REVISIONAL CRIMINAL.

Before Tek Chand, J.

SRI RAM AND OTHERS,—*Petitioners.*

versus

THE STATE AND OTHERS,—*Respondents.*

Crimioal Revision No. 46 of 1957.

1957

June, 27th

Code of Criminal Procedure (V of 1898)—Section 145(1)—Preliminary Order—Omission to draw—Effect of—Whether an illegality or an irregularity—Failure to observe conditions precedent—Whether occasions failure of justice.

Interpretation of statutes—Proviso—Interpretation of—Provisos to section 145(4)—Whether annexed to that subsection only or to the preceding subsections as well.

Held, that the provisions contained in subsection (1) of section 145 of the Code of Criminal Procedure are of mandatory character and the omission to observe such provisions vitiates the entire proceedings. The requirements of law relating to issuance of an initiatory order are not dispensable. On the other hand, these are the pre-requisites or *sine qua non* for instituting proceedings under Chapter 12 of the Code. These requirements of law contained in the first subsection as to the satisfaction on the question of existence of an apprehension of breach of the peace are purposeful and incorporated deliberately. Important rights relating to possession over immovable property regardless of title can be interfered with by Criminal Courts only when public tranquility is in danger and the extraordinary powers which are vested in the Magistrate under this provision can only be justified where breach of peace is to be prevented. A Magistrate would have no jurisdiction unless he was satisfied that there existed a dispute concerning land, etc., which would be likely to induce a breach of the peace. A formal order to this effect under subsection (1) is, therefore, absolutely necessary in order to give jurisdiction to the Magistrate. An omission to pass the preliminary order in accordance with the requirements of subsection (1) is not mere irregularity but is fatal to further proceedings.

Held, that the omission to indicate whether the Magistrate is satisfied, and the grounds of his satisfaction, as to the likelihood of breach of the peace, which is the very foundation of his jurisdiction, must occasion a failure of justice, as mentioned in section 537 of the Criminal Procedure Code. Finding as to apprehension of breach of the peace and the grounds for such a conclusion are coditions precedent before further action can be taken. If a drastic step of the nature contemplated by the subsequent provisions is taken in disregard of the qualifying conditions relating to the public tranquility that will occasion a failure of justice.

Held further, that a proviso is to be strictly construed, and it has no existence apart from the provision which it is designed to limit or qualify. Generally speaking, a proviso is intended to restrain the enacting clause and to except something which would have otherwise been within it or in some measure to modify the enacting clause. It is a rule of interpretation that the appropriate function of a proviso is to restrain or modify the enacting clause, or preceding matter, and it should be confined to what precedes unless the intention that it shall apply to some other matter is apparent. That being the true place of the proviso, the provisos appearing after subsection (4) of section 145 of the Code of Criminal Procedure are to be read as annexed to that subsection only and not to the preceding subsections.

Case reported under section 438 of the Criminal Procedure Code, by Shri Parshotam Sarup, Sessions Judge, Rohtak, with his No. 66 of 1956, for revision of the order of Shri Gian Chand, exercising the powers of Magistrate, 1st Class, Rohtak, dated 20th July, 1956, withdrawing the attachment order under section 145 of the Criminal Procedure Code.

The facts of this case are as follows:—

There was a dispute between Gurbux Singh and others, Harijans, on one side and Siri Ram, etc., Jats, Proprietors of the village on the other with regard to the possession of a vacant plot of land near the house of the Harijans. On the report of the police the plot was attached and proceedings were taken under section 145, Cr. P.C. According to Gurbux Singh, etc., they had been in possession since

long and on or about the date of the application which is dated 21st May, 1956, the other party took forcible possession. On the other hand according to Siri Ram, etc., they are the owners and have been in possession throughout. The learned trial Court relied upon the affidavits put on behalf of Gurbux Singh, etc., and gave the following finding:—

> *"Taking into consideration all the evidence on record, I am of the opinion that Gurbux Singh, etc., have been dispossessed by the other party. I accordingly withdraw the attachment order and put that party in possession as before."*

