1904
APRIL 20, 26.

CRIMINAL REVISION.

31 C. 685.

It has been contended by learned Counsel for the opposite party that this is not a question affecting the jurisdiction of the Court and that we ought not therefore to interfere in revision. We think this contention comes too late and cannot be sustained. This Court has on other occasions interfered when the Magistrate has refused to take the evidence which a party desired to adduce, *e.g.*, the case of *Madhab Chandra Tanti* v. *Martin* (1) in which it was held that the Magistrate acted without jurisdiction in refusing to issue processes for the attendance of witnesses cited by a party. There was another case of the kind recently decided by Ameer Ali. J., sitting with a member of the present Bench. We accordingly set aside the order of the Deputy Magistrate dated the 5th March last. It will now be open to him, if he should think fit, to take up the case at the stage at which it stood before he passed final orders, giving the first party an opportunity to examine the witnesses they had in attendance on the 27th and 28th January. We see no reason to transfer the case as we doubt not that the Deputy Magistrate will not allow himself to be influenced by his previous decision, but will give a fair and impartial consideration to the additional evidence that may be adduced.

Rule made absolute.

31 C. 688 (=8 C. W. N. 663.)

[688] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Pargiter.

GIRIBALA DASSI *v.* BIJOY KRISHNA HALDAR.*

[4th May, 1904.]

Probate—Security bond—Probate and Administration Act (V of 1881) s. 87.

Under s. 78 of the Probate and Administration Act a District Judge is not competent to call upon the executor (to whom probate has already been granted) to furnish security at any time after the grant of the probate.

APPEAL by Giribala Dassi, the executrix.

A probate was granted to Giribala Dassi, of the will of her father in March 1899, and she submitted an inventory in September 1899, and an account in September 1900 in accordance with the provisions of the Probate and Administration Act. Giribala was not directed to give any security at the time of the grant of the probate.

On the 18th February 1901, the reversionary legatees of the testator applied to the District Judge of Bankura for revocation of the probate on the ground that the inventory and the account were untrue in material particulars. Giribala was a *purdanashin* lady and her affairs were managed by her kinsmen. On the 5th June 1901, the District Judge passed an order concluding in the following terms :—

"Though both the inventory and the account are wrong, I do not think that they are wilfully wrong. No good purpose would be served by revoking the probate and granting it again to her. I think that the application (for revocation of the probate) should fail, but a good cause has been made out to call upon Giribala to furnish security. I therefore order that she should furnish a bond of the value of Rs 10,000 with two sureties of Rs. 5,000 each under s. 78 of the Probate Act. She must not take out the surplus sale proceeds deposited in the Collectorate on account of Chuk Sukul before executing this bond."

* Appeal from Original Decree, No. 163 of 1901, against the decree of K. N. Roy, Offg. District Judge of Bankura, dated June 5, 1901.

(1) (1901) I. L. R. 30 Cal. 508 (note.)

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MAY 4.

APPELLATE CIVIL.

31 C. 688=8 C. W. N. 663.

Against this order Giribala appealed to the High Court.

[689] Babu *Golap Chandra* (*Sarkar* Babu *Dwarka Nath Mitter* and Babu *Narendra Kumar Bose* with him), for the appellant. Under s. 78 of the Probate and Administration Act the District Judge had no authority to demand security from the executrix at a time subsequent to the grant of the probate. He might have done so at the time of grant; but after having once granted probate without security, he had no jurisdiction to call upon the executrix to furnish security after a lapse of two years.

Babu *Dwarka Nath Chakravarti* (Babu *Joy Gopal Ghose* with him), for the respondents. The last portion of s. 78 of the Probate and Administration Act contemplates a change of the form of security from time to time, as the Judge may by any general or special order direct; and so it may be said that the security itself could be called for subsequently to the grant of the probate.

GHOSE AND PARGITER, JJ. This is an appeal by an executrix, to whom probate of a will had been granted in March 1899. Under section 78 of the Probate and Administration Act, it was competent to the Judge, when granting the probate, to direct that the executrix should give security for the due fulfilment of her office as executrix, but no such direction was given at the time, and necessarily no security bond was executed by the executrix. About two years afterwards, the application was made by the opposite party before us, for revocation of the probate upon the ground that the inventory and account exhibited by the executrix were untrue.

