

## Shib Singh vs Sridhar And Ors. on 29 November, 1951

**Equivalent citations: AIR1953ALL371, AIR 1953 ALLAHABAD 371**

ORDER

Brij Mohan Lall, J.

1. This is a reference under Section 438, Criminal P. C., by the learned District Magistrate of Dehra Dun, recommending that an order, passed under Section 145, Criminal P. C., by the Sub-Divisional Magistrate of Mussoorie, be vacated.
2. An application under Section 145, Criminal P. C., was presented by one Shib Singh against one Sridhar. A preliminary order under Section 145 (1), Criminal P. C., was duly passed, and after recording evidence and considering the report of the Commissioner, the learned Magistrate came to the finding that Sridhar had all along been in possession. He passed an order forbidding Shib Singh to interfere with his possession.
3. Prima facie, the finding recorded by the learned Magistrate is a finding of fact which is not ordinarily disturbed in revision, but the learned District Magistrate has rightly pointed out that the learned Magistrate has relied on inadmissible evidence. The Commissioner who was appointed to make a local inspection was not examined as a witness. In the circumstances, his report could not be treated as evidence in the case. There is a provision in the Code of Criminal Procedure for appointment of Commissioners for recording the statement of a witness, but no provision exists for appointing a Commissioner for making a local investigation or inspection. Section 539B permits a Presiding Officer to make a local inspection but if a commissioner is deputed to go to the disputed place and to make an inspection he should appear in the witness-box: to make the statement on oath and should subject himself to cross-examination. Unless that is done, the statement made by him and embodied in his report cannot be taken in evidence. The report submitted by him is not per se evidence in the case. It is only when it is verified by the Commissioner by a statement on oath that it becomes evidence.
4. Since the report of the Commissioner played a very important role in enabling the Magistrate in arriving at his finding and since this report was inadmissible in evidence, the learned Magistrate's finding cannot stand.
5. In the circumstances the reference is accepted. The learned Magistrate's order is set aside. The case shall be sent back to the learned Magistrate. The commissioner shall be summoned and shall be examined and cross-examined in Court. Thereafter, the learned Magistrate shall record his finding on the disputed point and dispose of the case.