3. Siri Ram, etc., have come up in revision against this order.

4. The record of the case is submitted to the High Court for the following reasons:—

According to the finding of the learned trial Court the party of Siri Ram was in possession at the time of the application and the order of attachment. The learned trial Court, to order restoration of possession to the oppsite party, must have come to a clear finding that the opposite party has been dispossessed within two months of the date of the application as is laid down in the second proviso to subsection 3 of section 145, Cr. P.C. In the finding given above, the learned Magistrate has not stated as to when the other party was dispossessed. I have gone through the affidavits put on behalf of the party of Gurbux Singh but there is no mention as to the date of the dispossession of Gurbux Singh, etc., in any one of them. It is, therefore, recommended that this revision be accepted and the case remanded back to the learned Magistrate for giving a finding with regard to the date of dispossession and for disposing of the case in accordance with law.

P. C. PANDIT, for Petitioner.

L. D. DAUSHAL, Deputy Advocate-General and ANAND SARUP, for Respondent.

ORDER OF THE HIGH COURT

Tek Chand, J.

TEK CHAND, J.—The learned Sessions Judge, Rohtak, has sent up this case to this Court with the recommendation that the finding of Shri Gian Chand,

Srī Ram and others v. The State and others

Tek Chand, J.

Magistrate, 1st Class, to the effect that Gurbux Singh, etc., the respondents in this case, had been dispossessed by the petitioners and accordingly they be put into possession, should be set aside and the case remanded to the learned Magistrate for giving proper finding and for disposing of the case in accordance with law.

The brief facts of this case are, that there is a dispute as to the possession of a vacant site in the *abadi deh* of Rohtak, between the petitioners and the respondents. The petitioners claimed themselves to be in possession of this site as proprietors and alleged, that six months ago they constructed a thatched hut (chhappar) on a part of the site. The ownership rights in the land, it is contended by the petitioners, vest in them and in other landlords.

The contention of the respondents is, that long time ago this piece of land had been given to them by the *abadi deh* and has been in their exclusive possession. The site has been used by them for different purposes, among others for tethering their animals, keeping their carts, and for making dung-cakes and for other similar purposes. The site is contiguous to their residences and had been in their exclusive possession from times immemorial.

On 21st May, 1956, the police sent a report to the Magistrate, 1st Class, Rohtak, under section 145 of the Code of Criminal Procedure, expressing a fear of breach of the peace on account of the conflicting claims of the petitioners and the respondents as to the possession of this land. On 23rd May, 1956, the Magistrate inspected the spot in the presence of the parties and their counsel, and in his inspection note he observed that the land was lying vacant, that there was a small hut which appeared to have been recently put up on it by the Jats (the petitioners), that bricks of the parties were scattered all over on it and were

Sri Ram and others v. The State and others

Tek Chand, J.

lying in small heaps at several places and that it was a valuable piece of land and that there was a tension between the parties over this land. He thought that it was necessary to attach the property and gave notice to the parties to argue the point on 25th May, 1956.

On 25th May, 1956, arguments on behalf of the respective parties were heard. As the full implications of the order passed have been the subject-matter of disagreement between the parties, it would be useful to reproduce the relevant portions thereof *inextenso*:—

> "As it is a case of emergency, I order the land in dispute to be attached pending the decision of this application. The parties have been informed of this order. Copy of this order be sent to the S.H.O., City Rohtak, for necessary action and proclamation of this attachment. The parties to put up written-statements of their respective claims as respects the facts of the actual possession of the land in dispute on 4th June, 1956."

Written statements and affidavits were filed on behalf of the two sets of claimants on 20th July, 1956. The Magistrate accepted the contention of the respondents and the concluding words of his order read as under:—

> "* * their (the respondents') contention is that all the village *abadi* gave them land for houses and other purposes and from the very beginning they are in possession of this land in *abadi*. I see this argument quite reasonable and accept it and reject the other that they would be turned out. Taking into consideration all the evidence on record, I am of the opinion that Gurbux

> Singh, etc. (respondents) have been dispossessed by other party. I accordingly withdraw the attachment order and put that party in possession as before. They would continue in possessiin till they are evicted legally."

Against this order a petition of revision was filed by the petitioners in the Court of the Sessions Judge and he has recommended the revision to this Court for acceptance.

