

him. We do not say that this shows that there was any real bias in the mind of the Magistrate. On the contrary, we accept his explanation as to the reason why, notwithstanding that he released the accused on bail, he made this order. But, as we have said above, the order was calculated to create a reasonable apprehension in the mind of the accused that there was a bias against him.

That being so, we think it expedient for the ends of justice that the transfer applied for should be granted under clause (e) of section 526 of the Code of Criminal Procedure.

The next question is, to what Court should the case be transferred. Mr. Sinha for the complainant suggests that the case should be transferred to the Court of the District Magistrate of Burdwan as being the Court nearest to Purulia. We think that the suggestion is a fair one, and we accordingly direct that the case be transferred to the Court of the District Magistrate of Burdwan for trial.

S. C. B.

Before Mr. Justice Hill and Mr. Justice Rampini.

UPENDRA NATH BHUTTACHARJEE (PETITIONER) v. KHITISH
CHANDRA BHUTTACHARJEE AND ANOTHER
(OPPOSITE PARTY.)*

Procedure—Jury, Constitution of—Criminal Procedure Code (Act X of 1882), sections 133 to 138—Nomination of jury by Magistrate—Bona fides of claim. 1896
February 6.

In the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate under the provisions of section 138 of the Criminal Procedure Code, it is his duty to exercise his own independent discretion, and not merely to accept persons who may be put forward by the party opposed to the applicant.

A jury constituted in violation of the provisions of section 138 is not legally constituted, and is incapable of making a legally binding award.

Dino Nath Chuckerbutty v. Hur Gobind Pal (1) and Shatyanundo Ghosal v. Camperdown Pressing Co. (2) followed.

* Criminal Revision No. 51 of 1896, against the order passed by A. Ahmad, Esq., Sessions Judge of Nuddea, dated the 17th December 1895, affirming the order passed by W. N. Delevengue, Esq., District Magistrate of that District, dated the 13th of November 1895.

(1) 16 W. R., Cr., 23.

(2) 21 W. R., Cr. 43.

1896
DUPEYRON
v.
DRIVER.

1896

UPENDRA
NATH
BHUTTA-
CHARJEE
v.
KHTISH
CHANDRA
BHUTTA-
CHARJEE.

Where a claim is raised to the land in respect of which proceedings are taken, the Magistrate before proceeding further should satisfy himself as to the *bona fides* of the claim.

Luckhee Narain Banerjee v. Ram Kumar Mukerjee (1) and *Queen-Empress v. Bissessur Sahu* (2), approved of.

A PROCEEDING under section 133 of the Criminal Procedure Code was drawn up against the petitioner, for obstructing an alleged public path, by the District Magistrate of Nuddea. The petitioner in shewing cause claimed the path as his own property. At the suggestion of the Magistrate a jury, consisting of five men, was appointed, two of whom were nominated by the complainants, two by the petitioner, and the foreman was nominated by the Magistrate. The jury found the order of the Magistrate reasonable and proper and thereupon made his order absolute. The petitioner moved the Sessions Judge of Nuddea to have the order of the Magistrate set aside, but he declined to interfere.

Mr. *L. Ghose* and Babu *Haraprasad Chatterji* for the petitioner. The opposite party did not appear.

Mr. *L. Ghose*.—The question of a private claim to the path having been raised the Magistrate should have satisfied himself as to the *bona fides* of that claim before he proceeded further. *Basarauddin Bhinah v. Bahar Ali* (3), *Askar Mea v. Sabdar Mea* (4), *Luckhee Narain Banerjee v. Ram Kumar Mukerjee* (1), *Queen-Empress v. Bissessur Sahu* (2).

The constitution of the jury was illegal and in violation of the provisions of section 138 of the Criminal Procedure Code. *Dino Nath Chuckerbutty v. Hur Gobind Pal* (5), *Shatyanundo Ghosal v. Camperdown Pressing Co.* (6).

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

This rule was granted in relation to certain proceedings taken by the District Magistrate of Nuddea under Chapter X of the Code of Criminal Procedure.

The order of the Magistrate of the 13th November 1895 made

(1) I. L. R., 15 Cal., 564.

(3) I. L. R., 11 Cal., 8.

(5) 16 W. R., Cr., 23.

(2) I. L. R., 17 Cal., 562.

(4) I. L. R., 12 Cal., 137.

(6) 21 W. R., Cr., 43.

in these proceedings has been called in question here on several grounds, but we think that for the present purpose it is enough for us to say that it is bad, on the ground that the jury appointed by the Magistrate under section 138 of the Code was not legally constituted. Two of the jurors were the nominees of the party opposed to the petitioner in the proceedings before the Magistrate ; two were the nominees of the petitioner ; the foreman being the nominee of the Magistrate. The section requires the Magistrate to nominate the foreman and one-half of the remaining members of the jury, which it is his duty under that section to appoint when the occasion arises. In the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate, it is his duty, as has been laid down in the case of *Shatyanundo Ghosal v. Camperdown Fressing Co.* (1) decided in this Court, to exercise his own independent discretion, and not merely to accept persons, who may be put forward by the party opposed to the applicant. In the case to which we have referred it was held that a jury constituted in the manner in which the jury was constituted in the present case was not constituted legally, and was incapable of making a legally binding award. In the case of *Dino Nath Chuckerbutty v. Hur Gobind Pal* (2) the same view was taken under similar circumstances, the order of the Magistrate in that case being set aside.

Upon the authority of those cases, we think the order now complained of must be set aside.

We think it desirable to direct the attention of the Magistrate to the cases of *Luckhee Narain Banerjee v. Ram Kumar Mukerjee* (3) and *Queen-Empress v. Bissessur Sahu* (4) which prescribe the procedure which ought to be adopted by a Magistrate before he takes action under section 138 and the following sections of the Code. Here it would seem that the petitioner raised a claim of right to the land in respect of which these proceedings were taken ; and the cases to which we have now referred shew that it was the duty of the Magistrate to satisfy himself as to the *bona fides* of that claim, before he went further.

S. C. B.

(1) 21 W. R., Cr., 43.

(2) 16 W. R., Cr., 23.

(3) I. L. R., 15 Calc., 564.

(4) I. L. R., 17 Calc., 562.

1896

UPENDRA
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