The learned Judge, upon investigation, has found that though the inventory and the account are wrong, yet they are not, to use his own words, "wilfully wrong" and that no good purpose would be served by revoking the probate already granted. But he is, at the same time, of opinion that good cause has been made out for calling upon the executrix to furnish security; and he has accordingly directed that she should furnish security to the extent of Rs. 10,000. It is against this order that the executrix has appealed to this Court.

[690] Section 78 of the Probate and Administration Act runs as follows:—"Every person to whom any grant of letters of administration is committed, and if the Judge so direct, any person to whom probate is granted, shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs." It seems to us that it is only when the Judge grants probate, that he may direct that the person to whom the grant is made should give security. The words used in the section are "any person to whom probate is granted." And though the last three lines of the section declare that the "bond shall be in such form as the Judge from time to time by any general or special order directs," they refer simply to the form in which the security shall be given—form that may be prescribed by the Judge from time to time. It will be observed that there is no other section in the Act which entitles the District Judge to call for security at any time after the grant of the probate. No doubt if, upon an application made under section 50 of the Act for revocation of the probate, the probate is revoked, and a new executor or administrator is apointed, it is open to the Judge to direct that security

should be given by such executor or administrator, as the case may be. But in the present case the learned Judge is of opinion that the probate granted to the appellant in 1899 should not be revoked; and we do not see under what authority he could have directed that the executrix should now give security, which he did not at the time of the grant of the probate direct to be given. Upon these grounds, we set aside the order of the District Judge complained against. Each party should bear his own costs in both the Courts.

1904 MAY 4.

APPELLATE CIVIL.

31 C. 688=8 C. W. N. 663.

Appeal allowed.

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31 C. 691 (=8 C. W. N. 538=1 Cr. L. J. 453.)

[691] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Ameer Ali, Mr. Justice Brett.

MOHINI MOHAN CHOWDHRY *v.* HARENDRA CHANDRA CHOWDHRY.*
[21st March, 1904.]

Wrongful restraint—Right of way, interference with—Order to remove obstruction, legality of—Indian Penal Code (Act XLV of 1860), s. $\frac{341}{114}$—Criminal Procedure Code (Act V of 1898), s. 522.

Held by the Full Bench (Ameer Ali, J and Brett, J. dissenting), that a Magistrate, while convicting an accused under sections $\frac{341}{114}$ of the Penal Code for wrongfully restraining a person by the erection of a hut or by any similar act of obstruction, has no jurisdiction to order that the hut or other means of obstruction should be removed.

Debendra Chandra Chowdhry v. *Mohini Mohan Chowdhry* (1) overruled.

Held further by the Full Bench, that, whereas in this case criminal force had been used by the accused to the complainant when the latter objected to the obstruction, which interfered with his right of way over a path, and this constituted the offence of wrongful restraint, of which offence the accused had been convicted, an order for the removal of the obstruction could be passed under s. 522 of the Criminal Procedure Code.

[**Ref.** 45 I. C. 276=4 Pat. L. W. 329=19 Cr. L. J. 516; 61 I. C. 57=2 Lah. 63=22 Cr. L. J. 329; **Foll.** 2 Pat. L. T. 120.]

THE accused Mohini Mohan Chowdhry, and the complainant Harendra Chandra Chowdhry, were relations and neighbours. To the east of their homesteads, there was a tank, and a pathway, which was the *ijmali* property of both parties, ran over the west bank of it. This pathway had been in existence for a long time and had been used by the males and females of both sides. A portion of this pathway was excavated by the accused, who also erected a hut on it, leaving a space between the hut and the building on the other side of the pathway, so narrow, that a person could not pass through except with the greatest difficulty. **[692]** The complainant objected to the obstruction to the path, whereupon he was chased and assaulted by the accused. The accused Mohini Mohan Chowdhry and others were convicted on the 23rd June 1903 by the Honorary Magistrate of Munshigunge under s. 341 read with s. 114 of the Penal Code and fined. The Magistrate also ordered the hut to be removed and the excavation to be filled up.

The accused appealed to the District Magistrate of Dacca, who on

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* Reference to Full Bench in Criminal Motion No. 775 of 1903.

(1) (1901) 5 C. W. N. 432.