According to the reasoning of the Sessions Judge, the Magistrate before restoring possession to the respondents should have come to a clear finding that they had been dispossessed within two months of the date of the application as required under section 145(4) of the Code of Criminal Procedure. He found that the learned Magistrate had not stated anywhere as to the date when the respondents were dispossessed by the petitioners. Mr. P. C. Pandit appearing on behalf of the petitioners has stated that his clients had instituted a civil suit on 12th July, 1956, and on the same date they had made an application to the Magistrate requesting him to stay proceedings pending the civil suit. He also said that on 18th July, 1956, an application was made to the Magistrate for adjournment of proceedings under section 145, Criminal Procedure Code, and for awaiting the decision of the Civil Court, but on 20th July, 1956, the Magistrate passed an order under section 145, Criminal Procedure Code, which is being impugned in this revision petition. On this date the parties were also bound down under section 107, Criminal Procedure Code.

Lengthy arguments were addressed by the learned counsel for the petitioners questioning the legality of the proceedings in the Court of the Magistrate and

Sri Ram and others v. The State and others

Tek Chand, J.

of the orders passed by him on the 25th of May, 1956, and the 20th of July, 1956, respectively. It appears to me that the learned Magistrate while passing the impugned orders completely lost sight of the provisions of section 145 and of their implications.

Section 145(1) provides that whenever a Magistrate is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning land, etc., within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by Pleader within a time to be fixed, and to put in written-statements of their respective claims as respects the fact of actual possession of the subject of dispute.

Under subsection (3) of section 145, Criminal Procedure Code, a copy of the order shall be served upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

Subsection (4) to section 145 provides that the Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements, documents and affidavits, if any, so put in, and after hearing them and receiving all such evidence as may be produced, consider the effect of such evidence, and if possible, decide, whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject. This subsection has three provisos. The second proviso is to the effect that if it appears to the Magistrate that any party has, within two months next before the date of such order, been forcibly and

Sri Ram and others *v.* The State and others

Tek Chand, J.

wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date. The third proviso is to the effect, that if the Magistrate considers the case to be one of emergency, he may at any time attach the subject of dispute, pending his decision under this section. Under subsection (5) of section 145, Criminal Procedure Code, the Magistrate is empowered to cancel the preliminary order passed by him under subsection (1), on a party successfully showing to him, that no such dispute as aforesaid exists or has existed.

Subsection (6) provides that if the Magistrate decides that one of the parties was or should, under the second proviso to subsection (4), be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof, until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction and when he proceeds under the second proviso to subsection (4), the Magistrate may restore possession to the party forcibly and wrongfully dispossessed.

In this case the first error which has been committed by the learned Magistrate is that no preliminary order within the contemplation of subsection (1) of section 145, Criminal Procedure Code, has been passed. All that is stated in the Magistrate's order dated the 25th May, 1956, which the learned counsel for the respondents wants me to treat as a preliminary order under section 145(1) is that "as it is a case of emergency, I order the land in dispute to be attached pending the decision of this application." I agree with the arguments of the learned counsel for the petitioners, and do not think that this order fulfils the requirements of subsection (1). Before a preliminary order can issue, the Magistrate has to

Sri Ram and others
v.
The State and others

Tek Chand, J.

satisfy himself from a police report or other information that a dispute likely to cause a breach of the peace exists concerning the land, etc., and after doing so, he is to make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned, to attend his Court and to put in written-statements of their respective claims. The legislature has put in the forefront the satisfaction of the Magistrate as to the likelihood of the existence of a breach of the peace. At the initiatory stage the Magistrate is not concerned with the possession of anyone of the contesting claimants much less with the rightful or wrongful nature of such a possession. The law requires that at this stage the attention of the Magistrate should be focussed on the question of the likelihood of the occurrence of breach of the peace. There is no reference to any such apprehension in his order dated 25th May, 1956, Not only the Magistrate is required to satisfy himself as to such a likelihood, but the law requires him to state the grounds of his being so satisfied before he could take any further action. Not only the Magistrate had to inquire into the likelihood of breach of the peace occurring but he further had to come to a judicial decision upon it. These provisions contained in subsection (1) of section 145 have not been observed in this case and they are of a mandatory character. Omission to observe such provisions vitiates the entire proceedings. The requirements of law relating to the issuance of an initiatory order are not dispensable. On the other hand these are the pre-requisites or *sine qua non* for instituting proceedings under Chapter 12 of the Code. These requirements of law contained in the first subsection as to the satisfaction on the question of existence of an apprehension of breach of the peace are purposeful and incorporated deliberately. Important rights relating to possession over immovable property regardless of title can be interfered with by criminal

Sri Ram and others v. The State and others

Tek Chand, J.

