CRIMINAL REFERENCE.

Before Khundkar and Edgley JJ.

1940

Jan. 17.

BADRI DAS AGARWALA

v.

SOHAN LAL OSWAL*.

Mandatory injunction—*Magistrate, if can be issue such injunction—Obstruction to a right of way, if can be directed to be removed—Code of Criminal Procedure (Act V of 1898), s. 147.*

Section 147 (2) of the Code of Criminal Procedure empowers the Magistrate, in a proper case, to order a person to do something, or, in other words, to direct a mandatory injunction. Thus, when the Court finds that a person has obstructed the right of way of another over a path by erecting a fence across it and there is likelihood of a breach of the peace, it may direct the former to remove the fence and not to interfere with the use of the path by the latter.

Pasupati Nath Bose v. *Nando Lal Bose* (1); *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2); *Ambica Prasad Singh* v. *Gur Sahay Singh* (3) and *Khajer Naskar* v. *Tabrej Ali Naskar* (4) relied on.

Hari Mati Dasi v. *Hari Dasi Dasi* (5); *Tarani Mohan De Sarkar* v. *Dwark Nath Banikya Poddar* (6) and *Haradhone Mukherjea* v. *Brojendra Nath Rai Choudhuri* (7) dissented from.

The alteration in the language of s. 147 by the amendment of 1923 made no difference in this respect.

(*Kanta*) *Venkanna* v. (*Inuganti*) *Venkata Surya Neeladri Rao* (8) relied on.

CRIMINAL REVISION.

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

Carden Noad and *Manmatha Nath Roy* (Jr.) for the first party, in support of the Reference.

Santosh Kumar Basu and *Bijali Bhusan Sanyal* for the second party, to oppose the Reference.

*Criminal Reference, No. 167 of 1939, made by K. K. Hajara, Sessions Judge of Assam Valley Districts, Sep. 12, 1939.

(1) (1900) 5 C. W. N. 67.
(2) (1901) 5 C. W. N. 335.
(3) (1912) I. L. R. 39 Cal. 560.
(4) [1933] A. I. R. (Cal.) 752.
(5) (1925) 30 C. W. N. 238.
(6) (1933) 38 C. W. N. 476.
(7) (1937) 41 C. W. N. 900.
(8) [1930] A. I. R. (Mad.) 865.

1940

Badri Das Agarwala v. *Sohan Lal Oswal*

Khundkar J.

KHUNDKAR, J. This is a Reference under s. 438 of the Code of Criminal Procedure made by the learned Sessions Judge of the Assam Valley Districts, in which he recommends that a part of an order passed by a trying Magistrate in proceedings under s. 147 of the Code of Criminal Procedure should be set aside.

One Sohan Lal and another had been called upon to show cause why they should not be restrained from interfering with a right of way claimed by the first party, one Badri Das Agarwala. The case for the first party was that he was the owner of a latrine which was connected with the public road by means of a narrow pathway over which the municipal sweepers used to pass and which was the only means of access which the sweepers had to this latrine.

Upon the evidence in the case, the learned Magistrate found as a fact that the first party had established a right of way over this pathway and he thereupon went on to pass the order which is the subject matter of this Reference and which is in the following terms:—

> I accordingly direct that the above sweeper's passage, namely, a strip of land 2½ ft. wide running from Badri's present *puccâ* enclosure, alongside the southern *puccâ* wall of Hanuman Bux, through the fencing in *dâg* 476, right up to the road in the west, be opened for use of the first party's latrine and that the second party be prohibited from interfering with its use, until the whole thing is decided by a civil Court of competent jurisdiction.

It is stated and not denied that the second party had erected a fencing over the pathway thus interfering with the right of way claimed on behalf of the first party, and it is contended that the order just quoted is really a mandatory injunction by reason of which the second party has been ordered to remove the fencing. The learned Sessions Judge is of the opinion that such an order cannot be passed under s. 147(*2*) of the Code and he has drawn our attention in his letter of Reference to two decisions of this

1940

Badri Das Agarwala v. *Sohan Lal Oswal*

Khandkar J.

Court, namely, *Hari Mati Dasi* v. *Hari Dasi Dasi* (1) and *Tarini Mohan De Sarkar* v. *Dwark Nath Banikya Poddar* (2). The matter has been argued at some length before us and we are indebted to Mr. Carden Noad, who appears in support of the Reference, for yet another decision, *viz.*, *Haradhone Mukherjea* v. *Brojendra Nath Rai Choudhuri* (3).

