

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

FARZAND ALI v. HAKIM ALI.*

Criminal Procedure Code, section 133—Procedure—Jury—Applicant consulted by Magistrate as to appointment of jury.

In proceedings instituted under section 133 of the Code of Criminal Procedure at the instance of H against F, F. applied for the appointment of a jury, which was granted. He nominated two jurors. The Magistrate called upon H. to nominate two jurors. H. nominated two jurors, and the Magistrate appointed a foreman. The jury by a majority made an order against F.

Held that it is not illegal on the part of a Magistrate to address any inquiry to the applicant with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury: but the Magistrate should see that he does not appoint friends or partisans of the applicant. The criterion in such cases is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation. *Upendra Nath Bhattacharjee v. Kshitish Chandra Bhattacharjee* (1), *Kailash Chandra Sen v. Ram Lall Mitra* (2) and *Mir Imam Abdul Aziz v. Queen Empress* (3) referred to.

IN this case one Hakim Ali filed a petition before a magistrate of the Meerut district in which he complained that one Farzand Ali had recently enlarged his dwelling-house by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to Farzand Ali, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. Farzand Ali, as he was entitled to do, nominated two jurors.

The Magistrate appears to have enquired from Hakim Ali, whether he could suggest the names of two other suitable persons to serve on the jury, and thereupon Hakim Ali presented a petition suggesting the names of two Hindu residents of another village. The Magistrate then proceeded to nominate a foreman.

* Criminal Revision No. 588 of 1914 from an order of Jai Narain, Magistrate, First Class, of Meerut, dated the 24th of April, 1914.

(1) (1896) I. L. R., 23 Calc., 499. (2) (1899) I. L. R., 26 Calc., 869.

(3) Punj. Rec., 1897, Or. J., No. 4.

After the majority of the jury had decided the question referred to them in a sense unfavourable to Farzand Ali, the Magistrate proceeded to make his order absolute in accordance with law. Against this order Farzand Ali applied in revision to the High Court.

Mr. *J. J. Simeon* and Pandit *Uma Shankar Bajpai*, for the applicant.

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

The Assistant Government Advocate (Mr. *R Malcomson*), for the Crown.

PIGGOTT, J.—This is an application in revision in respect of certain proceedings taken by Magistrate under section 133 and the succeeding sections of the Code of Criminal Procedure. The matter appears to have been brought to the notice of the Magistrate by a petition presented by a person of the name of Hakim Ali. That petition stated in substance that Farzand Ali, who is the applicant now before me, had recently enlarged his dwelling-house by making certain constructions which had the effect of obstructing a portion of a public way used by the residents of two villages, and that serious inconvenience was thereby being caused to the petitioner and other residents of the neighbourhood. After notice had issued to Farzand Ali, the latter applied in accordance with law for the appointment of a jury to try the question whether the conditional order issued by the Magistrate for the removal of the alleged obstruction was a reasonable and proper order. Farzand Ali, as he was entitled to do, nominated two jurymen. I note that he nominated two co-religionists of his own. The Magistrate appears to have inquired from Hakim Ali whether he could suggest the names of two other suitable persons to serve on the jury, and thereupon Hakim Ali presented a petition suggesting the names of two Hindu residents of another village. The Magistrate then proceeded to nominate a foreman. It has been brought to my notice in the course of argument that the foreman originally nominated by the Magistrate declined to serve, that the Magistrate thereupon nominated another gentleman, a Muhammadan, and that this nomination was objected to on behalf of Farzand Ali. I have not pursued the history of this objection further because no plea is taken in the petition before me with

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regard to the appointment of the foreman. After the majority of the jury had decided the question referred to them in a sense unfavourable to Farzand Ali, the Magistrate proceeded to make his order absolute in accordance with law. Objection is now taken before this Court that the entire proceedings before the Magistrate, from the date of the order constituting the jury, are illegal and void, by reason of the fact that two of the jurors were appointed on the suggestion of the petitioner Hakim Ali. There is authority for this proposition in the cases of *Upendra Nath Bhuttacharjee v. Khitish Chandra Bhuttacharjee* (1), *Kailash Chandra Sen v. Ram Lall Mittra* (2), in some older cases of the same court referred to in the above decisions, and I have also been referred to the case of *Mir Imam Abdul Aziz v. Queen Empress* (3). Now it is certainly expedient that in all proceedings initiated under section 133 of the Code of Criminal Procedure the Magistrate should bear in mind that he is supposed to be acting purely in the interests of the public, and should be on his guard against any tendency to use this section as substitute for litigation in the Civil Courts in order to the settlement of a private dispute. In the present case the question before the Magistrate was whether there had been an obstruction to a public way, to the injury or inconvenience of members of the public entitled to use the same. Hakim Ali had no *locus standi* in the matter, once he had performed what was perhaps his duty as a good citizen in calling the attention of the Magistrate to the existence of the nuisance. In so far, therefore, as the rulings to which I have been referred lay down the principle that it is expedient that Magistrates should be on their guard against allowing a proceeding of this sort to assume the character of a private litigation and allowing it to be treated as a dispute to which two private individuals representing opposite interests are the parties, I am in entire accord with the same. I still more emphatically approve of the principle laid down in the Punjab case above referred to, that it would be highly improper on the part of the Magistrate to appoint to serve on a jury of this sort, the friends or supporters of the person at whose instance the proceedings under Chapter X of the Code of Criminal Procedure are being taken. At the same time, it must be remembered that it is often not an easy matter for a Magistrate to secure the

(1) (1896) I. L. R., 23 Cal., 499. (2) (1893) I. L. R., 26 Cal., 869.

(3) Panj. Rec., 1897, Cr. J., No. 4.

services of a foreman and two independent jurymen to undertake in the public interests an inquiry of this sort, it may be in some village distant from head quarters. If the rulings to which I have been referred are supposed to lay down the principle that it is illegal for a Magistrate to address any inquiry to the person who first came forward to draw his attention to the existence of the alleged public nuisance, with a view to ascertaining the names of respectable and independent residents of the neighbourhood who would be willing to serve on the jury, then I am unable to concur in any such principle. It clearly goes beyond anything which is to be found in the provisions of the Code of Criminal Procedure itself, and it also goes beyond the requirements of the effective and impartial administration of justice. The criterion, therefore, which I would apply to a case of this sort, is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law, as if he were a party to the litigation, and whether as a matter of fact the jurors nominated by the Magistrate could rightly be described as friends or supporters of the aforesaid person. Even in the cases to which I have been referred it is sufficiently clear that the underlying principle, that the revisional jurisdiction of this Court should be exercised only to correct a manifest failure of justice, was clearly recognized. The record before me does not show that Farzand Ali at any time objected in the court below to the two Hindu jurors who were nominated at the suggestion of Hakim Ali. Even in his petition to this Court he has not suggested, much less proved by affidavit, that these persons could be regarded as friends or supporters of Hakim Ali. I have, therefore, no materials before me which would justify the conclusion that these Hindu jurors were other than respectable and impartial residents of the neighbourhood and suitable persons to have been called upon to act as such; on the contrary, the silence of the applicant in revision justifies the opposite presumption. So far therefore from being prepared to hold that the Magistrate's proceedings were illegal or void, I do not find them to be vitiated by an such impropriety or irregularity as would justify the interference of this Court. The application is therefore dismissed.

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Libtary Application dismissed.