Courts only when public tranquitity is in danger and the extraordinary powers which are vested in the Magistrate under this provision can only be justified where breach of peace is to be prevented. A Magistrate would have no jurisdiction unless he was satisfied that there existed a dispute concerning land, etc., which would be likely to induce a breach of the peace. A formal order to this effect under subsection (1) is, therefore, absolutely necessary in order to give jurisdiction to the Magistrate. An omission to pass the preliminary order in accordance with the requirements of subsection (1) is not a mere irregularity but is fatal to further proceedings. Reference may be made to *Hakam and others* v. *Rullia Ram and Sunder Das,* (1), *Dhaniram and another* v. *Kaliram* (2),*Emperor* v. *Sis Ram and others* (3), and *Sita Ram* v. *The Crown* (4).

I am aware of a contrary view expressed by Din Mohammad, J., in *Rattan and others* v. *Tika* (5), and in the authorities mentioned therein, but the reasoning of the learned Judge does not commend itself to me. I cannot help thinking, that the omission to indicate whether the Magistrate is satisfied, and the grounds of his satisfaction, as to the likelihood of breach of the peace, which is the very foundation of his jurisdiction, must occasion a failure of justice, as mentioned in section 537 of the Criminal Procedure Code. Finding as to apprehension of breach of the peace and the grounds for such a conclusion are conditions precedent before further action can be taken. If a drastic step of the nature contemplated by the subsequent provisions is taken in disregard of the qualifying conditions relating to the public tranquility that will occasion a failure of

(1) A.I.R. 1924 Lah. 91
(2) A.I.R. 1927 Lah. 807
(3) A.I.R. 1930 Lah. 895
(4) (1949) 51 P.L.R. 301
(5) A.I.R. 1939 Lah. 233

Sri Ram and others v. The State and others

Tek Chand, J.

justice. I am firmly of the view that the order dated the 25th of May, 1956, cannot be deemed to be a preliminary order within the contemplation of sub-section (1) of section 145:

If there is no preliminary order, then the requirements of subsection (3) cannot be satisfied. In this case, even if it be assumed that the order, dated the 25th of May, 1956, could be deemed to be in accordance with subsection (1), even then that order has not been served and published in accordance with the provisions of subsection (3) which is essential.

In *Abdulla Khan and others* v. *Gunda and others* (1), a copy of the initiatory order was neither served on the parties nor affixed at or near the subject of dispute. Rattingan, J., held, that the proceedings were without jurisdiction, unless the procedure prescribed therefor was strictly adhered to.

The next noticeable omission on the part of the Magistrate is non-compliance with the requirements of subsection (4) of section 145. Under this sub-section after the issuance of the initiatory order under subsection (1) and after having served that order in the manner provided by subsection (3), the Magistrate shall then, without reference to the merits of the claims of any party to a right to possess the subject of dispute, hear the parties, conclude the inquiry and decide the question whether any and which of the parties was at the date of the order before mentioned in such possession of the land or water, as the case may be, which is the subject of dispute. This provision is then followed by certain provisions which will be considered presently. For purposes of subsection (4) the Magistrate is required to decide the question not as to the right to possess

(1) 7 P.R. 1907 (Cr.)