In the case of *Hari Mati Dasi* v. *Hari Dasi Dasi* (*supra*) it was held that sub-s. (*2*) of s. 147 of the Code of Criminal Procedure does not give a Magistrate any power to direct one of the parties to do a positive act by way of mandatory injunction. In that case the facts were that the first party complained that the second party had raised a *puccâ* wall on her land blocking the windows in the house of the first party and thereby shutting out light and air from the western room in that house. The Magistrate directed that the second party, Hari Dasi Dasi, should demolish the new wall within the period of one month from the date of order and that she should not put up another wall blocking the windows of Hari Mati's house till she was adjudged by a competent Court to have the right to do so. In the judgment of this Court, it was pointed out that, if the order of the Magistrate were to stand, the second party would have to bring a suit for a declaration that she had the right to re-build the wall after demolishing it in obedience to the order of the Magistrate, which would be a suit of a somewhat novel character, in which, if successful, the plaintiff could get no relief for the loss caused by the demolition. We are convinced that, in the special facts of that case, the order passed by this Court was the only order which could have been made. In so far, however, as that decision purported to lay down that a mandatory order could not, in any circumstances, be passed under sub-s. (*2*) of s. 147 of the Code, there

(1) (1925) 30 C. W. N. 238. (2) (1933) 38 C. W. N. 476.
(3) (1937) 41 C. W. N. 900.

is, as will presently be seen, a conflict of judicial opinion. This case was followed by the case of *Tarini Mohan De Sarkar* v. *Dwark Nath Banikya Poddar* (*supra*) in which the mandatory order was for the removal of a structure described as a *châprâ*, which we have been given to understand was a shed with a corrugated iron roof. The learned Judges who disposed of *Tarini Mohan's* case would seem to have considered themselves bound by the decision in the case of *Hari Mati Dasi*. In the case of *Haradhone Mukherjea* v. *Brojendra Nath Rai Choudhuri* (*supra*) it was observed that there was nothing in s. 147 which would entitle the Magistrate to direct the petitioner to pull down a wall which was said to obstruct the passage of water.

Mr. Santosh Kumar Basu, who appears to oppose this Reference, has drawn our attention to a number of cases which were decided before s. 147 was amended. In the case of *Pasupati Nath Bose* v. *Nando Lal Bose* (1), where it was found that the first party had a right to the flow of water for the purpose of irrigation from a certain channel passing through the village of the second party who had obstructed such flow by erecting a *bundh*, it was held that, under s. 147 of the Code of Criminal Procedure, a Magistrate was competent to direct that the obstruction should be removed. In the case of *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2) in which it was laid down that, where one party has any right of way over the land of another who obstructs such right by erecting certain huts and there is a likelihood of the breach of the peace in consequence of such obstruction, the Magistrate is competent under the provisions of s. 147 of the Code to direct that the obstruction be removed. In *Ambica Prasad Singh* v. *Gur Sahay Singh* (3) it was held that the Magistrate had jurisdiction under s. 147 of the Code, on being satisfied that a party had a

(1) (1900) 5 C. W. N. 67. (2) (1901) 5 C. W. N. 335.
(3) (1912) I. L. R. 39 Cal. 560.

1940

Badri Das Agarwala v. *Sohan Lal Oswal*

Khundkar J.

right to have an opening in an *âil* for the purpose of draining off the surplus water from his lands and that he had exercised the right for several years, * * * *, to pass an order requiring the opposite party to make the opening within a reasonable time and, on his failure to do so, to direct the police to make the same.

As just stated, these decisions were under s. 147, as it stood before the amendment. We have given anxious consideration to the language of the old section and to that of the new, and we are not prepared to say that the alteration brought about by the amendment makes any difference to the power conferred upon Magistrates in matters of this kind. In this connection, we consider it to be most significant that the amendment of the section was not accompanied by an amendment of Form XXIV in Sch. V to the Code. Our attention has been drawn to the decision of a single Judge of the Madras High Court in the case of (*Kanta*) *Venkanna* v. (*Inuganti*) *Venkata Surya Neeladri Rao* (1) and we think it would be advantageous to quote a portion of the judgment in that case, as, in our opinion, the reasoning which the passage embodies is both illuminating and helpful.

> Section 147, Code of Criminal Procedure, before it was amended in 1923, dealt, like the present section, with disputes concerning the right of use of any land or water and it enabled the Magistrate, if such right was found to exist, to make an order permitting such a thing to be done or directing such a thing should not be done. The corresponding provision of the section as it now stands is that if the dispute exists "regarding any alleged "right of user of any land or water" the Magistrate is empowered on his being satisfied about the existence of such a right, whether it be claimed as an easement or otherwise, to "make an order prohibiting any interference with "the exercise of such right." The order under the old section was directed to the person alleging that he was entitled to the right. The order under the new section is, where the right exists, directed to the person who is interfering with the right. Such an order is valid so long as it merely prohibits the interference with the exercise of the rights. I do not see how from this difference any inference is to be derived as to the propriety or otherwise of what may be generally called mandatory injunctions. Indeed Form No. 24, in Sch. V, Code of Criminal Procedurre, seems rather to favour the argument that what might in effect amount to a mandatory injunction is permissible. In that form, in para. two, the words of the order that the

(1) [1930] A. I. R. (Mad.) 865.

