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present condition was such that it was no longer a grove but they only sued about one part and this they cannot do.

I, therefore, allow the appeal with costs and restore the decision of the trial court dismissing the suit.

Appeal allowed.

REVISIONAL CRIMINAL

Before Mr. Justice Ziaul Hasan

1939
December, 1

BABU (APPLICANT) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE-PARTY)*

Indian Penal Code (Act XLV of 1860), section 188—Criminal Procedure Code (Act V of 1898), sections 144 and 195—Prosecution under section 188, I.P.C. without complaint required under section 195(1)(a) Cr. P. C.—Prosecution and conviction, whether legal—Order sanctioning prosecution, whether can be treated as complaint—Order under section 144 against an individual and general public, requirements of.

Where certain persons were prosecuted under section 188, I.P.C. without a complaint as required by the mandatory provisions of section 195(1)(*a*) the trial and conviction are illegal and nugatory. Report to the District Magistrate and his order sanctioning the prosecution cannot be treated to be complaint. *Kali Charan* v. *King-Emperor* (1), and *Abdul Rahman* v. *Emperor* (2), relied on.

The scope of an order passed under section 144, Criminal Procedure Code against the public generally is narrower than that passed against an individual and served personally on him. Although the word "public" has not been used with the expression "particular place" in section 144(3) still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public. Case of (*Devatha*) *Sriramamurty* (3), referred to.

*Criminal Revision Applications nos. 83-84 of 1939, for revision of order of B. K. Topa, Esq., Additional Sessions Judge, of Bahraich, dated the 23rd of August, 1939.

(1) (1934) 11 O.W.N., 473. (2) (1932) A.I.R., All., 190.
(3) (1931) A.I.R., Madras, 242.

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BABU v. KING-EMPEROR

Mr. *M. H. Qidwai*, for the applicant.

Mr. *H. S. Gupta*, Rai Bahadur, Government Advocate, for the Crown.

ZIAUL HASAN, J.:—These are two applications in revision against appellate orders of the learned Additional Sessions Judge of Bahraich upholding the convictions and sentences of the applicants under section 188, Indian Penal Code. Application No. 83 has been brought by Babu alone while application No. 84 has been filed on behalf of nine persons.

It appears that on the 27th January, 1939, the Sub-Divisional Magistrate of Nanpara in the Bahraich District took proceedings under section 144, Cr.P.C. and proclaimed a notice that as a breach of the peace was apprehended by the Muslims of villages Shankarpur and Muqam intending to sacrifice cows against previous practice, it was ordered that from 31st January, 1939, to 3rd February, 1939 (both days inclusive) no person should sacrifice a cow within a radius of a mile from Shankarpur and Muqam and that five or more persons should not assemble at any place except for prayers.

On the 8th February, 1939, the station officer of Sunwan, within whose jurisdiction Shankarpur and Muqam are situated, made a report that twenty-eight persons named in the report sacrificed cows on the 1st February, 1939, inside the house of Abdul Razzaq (one of the twenty-eight persons reported against) in village Shankarpur. A similar report was made on the same date against three persons one of whom is Babu applicant in application No. 83 and in both cases the sub-inspector suggested that cases under section 188, I.P.C. be started against the persons reported against. One these reports the Sub-Divisional Magistrate sent reports to the District Magistrate on the 8th February, praying that the persons mentioned in the sub-inspector's report be prosecuted under section 188, I.P.C. In the case of Babu the learned District

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Magistrate passed the following order on the Sub-Divisional Magistrate's report:

> "The prosecution of Babu and two others under section 188, I.P.C., is sanctioned. The case is made over to Mr. Raghubir Singh, Magistrate, first class for disposal."

Ziaul Hasan, J.

A similar order was passed against the twenty-eight persons mentioned above in the other case. Thereupon twenty-eight persons including the applicants in application no. 84 were prosecuted under section 188 in one case and Babu and two others in the other case. Out of the twenty-eight accused the learned trying Magistrate acquitted seventeen and convicted eleven. In the other case two were acquitted and Babu was convicted. In the first case Abdul Razzaq was sentenced to six months' rigorous imprisonment and a fine of Rs.100 and his co-accused to four months' rigorous imprisonment and a fine of Rs.25 each. In the other case Babu was given a sentence of six months' rigorous imprisonment and a fine of Rs.25. All the convicted persons in the two cases appealed but their appeals were dismissed by the learned Additional Sessions Judge except with regard to two of Abdul Razzaq's co-accused to whom he gave the benefit of doubt and whom he acquitted. It is thus that the nine persons in one case and Babu alone in the other bring these applications for revision.

The first point taken before me is that the trial and conviction of all the applicants was illegal as no complaint as required by section 195(1)(*a*) of the Code of Criminal Procedure had been made by the learned Magistrate who promulgated the order under section 144. This contention appears to me to have force. The reports of the learned Sub-Divisional Magistrate in both the cases show that they were made to the District Magistrate with a view to obtaining his permission for the prosecution of the persons concerned. The learned Government Advocate argues that the said reports were in fact complaints under section 195(1)(*a*) but I am

unable to agree with this view. Not only did the learned District Magistrate not treat these reports as complaints but the lists of papers that the learned Sub-Divisional Magistrate submitted along with his reports to the District Magistrate clearly show that the reports were not meant to be complaints but only reports for sanction of prosecution of the persons concerned. The list in one case comprises (1) the report of the station officer, (2) recovery list, (3) statements and Sub-Divisional Magistrate's orders on them to the station officer, (4) sketch of Abdul Razzaq's house and (5) Parbhu Chaukidar's statement; and in the other, (1) report of the station officer, (2) recovery list, (3) sketch (4) Lakshmi Narain's statement, and (5) statements of four persons. The lists of papers submitted were such as could enable the District Magistrate to form an opinion as to the advisability or otherwise of prosecution. It seems clear to my mind that the intention was to obtain the District Magistrate's sanction for prosecution and not to make a complaint to him under section 195(1)(*a*). It may also be noted that after recording his order on the 9th February, in one case and on the 11th February in the other the learned District Magistrate returned the records to the Sub-Divisional Mgaistrate and the latter sent the cases to Mr. Raghubir Singh with an endorsement—

