

A somewhat similar view has been expressed by the Rangoon High Court in *Ma Naw Naw v. Somasundram Chetty* (1), with regard to applications under order IX, rule 13, of the Code of Civil Procedure which are governed by article 164.

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I accordingly allow this revision and setting aside the decree of the court below dismiss the plaintiff's suit with costs.

### REVISIONAL CRIMINAL.

Before Mr. Justice Boys and Mr. Justice Banerji.

EMPEROR v. BHAGAT RAM.\*

*Criminal Procedure Code, section 133—Removing a trade or occupation—Borrow-pits dug for brick-making—Order to cease the brick-making, and also to fill up the existing pits—Legality of latter part of order.*

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Where a Magistrate passed an order under section 133 of the Code of Criminal Procedure to stop a trade or occupation of brick-making which was going on in a particular locality, on the ground that it was injurious to the health or physical comfort of the community inasmuch as the borrow-pits made for the purpose of brick-making became breeding-grounds for mosquitoes, and also to fill up the existing pits and restore the *status quo*: Held, that the power "to remove" any trade or occupation, conferred by section 133, did not cover such an order to restore the *status quo* by filling up the existing pits.

THE facts of the case are fully stated in the judgment of the Court.

Babu *Piari Lal Banerji*, and Babu *Saila Nath Mukerji*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

\*Criminal Reference No. 367 of 1928.

(1) (1924) I.L.R., 2 Rangoon, 655.

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BOYS and BANERJI, JJ. :—This is a reference from the Sessions Judge of Moradabad. We are now at the 26th of November, 1928, and these proceedings have dragged along from the 22nd of December, 1925, very nearly three years. This has been almost entirely due to the fact that the Joint Magistrate of Moradabad in February, 1926, passed at the outset an order directing the opposite party to cease excavating and burning bricks, and to fill up the existing pits, without taking the trouble to read the section under which he had to proceed. The result was that this Court set aside the proceedings, and a fresh notice had to issue. This notice was issued on the 1st of April, 1926, by Mr. Sayid Abu Mohammad, again a Magistrate of the first class, who did not take the trouble to see that the notice he issued conformed to the terms of one or other of the paragraphs in section 133. The result of this omission of both courts to be precise as to the law under which they were proceeding has led to much waste of time and trouble, and has also made it very difficult for us in this Court to know whether the orders eventually passed were such as we ought to uphold.

We do not propose to detail the whole of the subsequent procedure.

The substance of the complaint against Mr. Bhagat Ram, a civil engineer, is that he, having bought some land for the purposes of brick kilns just outside the municipal limits of Moradabad, proceeded to dig pits in the ordinary course of the trade or occupation of brick-making, and that those pits constituted a breeding ground of mosquitoes; and further that the smoke and the sparks from the chimneys constituted a nuisance and a danger. The Magistrate ordered the making of bricks to cease and the pits to be filled up. We have no information before us as to when the digging of the pits began, how much of the excavations had been made before the first notice

was served on Mr. Bhagat Ram, and how much subsequently. But this latter matter would only concern this Court as influencing the exercise of discretion. We have first to make it clear under what paragraph of section 133 these proceedings would apparently fall. There is no suggestion before us that any nuisance that may have occurred occurred on "any way, river or channel which is or may be lawfully used by the public, or on any public place." It is contended that the circumstances are covered by the second paragraph; that we have here a trade or occupation injurious to the health or physical comfort of the community. We have to see what order the Magistrate could pass in such circumstances. He could order the opposite party "to desist from carrying on, or to remove, or regulate in such manner as may be directed, such trade or occupation."

It is, of course, possible to suggest that power to order the "removal" of a trade must be held to include power to remove anything connected with that trade, or to restore the *status quo* before that trade commenced. But we do not think that that is the natural and straightforward meaning of the paragraph, and we have no right to strain the natural and straightforward meaning merely because an order that might be passed by so doing would possibly be very desirable. The powers given clearly suggest three different things: that the Magistrate may simply order the opposite party to stop carrying on the trade or occupation in question; he may think on the other hand that the carrying on of the trade or occupation would not be injurious if it were removed perhaps a short distance away, and he may order it to be so removed; or, thirdly, he may think that there will be nothing injurious if the occupation or trade is carried on at the same spot, provided certain conditions are fulfilled. We think that it would be manifestly straining the meaning of the word "remove" to hold that removal of the trade or

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occupation includes ordering the opposite party to restore the *status quo* in the manner now in this case considered by the authorities desirable. The only power given to the Magistrate,—we are speaking only of the circumstances of a case similar to this,—in reference to an excavation is to order it to be fenced. If there were any question of a nuisance on a public way, coming under the first paragraph of section 133, the power of the Magistrate might or might not include power to fill up a pit which was causing such nuisance. That we have not to decide.

We are not prepared to hold that where there is a case, as in the present, of a person being ordered to desist from a particular trade or occupation, or to remove that trade or occupation, or it is desired to regulate that occupation, the Magistrate has any power to order him to fill up the pits.

We have, of course, not failed to appreciate the grave danger said to arise to the inhabitants in the neighbourhood of these pits and the desirability of there being some such power in a suitable authority to control the commencement and conduct of these brick-making concerns. We entirely agree with the remark of Mr. Kidwai in the order of the 10th of February, 1926, in which he made an abortive effort to control this brick-kiln, that "it is a great pity that there are no bye-laws of the District Board which could at the very commencement put a stop to the starting of such works within so close a distance of habitations." Mr. Kidwai himself seems to have felt the desirability of more explicit powers existing in somebody. We agree. But that would not justify us in straining the language of section 133 to meet the case.

Another observation which we must make is that even if the Magistrate had the power to order the filling

up of the pits, it is open to doubt whether in the circumstances of this case it would have been a proper order. Mr. Abu Mohammad in his order of the 3rd of June, 1926, the present order, the propriety of which we are now considering, says: "In the case of the railway borrow-pits, of which the existing pond (that is, a railway pond, other than the borrow-pits now in dispute) is a tangible monstrous example, the railway authorities have had their attention drawn to the desirability of filling them up some years ago, but the task has become too stupendous to be feasible." The meaning of this can only be that the railway having once been allowed to make these borrow-pits, it would not be reasonable or practicable to order the railway to fill them up. It would be perhaps even more unreasonable to order Mr. Bhagat Ram, a private individual, to fill up pits which he has been allowed to make. If we had any evidence before us as to how far he had proceeded with the making of these pits after notice that it might involve him in trouble, other considerations might apply; but we have no such information.

The order of the Magistrate directing the cessation of the brick-making and of digging pits will stand, but that portion of his order directing the opposite party to fill up the pits is set aside.

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