

cannot find any provision of the law, or any rules having the force of law, permitting the use of affidavits in such proceedings or authorising the administration of an oath to persons who profess to file affidavits in such proceedings. Therefore we do not think that the facts show the commission of any offence by the applicant under section 199, Indian Penal Code. We accordingly think there are no grounds why the applicant should be prosecuted under either of these sections. We therefore set aside the order of the District Judge sanctioning the present prosecution, and direct that the proceedings be quashed and the rule made absolute.

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Rule made absolute and order set aside.

H. T. H.

Before Mr. Justice Trevelyan and Justice Rampini.

CHATHU RAI, 2ND PARTY (PETITIONER), v. NIRANJAN RAI,
1ST PARTY (OPPOSITE PARTY).*

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May 9.

*Criminal Procedure Code (Act X of 1882), ss. 145, 437—"Complaint"—
District Magistrate, power of, to order further enquiry—Dispute concerning land—Power to order enquiry.*

Section 437 of the Code of Criminal Procedure does not give power to order a further inquiry in a case under section 145 of that Code.

THE facts which led to the issue of the rule in this case were as follows:—

The two parties claimed to be in possession of five plots of land in mouzah Amma Narbipore. On 30th of June 1892, Niranjana Rai, the 1st party, brought a complaint against Chathu Rai and Mohabir Rai for criminal trespass, under section 447 of the Penal Code, with reference to this land. The Deputy Magistrate, Mr. S. M. Nasiruddin, in charge of the Magistrate's office at the time, before whom the complaint was filed, issued a summons only against Mohabir Rai, and made the case over to Baboo Medni Prasad Singh, Deputy Magistrate, for trial. The case was, however, compounded as between Niranjana and Mohabir. Niranjana

* Criminal Revision No. 222 of 1893, against the order passed by S. M. Nasiruddin, Deputy Magistrate of Arrah, dated the 24th of February 1893.

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then applied to the same Deputy Magistrate in charge for issue of process against the other defendant, Chathu Rai, which application was granted, and the case was again made over to Baboo Medni Prasad Singh for disposal, who after holding a trial acquitted the accused on the 29th of August 1892. The complainant then put in a petition before the Deputy Magistrate in charge on the 9th of November 1892, praying that proceedings might be instituted to prevent a breach of the peace. The Deputy Magistrate in charge, thereupon, on the 11th November 1892, instituted a proceeding under section 145 of the Code of Criminal Procedure. This matter was also made over to Baboo Medni Prasad Singh for enquiry and disposal, but on the application of Niranjan Rai to the District Magistrate the case was transferred on the 16th of November 1892 to the file of the Deputy Magistrate, Mr. S. M. Nasiruddin, who while in charge had instituted the proceeding.

This Deputy Magistrate, however, went away on leave, and was relieved by the Joint-Magistrate. The case accordingly went to the file of the Joint-Magistrate, who on the 29th December 1892 stopped further proceedings and struck off the case without taking evidence, as he was of opinion that there was no immediate apprehension of a breach of the peace. The District Magistrate having been moved in the matter, reinstated the proceeding under section 145 on the 9th of February 1893, and transferred the case to the file of Mr. S. M. Nasiruddin, who had in the meantime returned to duty. The order of the District Magistrate was in the following terms:—

“In this case a Magistrate properly empowered drew up a proceeding based on what had transpired in a trespass case—calling on parties to a dispute about certain lands to attend on a certain date with written statements, &c., under section 145, Criminal Procedure Code. This case was at first on the file of Moulvi S. Nasiruddin, Deputy Magistrate, who initiated it: but he, as in charge of the head-quarters office, transferred it to Baboo Medni Prasad's file. Thence, as the latter had formed an opinion, it was transferred to Moulvi S. Nasiruddin's file, whence, in the latter's absence on leave, it migrated to the Joint-Magistrate's file. Such were the travels and such the delay in a proceeding which the law clearly intended should be sharp and summary. I do not know under what section it has been disposed of by the Joint-Magistrate, but his action was clearly *ultra*

vires. The possession contemplated by the section is that at the time the dispute arose, *i.e.*, at the time the order instituting proceedings was passed. Otherwise it would be impossible to decide a case of the kind at all: for while proceedings are going on there is never any serious risk to the peace. The very limited sense which is sought to impose on the word 'then' is irrational. It is incumbent on a Magistrate when proceedings have once been instituted to proceed as clause (2) of section 145 demands. As the orders of the Joint-Magistrate are *ultra vires* and based on no provision of the law, I shall simply order the case under section 145 to proceed, and transfer it to Moulvi S. Nasiruddin's file."

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The Deputy Magistrate thereupon took up the case, and after recording evidence declared the 1st party to be in possession of the lands in dispute.

Against this order the 2nd party moved the High Court, on the grounds, *inter alia*, that the District Magistrate had no jurisdiction under the Criminal Procedure Code to reinstate the proceeding under section 145 of the Code after it had been once struck off and disposed of. On the application for the rule being made, it was urged that the only section under which the District Magistrate could possibly be taken to have acted was section 437, and that that section could not apply to the case, inasmuch as it was not a complaint which had been dismissed under section 203, nor was it the case of an accused person who had been improperly discharged.

On that application a rule was granted which now came on for argument.

Baboo *Durga Mohun Dass* for the petitioner.

Mr. *W. C. Bonnerjee*, Baboo *Raghu Nath Prasad*, and Baboo *Sotish Chunder Ghose* for the opposite party.

Mr. *W. C. Bonnerjee* intimated that if the Court considered that the District Magistrate had no power to act as he had done under the provisions of section 437 of the Code, he had no cause to show.

Baboo *Durga Mohun Dass* was not called on.

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows :—

In this case the learned Counsel in support of the order of the Magistrate has only been able to refer us to section 437, Code of

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Criminal Procedure, in support of the power of the Magistrate to make the order which he had passed. Now, that section only allows a further enquiry into a complaint. A complaint means a complaint of an offence [section 4 (a), Criminal Procedure Code], and an offence is defined in the Code as "any act or omission made punishable by any law for the time being in force." We think it is quite clear that section 437, which enables a Magistrate to make an order for further enquiry, does not authorize him to order a further enquiry in a case under section 145, which is not directed to any offence at all. That being so, we think that this rule must be made absolute, and that the orders dated the 9th February and 24th February should be set aside.

Rule made absolute and order set aside.

H. T. H.

APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and
 Mr. Justice Ghose.*

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 May 5.

MODHU SUDAN KUNDU (DEFENDANT No. 1) v. PROMODA NATH ROY AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

Bengal Municipal Act (Bengal Act III of 1864), s. 10—Public highways—Roads vesting in Commissioners—Subsoil of road, right to—Civil Procedure Code (Act XIV of 1882), s. 13—Res judicata—Settlement proceedings, effect of—Regulation XI of 1825—Act XXXI of 1858.

Section 10 of Bengal Act III of 1864 does not deprive a person of any right of private property that he may have in land used as a public road, nor does it vest the subsoil of such land in a municipality: and when such land is no longer required as a public road, the owner is entitled to claim its possession.

A decision in a suit brought by the plaintiffs' predecessor in title to recover certain land from a municipality (which had been taken up as a public road and vested in the municipality subsequently under Bengal Act III of 1864, section 10), on the ground that the plaintiffs had been

* Appeal from Appellate Decree No. 1479 of 1891, against the decree of R. R. Pope, Esq., Officiating District Judge of Hooghly, dated the 25th of June 1891, reversing the decree of Baboo Kedar Nath Mozoomdar, Subordinate Judge of that district, dated the 19th of April 1890.