Sri Ram and others
v.
The State and others

Tek Chand, J.

but as to the factum of actual possession at the date of preliminary order. Apart from the fact that the passing of the preliminary order is nebulous, the Magistrate has not given his conclusion as to whether, on the particular date, the petitioners were in possession or the possession was with the respondents. In his inspection note dated the 23rd of May, 1956, the Magistrate merely said that "at present this land is lying vacant." In his order dated the 25th May, 1956, there is no reference to any possession of any party. In the order dated the 20th of July, 1956, which is being impugned, all that he says is that the respondents' contention is that "all the village *abadi* gave them land for houses and other purposes and from the very beginning they are in possession of this land in *abadi*." Then he says "I see this argument quite reasonable and accept it and reject the other that they would be turned out and taking into consideration all the evidence on record, I am of the opinion that Gurbux Singh, etc. (respondents) have been dispossessed by the other party. I accordingly withdraw the attachment order and put that party in possession as before". The above observations, which do not appear to be expressed in clear language, do not furnish an answer to the question as to which of the parties at the date of the order under subsection (1) was in possession. It is not stated anywhere, whether this site, which from the plan appears to be very extensive, was in exclusive possession of one or the other party or was in possession of either. Then the second proviso lays down that, if it appears to the Magistrate that any party has within two months next before the date of the preliminary order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date. As pointed out by the learned Sessions Judge, there is no indication as to the date when the respondents were dispossessed; and if they

Sri Ram and others
v.
The State and others

Tek Chand, J.

had been dispossessed, whether that was done forcibly and wrongfully. The order of the Magistrate, the operative portion of which has been reproduced above, is completely silent as to the subject-matter of this proviso. According to the contention of the learned counsel for the respondents, the date of dispossession should be deemed to be the night of 20th and 21st May, 1956, when a hut was erected on a small portion of the site. This contention is conjectural. In the respondents' written-statement dated the 25th of May, 1956, they allege that they have been in possession of the land in dispute for a long time and that the other party (the petitioners) wish to dispossess them forcibly and without any right. This written-statement is supported by a number of affidavits dated the 12th of July, 1956. Neither in the written-statement, nor in the affidavits has it been stated that they have been in fact dispossessed at any time. It has not been the respondents' case, that being in possession they had been actually dispossessed as seems to have been made out by the Magistrate. That being so, it is not possible to accept the argument of the learned counsel for the respondents that his clients should be deemed to have been dispossessed on the 20th or 21st May, 1956, The affidavits of the 12th of July, 1956, merely allege that the petitioners desire to dispossess the respondents. The result, therefore, is that not only there is no finding of the Magistrate as to the date of dispossession nor as to the forcible or wrongful nature of any such dispossession, but there is not even an allegation in support of such a contention.

Under the third proviso to subsection (4) if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

It is well to remember that a proviso is to be strictly construed, and it has no existence apart from

Sri Ram and others
v.
The State and others

Tek Chand, J.

the provision which it is designed to limit or qualify. Generally speaking, a proviso is intended to restrain the enacting clause and to except something which would have otherwise been within it or in some measure to modify the enacting clause. It is a rule of interpretation that the appropriate function of a proviso is to restrain or modify the enacting clause, or preceding matter, and it should be confined to what precedes unless the intention that it shall apply to some other matter is apparent. That being the true place of the proviso, it is to be read as annexed to subsection (4) and not to the preceding subsections. It seems to me that the order that the Magistrate passed on the 25th of May, 1956, was not the preliminary order under subsection (1) but an attachment order referred to in the third proviso to subsection (4). That, of course, was no stage as on that day no step had yet been taken by the Magistrate which was in accord with the earlier provisions. The use of the word 'then' at the beginning of subsection (4) indicates that the question of determination of the factum of possession under subsection (4), arises only after the requirements of subsection (1) and subsection (3) have been complied with. I cannot accept the argument advanced on behalf of the respondents that the third proviso to subsection (4) of section 145, Criminal Procedure Code, is of such amplitude that it arms the Magistrate in case of emergency, with powers, to attach the subject of dispute even without making the initiatory order under subsection (1) of section 145. If it were the intention of the legislature to arm the Magistrate with such plenary powers at the very commencement of the proceedings under section 145, those powers could be so vested in clearer terms and not in the form of proviso to subsection (4). I do not feel justified in construing this proviso as enlarging the scope of the enactment when it can be fairly

Sri Ram and others v. The State and others

Tek Chand, J.

and properly construed without attributing to it that effect.

In *West Derby Union* v. *Metropolitan Life Assurance Company* (1), Lord Watson observed—

> "I am perfectly clear that if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light on the ambiguous import of the statutory words."