"To Mr. Raghubir Singh for favour of disposal". This also shows that the learned District Magistrate did not treat the reports as complaints under the Criminal Procedure Code. The learned Government Advocate refers to the evidence of the Sub-Divisional Magistrate who proved his reports before the trying Magistrate and called them complaints; but his calling them complaints several months afterwards does not in my opinion make them complaints when as I have shown above, they are on the face of them mere reports for sanction and when they were treated as such by the learned District Magistrate.

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The fact that no compromise required by the mandatory provisions of section 195(1)(*a*) were made makes the trials nugatory. In the case of *Kali Charan* v. *King-Emperor* (1), the facts were on all fours with those of the present case, and it was held by a learned Judge of this Court that if a Court takes cognizance of an offence under section 185 without a complaint as required by section 195(1)(*a*) Cr. P. C. and convicts the accused, the irregularity in the procedure cannot be cured by section 537(*a*) Cr. P. C. and the conviction cannot be legally sustained. In that case a person who had failed to pay up the balance due from him on the sale of an excise licence, was prosecuted under section 185, I. P. C. and the prosecution had started on the following order of the learned District Magistrate on the report of the Excise Officer—

> "Prosecution under section 185 is sanctioned. Case to Syed Mohammad Zakir."

With regard to this order of the District Magistrate which, it will be noted, was exactly similar to the order in the case now before me, the learned Judge remarked—

> "Now this order of the District Magistrate cannot by any stretch of language be deemed to be a complaint within the meaning of the term as defined under section 4(*h*) of the Code of Criminal Procedure."

In the case of *Abdul Rahman* v. *Emperor* (2), the facts were that the accused lodged information at the police station to the effect that a motor lorry belonging to a certain person had been overloaded. On investigation this information was found to be false. The investigating Officer then moved the Superintendent of Police for the prosecution of the accused under section 182, I. P. C. The Superintendent of Police sent the report to the District Magistrate with the following note:

> "District Magistrate. The accused is the reader of the Tahsildar of Konch. Have you any objection to his prosecution."

(1) (1934) 11 O.W.N., 473.

(2) (1932) A.I.R., All., 190.

The District Magistrate passed the following order:

> "I sanction the prosecution of Abdul Rahman, Judicial moharrir, Konch. Case to S. D. M. for disposal. The moharrir will be suspended till the disposal of the case."

It was held by two learned Judges of the Allahabad High Court that there was no complaint either by the Superintendent of Police or by the District Magistrate and consequently the conviction of the accused was set aside.

Ziaul Hasan, J.

Although the present application must be allowed on the ground mentioned above, but I consider it necessary to deal with another point raised on behalf of the applicants. It is that the order proclaimed under section 144, Cr. P. C. was not in accordance with law. The order as I have already noted was addressed to the general public and was to the effect that nobody shall sacrifice a cow within a radius of a mile from the villages of Shankarpur and Moqam. Now looking to section 144, Criminal Procedure Code it appears to me that the scope of an order passed under section 144 against the public generally is narrower than that passed against an individual and served personally on him. Sub-section (3) of section 144 lays down:

> "An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place."

Now although the word "public" has not been used with the expression "particular place" still the law intends not only that the particular place should be specified but also that it should be a place which is frequented or visited by the public. In the case of *(Devatha) Sriramamurty* (1), it was observed—

> "The order consists of two parts, one addressed to five individuals, the other to the public generally. So far as it is addressed to the public generally, it is clearly a violation of the express terms of section 144(3), which states that an order under this section may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place, namely, that it must be one,

(1) (1931) A.I.R., Madras, 242.

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whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meetings held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses first because those who put up the flags are owners or occupants of such houses and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house-owners who use their houses members of the public for the purpose of this section, and I have not been shown any instance of such a use of the section."

The convictions and sentences of the applicants in both the cases must therefore be set aside and no question of re-trial arises owing to the view that I have taken of the order under section 144, Cr. P. C.

The applications are accepted and the convictions and sentences of the applicants set aside.

Application accepted.

MISCELLANEOUS CIVIL

Before Mr. Justice R. L. Yorke

1939
December, 11

MRS. N. A. ALEXANDER (APPLICANT) v. M. S. JALIL AND ANOTHER (RESPONDENT-OPPOSITE-PARTY)*

Divorce—Indian Divorce Act (IV of 1869), *section* 16—*Civil Procedure Code (Act V of* 1908), *section* 151 *and Order XXXII, rule* 5—*Decree for dissolution of marriage made absolute—Application by third party for setting aside decree under section* 151, *C. P. C., maintainability of—Order XXXII, rule* 5, *applicability of.*

Where in a divorce suit both decree *nisi* and decree absolute for dissolution of marriage have been passed a third party cannot maintain an application to have the decree set aside under section 151, C. P. C.

*Civil Miscellaneous Application no. 161 of 1939, for setting aside the decree for dissolution of marriage passed in Divorce Case no. 9 of 1937, dated the 23rd November, 1938.