before him. It was submitted by Mr. Indra Bhanu Singh, learned Counsel appearing for the petitioner, that the affidavits filed on behalf of the petitioner were not properly considered by the Munsif. I find it difficult to accept this contention. The learned Munsif has applied his mind to all the affidavits of the witnesses and the documents filed by the parties and it cannot be said that the

finding is open to challenge. Since the final order of the Magistrate has been passed in conformity with the finding of the Munsif, I find it difficult to interfere with the same.

30. In Criminal Revision No. 2586 of 1969 Mr. Chhatrapati Kumar Sinha, learned Counsel appearing for the petitioner, has raised the following contentions, namely, (1) that the order of reference u/s 146(1) of the Code of Criminal Procedure was barred and illegal because the Magistrate himself did not consider the affidavits etc., and did not apply his mind; (2) that the order of the Munsif is vitiated be-cause he has not considered two of the affidavits, namely, the affidavit of the Mukhiya and the affidavit of the petitioner; (3) that the Munsif has adopted a double standard in considering the affidavits of the parties; and (4) that the Munsif has given no reasons for rejecting the affidavits of the witnesses of the first party.

31. It appears that shri J. Ram, Magistrate, Banka, by his order dated the 3rd of December, 1965, referred the proceeding to the Munsif u/s 146(1) of the Code of Criminal Procedure. In the order the learned Magistrate simply stated that the evidence led by the parties was of complicated nature and consequently it was difficult to determine the question of possession of either of the parties over the disputed land. Section 146(1) of the Code lays down that if the Magistrate is unable to decide as to which of the parties was in actual possession of the subject of dispute, he may attach it and after drawing up a statement of the facts of the case forward the record of the proceeding to a Civil Court of competent jurisdiction to decide the question whether any and which of the parties was in possession of the subject of dispute at the date of the order as explained in Sub-Section (4) of Section 145, A perusal of the order of the Magistrate shows that there was substantial compliance with the provisions of Section 146(1) of the Code. There, is, therefore, no substance in the first contention which has been raised by learned Counsel appearing for the petitioner. Moreover, this point ought to have been taken at the stage when the proceeding was referred to the Civil Court. It is difficult to hold that the Munsif has adopted a double standard in the matter of assessment of evidence. He has discussed the affidavit of every witness filed on behalf of the parties and it cannot, therefore, be said that his finding is vitiated because of non-consideration of any of the affidavits. Learned Counsel is not correct in his submission that the Munsif has not given reasons for rejecting the affidavits of the first party. It is stated in Paragraph 29 of the application that the Mukhiya had made enquiry and found the petitioner in possession of the disputed land and had further submitted that Ghan Shyam was son-in-law of the second party. Although the affidavit of the Mukhiya has not been specifically referred to by the Munsif in his order, the order sheet in Mutation Appeal No. 12 of 1962-63 has been considered which shows that the Mukhiya and the Circle Officer had found ialdhari Mahto to be in possession. It cannot, therefore, be said that the petitioner has been prejudiced by the non-consideration of the affidavit of the Mukhiya. In his affidavit the petitioner has simply supported his own case which he put forward in his written statement. In

that view of the matter, if the learned Munsif has not specifically referred to the affidavit of the petitioner the omission is not vital justifying an interference by this Court with the final order of the Magistrate. I, therefore, do not find any adequate ground to interfere with the finding of the Civil Court and with the final order of the Magistrate which has been passed in conformity with the finding of the Civil Court.

32. I would like to state before closing this judgment that some argument was advanced on the question of application of Section 167 of the Evidence Act. A contention had been raised that if this Court is satisfied that there is sufficient material to justify the final order of the Magistrate in a proceeding u/s 145 of the Code, this Court should not interfere with the order merely on the ground of acceptance of some inadmissible evidence. It is not necessary to go into this question in the instant cases as I have taken the view that the entire proceedings were not vitiated and the defect is curable u/s 537 of the Code of Criminal Procedure.

33. In the result, all the four applications are dismissed.

34. K.B.N. Singh, J.

I entirely agree.