REVISIONAL CRIMINAL.

1912
February, 19.

Before Mr. Justice Tudball.

EMPEROR v. BHAROSA PATHAK AND OTHERS.*

Criminal Procedure Code, section 133—Public nuisance—Construction of dam causing injury to village lands.

A, B and C being contiguous villages, of which C lay at a lower level than A and B, the surplus water falling on A and B used to run off through certain natural channels over the lands of village C. The inhabitants of C erected a dam to keep the water from their lands, and by so doing caused flooding of and damage to the lands of A and B. *Held* that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under section 133 of the Code of Criminal Procedure.

IN this case three villages were concerned, Aman and Basarat on the one side and Barkagaon on the other. The villages were contiguous and the last mentioned lay at a lower level than Aman and Basarat, and in consequence the surplus water from these two villages escaped through certain natural channels over the lands of Barkagaon. To some extent this water was retained by means of a dam, which had been the subject of former litigation. The men of Barkagaon extended this dam and thereby caused the lands of the other two villages to be flooded. The inhabitants of Aman and Basarat thereupon petitioned the magistrate to take action under section 133 of the Code of Criminal Procedure; and he did so and ordered the removal of the new portions of the dam. Against this order the inhabitants of Barkagaon applied in revision to the High Court.

Babu *Surendra Nath Sen*, for the appellants.

Dr. *Tej Bahadur Sapru*, for the opposite party.

TUDBALL, J.—This application for revision arises out of proceedings taken by a Magistrate under section 133 of the Criminal Procedure Code. The facts, as far as they can be gathered from the record and the not very luminous judgement of the lower court, appear to be as follows:—The complainants in the matter are residents and cultivators of Aman and Basarat, two villages, and the opposite party are residents of Barkagaon. Apparently the lands of the latter village lie at a lower level than those of the two former and when excessive rain falls the water from the higher

* Criminal Revision No. 740 of 1911 from an order of Ganga Prasad, Magistrate, first class, of Gorakhpur, dated the 24th of November, 1911.

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lands flows down upon the lower lands of Barkagaon. Presumably both sets of lands lie in an ill-defined hollow. In 1885, there was civil litigation between the parties in regard to a dam which the Barkagaon people built across their fields to prevent the excess water from the lands above flowing on to their lands. The Civil Court held that the dam was an ancient one and maintained it. The patwari's evidence also shows that there is a *tal* or *jhil* in Aman, the end of which is also damned to keep back its waters, and that this dam is broken in several places.

The complaint made to the Magistrate was to the effect that the opposite party, the Barkagaon men, had extended their old dam both eastwards and westwards, thereby adding a further obstruction to the flow of excess water along its natural channel over the lands of Barkagaon with the result that the lands above the dam were flooded and a large area of crops damaged. As usual, they exaggerated their case by pleading that houses in their villages had been flooded out and had fallen.

The Magistrate, who inspected the locality and recorded the evidence, has found that there has been a considerable extension of the dam resulting in the holding up of a large volume of water, and that this has resulted in considerable injury to the crops growing over a considerable area above the dam.

He has, therefore, passed an order for the removal of the extensions. He has ostensibly taken action under Chapter X of the Criminal Procedure Code which relates to public nuisances.

The pleas raised and pressed in this Court are :—

(1) That the Magistrate had no jurisdiction in the matter as it was merely a case of disputed civil rights.

(2) That the applicants were justified in their action as it was taken to protect their own lands and crops.

In regard to jurisdiction the matter is by no means clear. Section 133 enables the Magistrate to take action under it if he considers on information and inquiry (if any) that an unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place.

There can be no doubt that the applicants have placed (by extending their dam) an unlawful obstruction in the channel along

which the complainant party has in the past drained off the surplus waters which flow upon their lands. This extension has been found by the Magistrate to have been recently made. It affects the lands of at least two villages. A person is guilty of a public nuisance who does any act which causes common injury to the public or the people in general who dwell or occupy property in the vicinity (*vide* section 268, Indian Penal Code). The resultant injury in the present case affects a large area of cultivated land and a considerable body of persons. It is difficult, if not impossible, to lay down any fixed boundary between what constitutes a public nuisance and what a private nuisance; but in the present case, seeing that the cultivators of two villages are affected, there can be little doubt that the case is one of a public nuisance. There cannot be any doubt that even from before 1885, that portion of the public affected by the act has been draining off the excess waters which come upon its lands over the lands of the applicants, and that the applicants have placed an unlawful obstruction to prevent the flow of water along its natural channel, a channel which the public body affected has a right to use for the removal of excess water over and above that held up by the smaller pre-existing dam. The case, no doubt, is close to the border line between private and public nuisances, but in the circumstances I do not see sufficient cause for interference on revision on this point. The second plea has no force. A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the applicants (section 268, Indian Penal Code).

The case is one in which I do not think interference is necessary or advisable, and I therefore dismiss the application.

Application dismissed.