Magistrate may pass are "I do order.....shall not take (or retain), "possession of the said land (or water) to the exclusion of the enjoyment "of the right of use aforesaid." That form is applicable to the use of land or water and it contemplates an order against a person who has interfered with another man's use of land or water that he shall not retain possession of that land or water in violation of that user. In one sense it may be said that that is a mandatory injunction because it requires the person enjoined to give up possession to the other party. I do not see what objection can be raised to using the same form as against a person who has put up an obstruction to the flow of water to which another man is entitled, modified in the following way "I order that.....shall not retain any obstruction to "the flow of water along the said channel to the exclusion of the enjoyment "of the right of user of....." or words to that effect, or alternatively "I order that.....shall not retain possession of the said water to the "exclusion of the enjoyment of the right of user of....." Either form would amount to the same thing in effect and involve, upon the person enjoined, the removal of any obstruction which he had put up. I am, therefore, unable to say that the amendment of s. 147 has had any effect in so far as making the decision in *Karuppana Kownden* v. *Kandasawmi Kownden* (1) inapplicable.

Following the reasoning set out in the passage just quoted we are of opinion that, in the present case, the Magistrate might, in accordance with Form 24 in Sch. V, have framed his order in the following words:—

I do order that the second party shall not retain possession of the pathway with the fence thereon to the exclusion of the right of user of the first party.

Had the order been in these terms, it would, in our view, have none the less amounted in the facts of this case to a direction to the second party to remove the fencing.

The last case, to which our attention has been drawn by Mr. Basu, is a decision of this Court under s. 147, as it now stands, after the amendment. It is the case of *Khajer Naskar* v. *Tabrej Ali Naskar* (2), in which C. C. Ghose J., Acting Chief Justice, as he then was, held that it was impossible to lay down a hard and fast rule, that in every case the final order of the Magistrate should be in exactly the same words as are used in the section. Each case must depend upon its own facts. He also held that, where it was found that, by reason of the erection of a wall, an obstruction to the right of the

(1) [1914] A. I. R. (Mad.) 712. (2) [1933] A. I. R. (Cal.) 752.

1940

Badri Das Agarwala v. *Sohan Lal Oswal*

Khundkar J.

complainant was caused, an order directing removal of the obstruction though not exactly in terms of s. 147 (2) was valid. In the course of his judgment the learned Acting Chief Justice observed as follows :—

> If the Magistrate says to the party who is obstructing the exercise of the right alleged by the complainant that he should be prohibited from interfering with the exercise of such right, and if he translates the order in a manner which would be effective by saying that "you the party obstructing must remove the obstruction," that is the same thing as is indicated in the terms of the clause referred to above.

We prefer to follow the decisions in which it has been held that s. 147 (2) does in a proper case cover the power to order a person to do something or, in other words, the power to direct a mandatory injunction.

We are fortified in this view by the manifest intention of the legislature that s. 147 of the Code may be invoked in proper cases for the purpose of preventing a breach of the public peace. In a case such as that with which we are now dealing we can imagine nothing more likely to embitter the feelings of the successful party and thereby to aggravate the possibility of a breach of the peace, than to make an order to the effect that he is entitled to use the disputed passage and, at the same time, to render the exercise of the right impossible by refusing to remove the obstruction which impedes the exercise of the right. On the analogy of s. 145 of the Code, the obvious intention of the legislature was to allow the free exercise of the right, which had been established in this summary proceeding, until the final rights of the contending parties had been ultimately decided in the civil Court, and it seems to be clear that it would be impossible to give effect to this intention in many cases without issuing some order of a mandatory nature. The language of sub-s. (2) of s. 147 is sufficiently wide to confer a discretion upon the Magistrate as to the nature of the order that he may make in prohibiting any interference with the right of the successful party. In a situation such as that with which the learned Judges

were dealing in *Hari Mati Dasi's* case (*supra*) it would have been unreasonable to direct the demolition of a *puccâ* structure when some slight delay would have secured a full adjudication of the rights of the parties in a civil Court. But the circumstances are clearly different in the case of the obstruction of a sweeper's passage by a fence, and, in our view, in such a case, it is both reasonable and legal to hold that an order prohibiting any interference with the right to use the passage should involve a direction to the effect that the obstruction should be removed.

This Reference is accordingly rejected.

EDGLEY J. I agree.

A. C. R. C.

Reference rejected.