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IN THE MATTER OF DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY COMPANY, LIMITED.

is no discussion in the case as to a liquidator's power to refer to private arbitration. I do not, therefore, find this case to be of any guidance to me.

Looking from all points of view it appears to me that I should not permit the official liquidators to refer the present dispute to private arbitration. I accordingly refuse the application.

I may point out that, in any case, the present application could not be granted except to authorize the official liquidators to execute an "agreement of reference to arbitration" jointly with the Allahabad Bank. The present application is framed as if a suit is already pending in this Court and a reference is to be made in the suit, under paragraph 1 of schedule II of the Code of Civil Procedure.

The sanction to institute the suit was given sometime back, and it will be the duty of the official liquidators to institute the suit forthwith. Questions of limitation may arise in the case and the liquidators must bear the responsibility if, owing to delay, any portion of the claim be lost.

REVISIONAL CRIMINAL.

Before Mr. Justice Dalal.

MUNNA TIWARI AND OTHERS *v.* CHANDRABALI AND OTHERS.* 1928 *May*, 21.

Criminal Procedure Code, sections 137 *and* 139A*—Public nuisance—Distinction between public right and private right —*Bonâ fide *claim to the exercise of a private right—Procedure.*

Where in the course of proceedings initiated under chapter X of the Code of Criminal Procedure it becomes apparent that

*Criminal Revision No. 275 of 1928, from an order of Kashi Prasad, Additional Sessions Judge of Basti, dated the 3rd of March, 1928.

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there is a *bonâ fide* question of the private rights of the parties involved, the proper course for the court to adopt is to stay the proceedings until such time as rights of the parties concerned have been decided by a competent civil court. *Emperor* v. *Bharosa Pathak* (1), In re *Maharana Shri Jaswantsangji Tatesangji* (2), *Jagarnath Sahu* v. *Parmeshwar Narain* (3), *Abdul Wahid Khan* v. *Abdullah Khan* (4), *Bhagwan Das* v. *Emperor* (5) and *Manipur Dey* v. *Bidhu Bhushan Sarkar* (6), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *Syed Muhammad Husain*, for the applicants.

Maulvi *Iqbal Ahmad*, for the opposite parties.

DALAL, J. :—This is an application for revision from an order passed by a Magistrate in the Basti district under section 137 of the Code of Criminal Procedure directing that a certain *bandh* (a wall to prevent the flow of water) be removed. The court adopted the correct procedure by issuing a notice against the applicants to remove the *bandh* within a certain time specified in the order, or to appear and show cause against the same. When the applicants appeared, they denied the existence of any public right in the opposite party under section 139A. The Magistrate thereupon recorded evidence. There was considerable reliable evidence in support of the denial of the right being a public right. The Magistrate, however, found that there was no such evidence and proceeded as laid down in section 137 of the Code of Criminal Procedure. The applicants Munna Tiwari and others have, therefore, come in revision to this Court, because the Magistrate finally made the orders under section 133 absolute under section 137 of the Code of Criminal Procedure.

For the sake of convenience the persons who desired the removal of the *bandh* may be called

(1) (1912) I.L.R., 34 All., 345.
(2) (1897) I.L.R., 22 Bom., 988.
(3) (1914) I.L.R., 36 All., 209.
(4) (1923) I.L.R., 45 All., 657.
(5) (1922) 73 Indian Cases, 523.
(6) (1914) I.L.R., 42 Calc., 158.

Chandrabali's party, and the persons who built the *bandh* may be called Munna's party. There is a very large *jhil* (expanse of water) on Chandrabali's side in village Tal Bharanch *alias* Bakhra *jhil*. This village is on a higher level than the village of Ghurapali which belongs to Munna and others. The water flows down from the *jhil* by a channel to the river Rapti from village Tal Bharanch and village Ghurapali which adjoins Tal Bharanch. Subsequently the water passes through several villages before it reaches the river Rapti. During the rains there is an expanse of water right up from the *jhil* to the Rapti, but in the dry season the water has to be prevented from flowing away, and Chandrabali's party have by litigation acquired a right to build a *bandh* to preserve the water of the *jhil* during the dry season. Munna's party of the Ghurapali village did the same during the spring and collected water for their use in their village. In the winter and spring this year there had been rain, so this stoppage of water threw the water back on to the village of Chandrabali, and it is alleged that it caused damage there. Chandrabali's party claimed that Munna had no right to build the *bandh* which he did to stop the water flowing on to the river Rapti, and that Chandrabali and his party have a right to prevent all the villages between their village and the Rapti from building a *bandh* and thereby preventing the flow of water from Chandrabali's *jhil* to the Rapti, when Chandrabali has surplus water. This very statement of the case will show that Chandrabali claimed a private right, and not a public one. Both the subordinate courts have relied on a single Judge case of this Court, *Emperor* v. *Bharosa Pathak* (1), in holding that the right claimed by Chandrabali was a public right, because it affected a very large number of

(1) (1912) I.L.R., 34 All., 345.

