

## CRIMINAL REVISION.

Before Lord-Williams and M. C. Ghose JJ.

KUSHUMKUMARI DEBEE

v.

HEMNALINEE DEBEE.\*

1933

July 26.

*Order—Mandatory order, if can be passed by a magistrate—Code of Criminal Procedure (Act V of 1898), s. 144—Indian Penal Code (Act XLV of 1860), s. 188.*

Under section 144 of the Code of Criminal Procedure, the magistrate is only entitled to make a restrictive order preventing a person from doing an act; it does not enable him to make a mandatory order directing him to do some act.

The person so ordered is under no obligation to obey it and proceedings under section 188 of the Indian Penal Code, for disobedience of such order, cannot be sustained.

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The material facts of the case and the arguments in the Rule appear from the judgment.

*Sateendranath Mukherji* and *Amiyaprasad Maitra* for the petitioners.

*Prabodhchandra Chatterji* for the opposite party.

LORT-WILLIAMS J. In this case, a Rule was issued calling upon the Chief Presidency Magistrate and the opposite party to show cause why certain orders should not be set aside. These orders were made under section 144 of the Code of Criminal Procedure and section 188 of the Indian Penal Code.

It appears that the petitioner No. 1 is the owner of premises Nos. 23/A and 23/B, Masjidbarhi Street, Calcutta, and the opposite party is the owner

\*Criminal Revision, No. 667 of 1933, against the orders of S. Wajid Ali, Third Presidency Magistrate, Calcutta, Northern Division, dated June 8 and 23, 1933.

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of 24/3, Masjidbarhi Street. Between the premises there was a passage. This originally had been 6 feet wide. On about 2 feet of this the opposite party had built a wall: but she claimed that the whole 6 feet belonged to her. The petitioner No. 1 claimed that the balance of 4 feet odd belonged to her. She became apprehensive that the opposite party was making a hole in her wall, so that she could use this remaining part of the original passage claimed by petitioner No. 1. Instead of waiting until any such hole had been made and then asking the court for an injunction, she was advised to build a wall of her own up against the wall built by the opposite party. In passing, I ought to mention that the opposite party claimed that she had always had a door in this wall, and, therefore, had a right to use the passage which, she said, belonged to her.

When the opposite party saw the petitioner's workmen digging the foundations of her wall, she applied to the magistrate and got an order under section 144, which was made on the 4th May, 1933, restraining the petitioner from proceeding with the building of the wall and ordering her to fill up the excavation at her own cost. This order was made by Mr. Wajid Ali who was then acting for the Additional Chief Presidency Magistrate. But he reverted to his position as Third Presidency Magistrate on the 16th May, when Khan Bahadur A. Gaffar was appointed Additional Chief Presidency Magistrate. On the 19th May, Khan Bahadur A. Gaffar took up the case and asked Mr. Wajid Ali to make an inspection which he did. Subsequently, the present petitioner showed cause against the order, but did not succeed in getting it set aside. As, however, she failed to obey it, a subsequent order was made, giving the opposite party leave to fill up the excavation at her own cost, and that has been done.

The points taken on behalf on the petitioners are firstly that the magistrate had no power to make the order. Section 18 of the Code of Criminal Procedure

provides that the Local Government may appoint a sufficient number of persons as Presidency Magistrates and one of them to be Chief Presidency Magistrate. Also that it may appoint any person to be an Additional Chief Presidency Magistrate, who shall have all such powers of the Chief Presidency Magistrate as the Local Government may direct.

Section 144 of the Code provides that the powers under that section shall only be exercised by a District Magistrate, a Chief Presidency Magistrate, a Subdivisional Magistrate or any other magistrate specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under that section.

Sub-section 4 provides that any magistrate may "either on his own motion or on the application of any "person aggrieved" rescind or alter any order made under that section by himself or any magistrate subordinate to him, or by his predecessor-in-office.

The contention is that as Mr. Wajid Ali had ceased to be Additional Chief Presidency Magistrate on the 16th May, 1933, he had no power to make what the petitioners call the "final" order, that is to say, the order made after hearing the present petitioner. In our opinion, this contention is unsound. The order under the section was made on the 4th May, when Mr. Wajid Ali had power to make it. Under the procedure, an opportunity is given to the other side to apply to have the order set aside. If he succeeds, the magistrate will set aside the order previously made under the section. If he fails, the original order stands.

The second point is that the magistrate is only entitled to make a restrictive order preventing the opposite party from doing an act, but that it does not enable him to make a mandatory order directing the opposite party to do some act. The original order of the 4th May directed the opposite party, who is the present petitioner No. 1, to fill up the

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excavation, and as she failed to obey this part of the order proceedings were started against her under section 188 of the Indian Penal Code. In our opinion, this part of the order was beyond the magistrate's powers, being in effect mandatory. Consequently, the present petitioners were under no obligation to obey it, and the proceedings under section 188 of the Indian Penal Code, must be set aside.

The Rule is made absolute to this extent only. That part of the order which restrained the petitioner from building a wall stands.

M. C. GHOSE J. I agree.

*Order varied*

A.C.R.C.