1900

BHUP INDAR BAHADUR SINGH v. BIJAI BAHADUR SINGH.

reference to the decree of the 12th November 1887 is to deprive the later order of its obvious meaning. It is true that one of the arguments used for the defendant was that the later order has no meaning as regards mesne profits because they are not expressly mentioned; but that is clearly wrong and was hardly pressed at this Bar.

Agreeing with the High Court their Lordships will humbly advise Her Majesty to dismiss the appeal and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow and Rogers.*

Solicitors for the respondent:—Mr. *T. C. Summerhays.*

REVISIONAL CRIMINAL.

1901
January 3.

Before Mr. Justice Blair and Mr. Justice Aikman.

QUEEN-EMPRESS v. KEDAR NATH.*

Criminal Procedure Code, section 133—*Nuisance—Encroachment upon unmetalled portion of a Government road.*

Held that any obstruction upon a public road is a nuisance within the meaning of section 133 of the Code of Criminal Procedure, whether in point of fact it causes practical inconvenience or not.

This was a reference made by the Additional Sessions Judge of Agra under section 438 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the order of the Court.

The *Government Pleader* (Maulvi *Ghulam Mujtaba*) in support of the order of the Magistrate.

BLAIR and AIKMAN, JJ.—This matter has been referred to us by the Additional Sessions Judge of Agra with a recommendation that all proceedings held in a certain case to be hereafter described should be set aside. It appears that one Kedar Nath made an application to the District Magistrate of Muttra on the 30th of January, 1900, asking for leave to erect a watering trough for cattle on land described by him in his petition as *nazul land*, and forming part of, or adjacent to, the public road between

* Criminal Reference No. 625 of 1900.

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Muttra and Dig. We find it difficult to understand how such permission should have been sought if the site of the intended trough had been the private property of the petitioner, there being no Act in force in the locality to prevent a man from building as he chose upon his own land. The Magistrate referred the question to the Tahsildar for report. The Tahsildar, accepting the position taken up by the petitioner as to the proprietorship of the land, reported that no public inconvenience would be caused by the erection. The matter was then referred to the District Engineer, who reported that the erection would be an encroachment on public land, and ought not to be sanctioned. Thereupon the District Magistrate made an order, no doubt intended to be an order under section 133 of the Code of Criminal Procedure, but which, owing to some mistake in the office, was wholly meaningless. The mistake, however, was found out, and the Magistrate issued a fresh and valid order on the 12th of June, 1900. At some time before these last mentioned orders the petitioner, without waiting for the granting of his petition by the Court, had erected the watering trough, and, it appears to us beyond substantial doubt, on the very site on which he had asked leave to erect it. The Additional Sessions Judge in his order of reference remarks that a contention was raised by Kedar Nath that when he failed to get the permission applied for on the 30th of January, he built a watering trough on his private land. We find no trace of any such contention on the record. It appears to us that the site upon which he erected was the very site upon which he had asked leave to erect it; but that, finding himself confronted with the difficulty that the land was public land, he withdrew his admission to that effect and set up the contention that this land was his own private land. When this plea was raised before the District Magistrate, he overruled it, holding in substance and effect that this was not a *bonâ fide* contention. Therein he was acting within his discretion, and acting rightly. The contention of the applicant upon the matter of jurisdiction having been overruled, the Magistrate, in accordance with the application of the petitioner, appointed a jury to try whether the order made by him was a reasonable and proper order. A jury of five was accordingly appointed. The 13th of July was fixed as the date

upon which their verdict should be delivered. Before that date, *i.e.*, on the 7th of July, two jurors nominated under the provisions of the Act by Kedar Nath, both of whom were practising pleaders, applied to the Court of the District Magistrate for an enlargement of the time within which to deliver their verdict, on the ground that professional engagements rendered them unable to attend on the 12th to accompany the other jurors to view the locality. For some reason or other unexplained, no order was passed on their application until the 11th of July, and it was then rejected, apparently on the ground that it was too late. The order appointing the jurors was dated the 4th of July, and we think that the application for enlargement of time made on the 7th and upon the grounds stated was neither a tardy nor otherwise an unreasonable application. There is, however, one ground of objection taken by the applicant for revision in his petition which does not appear to have attracted the notice of the Additional Sessions Judge; and it is one which, in our opinion, goes to the root of all proceedings held after the due and legal appointment of the jurors. This application ought to have been dealt with by the Magistrate who appointed the jury and by no one else. In some unexplained way it came before Mr. Dewar, who had been appointed foreman of the jury, and who took it upon himself to deal with and reject the application. Such rejection had, under the circumstances, no legal validity. The application upon which that order was made must be taken to be as yet undisposed of by any judicial authority. Until it has been so disposed of no proceedings can be held to be valid. The ultimate order made by the Magistrate and purporting to be an order under section 141 of the Code of Criminal Procedure must therefore be set aside, no duly empowered Magistrate having exercised his discretion whether or not to extend the time to the jurors to give their verdict. Such an exercise of discretion is a condition precedent to the passing of such an order. The power to extend or refuse to extend time is expressly conferred by the last clause of section 138 of the Code of Criminal Procedure.

In our opinion the explanations given by the District Magistrate entirely meet the objections of the Additional Sessions Judge. But the Additional Sessions Judge has not dealt with the matter

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to which we have called attention. We wish specifically to indicate our approval of the view taken by the District Magistrate, that the motive with which a public highway is obstructed is absolutely irrelevant. We also agree that any obstruction on a public road is a nuisance, whether in point of fact it causes practical inconvenience or not. The land upon which it is built may not be at the time necessary for the continuous use of the road. An increased traffic might make it so.

We may add that although the verdict of the majority of the jury must be accepted by the Magistrate, this means that the jury should have heard together and tried the matter which had been referred to them; the decision of three of them acting in the absence of the other two is wholly invalid. For these reasons we set aside the order of the 11th of July, refusing to grant to the jurors enlargement of time, and all proceedings and orders subsequent thereto. We direct the District Magistrate to take up the case from that point, and to deal with the application of the two jurors for enlargement of time to the best of his discretion.

1901
January 15.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.

KALKA DUBE (DECREE-HOLDER) *v.* BISHESHAR PATAK AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Limitation—Act No. XV of 1877 *(Indian Limitation Act), Sch ii, Art.* 179.

Held that an application for execution of a decree, which was defective only in that it stated incorrectly the date of a previous application for execution (such date being, under the circumstances of the case, quite immaterial), and which was amended within three days of an order of the executing Court requiring the amendment, could not be treated as an application not in accordance with law within the meaning of article 179 of the second schedule to the Indian Limitation Act, 1877. *Gopal Chunder Manna* v. *Gosain Das Kalay* (1), followed.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

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* Second Appeal No 706 of 1898 from a decree of J. Denman, Esq., District Judge of Allahabad, dated the 30th June 1898, confirming a decree of Babu Mohan Lal, Subordinate Judge of Allahabad, dated the 29th January 1898.

(1) (1898) I. L. R., 25 Calc., 594.