In the same case Lord Herschell at page 655 said—

> "I decline to read into any enactment words which are not to be found there and which would alter its operative effect because of provisions to be found in any proviso."

As to the place of this proviso I cannot do better than to borrow the words of Moulton, L.J. in *R.* v. *Dibidin* (2), when he said—

> "The fallacy of the proposed method of interpretation is not far to seek. It sins against

(1) (1897) A.C. 647 (652).
(2) (1910) P. 57, 125.

Sri Ram and others v. The State and others

Tek Chand, J.

the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in the proviso."

In *Ex p. Partington* (1), Denman, C.J., said—

"We are of opinion that this case does not fall within the proviso which must be construed with reference to the preceding parts of the clause to which it is appended."

Reference may also be made in this connection to *Stourbridge Navigation Co.* v. *Earl of Dudley* (2), *Re Brockleband* (3), and *Hill* v. *East and West India Dock Company* (4).

In *State* v. *Mukanda Singh* (5), Desai, J., expressed the view that a Magistrate derives jurisdiction to order attachment only under proviso (2) to section 145(4), i.e., after the preliminary order has been passed. A Magistrate has no jurisdiction at all to start proceedings under section 145 by passing the preliminary order, unless he is first satisfied that a dispute concerning land and likely to cause breach

(1) (1844) 6 Q.B. 649, 653
(2) (1860) 3 E. and E. 409 427
(3) (1889) 23 Q.B.D 461
(4) (1884) 9 A.C. 448
(5) A.I.R. 1951 All. 621.

Sri Ram and others
v.
The State and others.

Tek Chand, J.

of the peace exists; unless he assumes jurisdiction, he cannot order any attachment.

Under the second proviso to subsection (4) the question of possession is to be determined with reference to a fixed point of time, i.e., within two months next preceding the date of the initial order. The respondents in this case had to show that they had been forcibly and wrongfully dispossessed within two months next preceding the date of that order. If the forcible or wrongful possession has discontinued for a period exceeding two months, the party so dispossessed does not come within the protection of this proviso.

To sum up, firstly, the Magistrate has omitted to pass preliminary order as contemplated under subsection (1) of section 145 giving the grounds of his satisfaction as to the likelihood of there being caused a breach of the peace; secondly, no copy of the order had been served and published as required by subsection (3); thirdly, it has not been decided whether any and which of the parties was in possession of the land at the date of the preliminary order, fourthly, it has not been determined that the respondents had been in fact dispossessed by the petitioners and, if so, whether their dispossession was forcible and wrongful and within two months next before the date of the preliminary order.

Accepting this reference I set aside the orders of the Magistrate dated the 25th of May, 1956, and the 20th of July, 1956, and direct that the case be remanded to the learned Magistrate for proceeding according to law from the stage just preceding the passing of the order dated the 25th of May, 1956.

It has been suggested to me at the Bar that as civil proceedings, are pending I should direct the

Magistrate to stay his hands. I do not propose to fetter the discretion of the Magistrate in any way.

Sri Ram and others
v.
The State and others

Tek Chand, J.

My attention has also been called to the provisions of section 146, Criminal Procedure Code, according to which if the Magistrate is of the opinion that none of the parties was then in such possession, or is unable to decide as to which of them was then in such possession of the subject of dispute, he may attach it and draw up a statement of the facts of the case and forward the record of the proceedings to a Civil Court of competent jurisdiction to decide the question, whether any, and which of the parties is in possession of the subject of dispute at the date of the order as explained in subsection (4), of section 145. He shall direct the parties to appear before the Civil Court on a date to be fixed by him. It is open to the Magistrate to proceed under section 146, if he has any doubt as to the possession over the land being with a particular party.

In the result, Criminal Revision No. 46 of 1957 is allowed and the case remanded to the Court of Magistrate, 1st Class for decision according to law.

APPELLATE CRIMINAL.

Before Tek Chand, J.

CHANDER,—*Convict-Appellant.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 267 of 1957.

1957

July, 1st

Code of Criminal Procedure (V of 1898)—Section 237—Indian Penal Code (XLV of 1860)—Sections 201 and 302—Accused charged for murder but acquitted—No charge framed under section 201 but the accused convicted under that section—Conviction, whether legal—Removal of dead