CRIMINAL REVISION.

Before Lort-Williams and S. K. Ghose JJ.

BANKABIHARI RAY

v.

EMPEROR.*

1930
Dec. 18.

Public Nuisance—Issue of notice after order absolute is made, if can be postponed —Civil suit and temporary injunction, effects of—Code of Criminal Procedure (Act V of 1898), ss. 133, 139, 140.

In a case of public nuisance, after the report of the jury, empanelled under section 138 of the Code of Criminal Procedure, to the effect that the magistrate's conditional order is reasonable, and the making of the order absolute under section 139 (*1*), the magistrate has no discretion to postpone the issue of the notice under section 140 (*1*), notwithstanding the institution of a civil suit with respect to the subject matter of the proceeding and the granting of a temporary injunction by the civil court, although the magistrate, in his discretion, may postpone further proceedings contemplated under sub-clause (*2*) of section 140.

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The material facts appear from the judgment.

Narendrakumar Basu and *Gopalchandra Narayan Chaudhuri* for the petitioners.

Debendranarayan Bhattacharya for the Crown.

Biswanath Ray for the opposite party.

LORT-WILLIAMS J. In this case a conditional order, under section 133 of the Code of Criminal Procedure, was made directing the removal of a certain obstruction to a public cattle track. The opposite party showed cause under section 135 of the Code and applied to the magistrate to appoint a jury to try whether the conditional order was reasonable and proper. The jury was empanelled and they reported that the order was reasonable and proper. Thereupon, the magistrate made the order absolute

*Criminal Revision, No. 771 of 1930, against the order of T. H. Ellis, Sessions Judge of Tippera, dated July 19, 1930.

under section 139 (*1*). An application was made before the Court of Session for moving the High Court to set aside the order of the magistrate. This was rejected and, on an application to the High Court, this also was rejected. Meanwhile, a civil suit was instituted by the opposite party and in that suit a temporary injunction was obtained from the Munsif, Central Court, Comilla, ordering the defendants in that suit not to cut earth or trees from the land in dispute. Obviously, that injunction was not directed against the magistrate, and if it had been, it would, as regards him, have been invalid.

The learned magistrate, in these circumstances, proceeded, under section 140 (*1*) of the Code of Criminal Procedure, and gave notice to the opposite party requiring him to perform the act directed by the order within a certain time.

Mr. N. K. Basu, on behalf of the petitioners in this Rule, has argued that, in the circumstances, although it is true to say that the temporary injunction was not directed against the magistrate, still it was proper for him to stay his hands and give no notice to the opposite party to remove the soil and so on, because the civil suit had been instituted. The learned magistrate's view was that he had no discretion under section 140 (*1*) and that, after the report of the jury, he must under sub-section (*1*) of section 140, which is mandatory, give notice thereunder as required. In our opinion, the magistrate's view was correct. We, therefore, cannot interfere with the order which he has made. The argument of the learned advocate would have been pertinent, if the further proceedings had been taken, which are referred to in sub-section (*2*) of section 140. The learned magistrate is given a discretion whether he should give directions to some one else to carry the order into execution and whether he should make the opposite party pay the costs of such proceedings. The learned magistrate, under this sub-section, can take into consideration the whole of the circumstances and decide whether he ought to give the direction

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referred to in sub-section (*2*) or whether he thinks it expedient to leave the matter where it is until the conclusion of the civil suit. This is a matter for him to decide, but it is open to the opposite party to come to this Court and say that such an order is not expedient and proper. Of course, it would have to be shown that the learned magistrate, in exercising his discretion, had not done so judicially, otherwise the opposite party will not succeed in inducing this Court to set aside the order. This Rule, therefore, is discharged.

S. K. GHOSE J. I agree.

Rule discharged.

A. C. R. C.