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people. In that case, however, the learned Judge observed that the case was on the border line. He made reference to section 268 of the Indian Penal Code, in which a public nuisance is defined as an act or an illegal omission which causes any common injury, danger or nuisance to the public, or to the people in general who dwell or occupy property in the vicinity. The injury must be to the people in general, and not to particular people, such as cultivators. In the present case the injury is not caused to people in general, whether they be cultivators or artisans, but only to a certain class of people who are agriculturists in the village of Chandrabali. As pointed out by a Bench of two Judges of the Bombay High Court in *In re Maharana Shri Jaswatsangji Fatesangji* (1), not only the way, river or channel, where an unlawful obstruction is made, must be one of public use, but also the obstruction must be of that public use. In the present case the channel is not a public river, but one passing through particular villages, and of which the water is used by the agriculturists on both banks thereof. The obstruction in any way cannot be considered public, because only the villagers of Chandrabali's village allege that they were injured thereby, and there is no complaint by the general public. In a case similar to the present a Bench of this Court considered the law on the subject in some detail, and came to the conclusion that a field which is on a lower level than the adjoining fields and over which the surplus water of these adjoining fields used to flow into a tank, even if it be described as a channel, is not such a channel as had been or could lawfully be used by the public, and action cannot be taken under section 133 of the Code of Criminal Procedure for the removal of any unlawful obstruction from it: *Jagarnath Sahu* v. *Parmeshwar Narain* (2). In a Full Bench ruling, *Abdul*

(1) (1897) I.L.R., 22 Bom., 988. (2) (1914) I.L.R., 36 All., 209.
(3) (1923) I.L.R., 45 All., 657.

Wahid Khan v. *Abdullah Khan* (3), the majority of Judges out of three were of opinion that the Magistrate has jurisdiction to take action under section 133 of the Code of Criminal Procedure even where a *bonâ fide* claim of right is raised by the defendent, but when the question whether the right rested in the public is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, the proper procedure for a Magistrate to employ would be under section 139A(2) to stay proceedings until the matter of the existence of such right has been decided by a competent civil court. In a case before me in Oudh I drew the attention of Magistrates to the observations of Mr. Justice DANIELS in another case that the existence of a genuine dispute as to title, suitable for decision by the civil court, is a sufficient ground for not making an order absolute under section 137 of the Code of Criminal Procedure : *Bhagwan Das* v. *Emperor* (1).

It may be noticed that the provisions of section 139A were enacted in 1923 to give effect to a Bench ruling of the Calcutta High Court in *Manipur Dey* v. *Bidhu Bhushan Sarkar* (2). That case was a case of the obstruction of a public way, and the decision was that if the Magistrate finds that the claim of the defendant is a *bonâ fide* one to the effect that the right is private and not a public one, the Magistrate should stay his hand and refer the parties to the civil court. In the present case there cannot be the slightest doubt that Munna's party is laying a *bonâ fide* claim to a private right to raise a *bandh* for the preservation of water to irrigate their own fields. In fact Mr. *Iqbal Ahmad*, who appeared for the opposite party, informed the Court that a suit for damages to the extent of Rs. 50,000 was being prepared for the damage caused to Chandrabali's party by the *bandh* being put up. Obviously, then, the dispute is a private one between Munna's party and Chandrabali's party, and

(1) (1922) 73 Indian Cases, 523. (2) (1914) I.L.R., 42 Calc., 158.

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should be decided by a civil court. As pointed out in the Calcutta case and in the case of this Court reported in I.L.R., 45 Allahabad, the proper order for the Magistrate to pass was one under section 139A to stay proceedings until the matter of the existence of such right had been decided by a competent civil court. I set aside the order of Mr. Ram Bihari Sahi, Magistrate, dated the 19th of February, 1928, under section 137 of the Code of Criminal Procedure and substitute in its place an order under section 139A that the proceedings be stayed until the matter of the existence of the right of Munna's party to build the *bandh* has been decided by a competent civil court.

Before Mr. Justice Dalal.

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EMPEROR *v.* HASAN AHMAD.*

Act No. VIII of 1914 *(Indian Motor Vehicles Act), sections* 6, 8, 9 and 16—*United Provinces Motor Vehicles Rules,* 1924, *rules* 20, 21, 22 *and* 24—*Licence—Permit—Failure to produce permit—Power of district authority to prescribe route along which a public motor vehicle shall ply for hire.*

Held, (1) that there is no power given to the "district authority" either by the Indian Motor Vehicles Act, 1914, or by the rules framed thereunder, which enables that authority to prescribe the route along which a public motor vehicle authorized to ply for hire shall run, and (2) that there is no provision in either the Act or the rules which renders punishable the non-production of a "permit" issued under rule 24, as distinct from a licence prescribed by section 5 and rules 20—22.

This was a reference made by the District Magistrate of Muttra. The facts of the case are clearly stated in the referring order, which was as follows :—

"In my opinion the convictions and sentences passed in this case cannot possibly be upheld. The Magistrate has

*Criminal Reference No. 416 of 1928.