

1908
MAY 2.
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APPELLATE
CIVIL.
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32 C. 931=2
C. L. J. 696.

not the proper section, we think the order itself was right and that it may be justified under section 254. This Rule must also be discharged, but without costs.

Appeal dismissed. Rules discharged.

32 C. 930 (=2 Cr. L. J. 762)

[930] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

ZAFFER NAWAB *v.* EMPEROR.*
[10th and 19th May, 1904.]

Public Nuisance—Obstruction of ford by erection of bund—Prescriptive right of public to user of ford—Desuetude of right to erect bund—Use of one's right so as not to cause obstruction or nuisance—Criminal Procedure Code (Act V of 1898) s. 133.

Where the petitioner erected a *bund* in a river, the effect of which was to render it unfordable at a place where the stream had been fordable throughout the year, except for a few days during the freshets, and claimed the right to do so, but it was proved that for a period exceeding twenty years the public had used the ford, and had never been so obstructed in crossing the river on foot or in vehicles :

Held that the public had acquired a prescriptive right of way through the river and that the petitioner had lost his right of erecting a *bund* by long desuetude ;

that even if the petitioner had a subsisting right to dam the river by a *bund*, such right was subject to the maxim *sic utere tuo ut alienum non laedas* ;

that his action had caused an obstruction, which was not justifiable to the public, who were in the lawful enjoyment of a right of way ; and

that the order of the Magistrate to remove the obstruction was not illegal.

[Dist. 86 All. 209=13 A. L. J. 248=15 Cr. L. J. 229=23 I. C. 181.]

RULE granted to Zaffer Nawab.

The petitioner, Zaffer Nawab, is the proprietor of a number of mouzas in the subdivision of Aurangabad in the district of Gaya, through or near the villages of which the river Poon Poon flows.

The district Board of Gaya has built a public road running north and south, and intersecting the river near a village called Kharanti. There is no bridge over the bed of the river at this point, but the water is only ankle deep in the dry season, and the stream is always fordable there all through the year, except for a few days during the freshets. A ferry boat is kept by the District Board, when the water is high. The petitioner erected a *bund* a [931] little lower down to feed two *pynes* or channels, which issue from the river and are utilized for the purposes of irrigation, and thereby increased the height of the water, thus rendering the river unfordable at the road crossing.

Upon the receipt of a police report alleging that a *bund* had been constructed, which had deepened the river and thereby caused an obstruction to passenger and vehicular traffic, and praying for the institution of proceedings under s. 133 of the Criminal Procedure Code, the Subdivisional Officer of Aurangabad drew up a conditional order under that section, on the 4th April in the terms mentioned in the judgment below.

* Criminal Revision No. 885 of 1904 against the orders passed by P. T. Rebello, Sub-divisional Officer of Aurangabad, dated April 11, 1904.

The petitioner appeared on the 11th instant and filed a written statement alleging that the *bund* was erected by the *thiccadars* of the adjacent villages, and was an old *bund*, which had been repaired and re-constructed from time to time, and that without it the river water would not pass into his *pynes* so as to irrigate his lands. He also put in certain Civil Court judgments of 1869 and 1870, showing his right to clear the sand from the mouth of one of his *pynes*, and proving that the defendants in the action had incidentally admitted his right to erect a *bund* across the river. The Magistrate recorded the evidence of seven witnesses and made the order absolute under s. 137 of the Code. He found that the petitioner by erecting the *bund* had caused an obstruction, inconvenience and a nuisance to the public using the road, by deepening the water so as to interfere with the usual crossing of the river during the dry months; that the right to have a *bund* appeared only to affect certain other *zamindars*, though there was nothing to show that during the dry season, or even at any time during the rains, the water could be kept continuously deep at the ford; that the evidence showed that for a number of years the passage had never been obstructed in this way, particularly during the hot months; and that the public should not be inconvenienced, but should have the use of the ford as they had been previously accustomed to.

The petitioner then obtained the present Rule upon the District Magistrate to show cause why the order of the Sub-divisional Magistrate, dated the 11th instant, passed under s. 137 of the Criminal Procedure Code should not be set aside on [932] the ground that the petitioner erected the *bund* in question in the exercise of a long standing right, which had been affirmed by a decree of Court.

The Deputy Legal Remembrancer (Mr. White) for the Crown. The petitioner has caused a serious obstruction on a public road, and the public have been put to much inconvenience in consequence. People were in the habit of fording the stream at this part of the river, when it was fordable; whereas now they have to make a long detour, in consequence of the petitioner having deepened the channel by the erection of his *bund*. The public have been in the enjoyment of this right of way for a great many years, and the interference with this right was a most high-handed proceeding, and it was necessary to put a stop to it. The Magistrate's order is perfectly legal and proper.

Mr. Donogh (with him *Moulvi Mahomed Mustafa Khan*) for the petitioner. The erection of a *bund* is necessary every year to raise the water of the river so as to flood the *pynes* for the purposes of irrigation. The right to do so was established by the petitioner in the Civil Courts more than thirty years ago. It has been, and has to be, constructed annually in the dry season when the water of the river is low. At the point at which the road intersects the river, there is ordinarily a ferry, but in the dry season a ford. The erection of the *bund* may have the effect of deepening the channel at this point temporarily, and of making it unfordable, but the public cannot insist on a right, which has not been acquired by uninterrupted user. There cannot be a right of way across the bed of a river, the only permanent passage over which is by ferry. Moreover, the section does not apply, for the mere presence of water at a ferry cannot be regarded as an "unlawful obstruction or nuisance." At most there may have been a temporary inconvenience, but something more than that is necessary.

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PRATT AND HANDLEY, JJ. In consequence of various complaints the Subdivisional Magistrate of Aurangabad issued a notice to the petitioner on the 4th April last to the following effect: "Whereas it has been made to appear to me that you have [933] caused an unlawful obstruction as well as a nuisance to persons using the public road from Aurangabad to Daudnagar, at a point where it crosses the Poon Poon river at Kharanti village, by erecting a *bund* lower down the river and at a short distance from the above crossing point, which has raised the depth of the water in the river to such an extent as to prevent persons, carts and conveyances crossing the bed of the river easily and on foot, as they have always been accustomed to do, greatly to their inconvenience, danger and annoyance, and that such obstruction and nuisance still exists:"—then follows a direction to remove the aforesaid obstruction and nuisance—by the removal, lowering or otherwise of the aforesaid *bund* by the 11th April, or to appear that day and move to have the order set aside or modified. The petitioner accordingly appeared and put in a certain judgment of the Civil Court of the years 1869 and 1870, showing that he had a right to clear the sand of the river from the entrance to his Baluhai *pyne*, and that the defendants in the said action had incidentally admitted his right to erect a *bund* across the river lower down. The height of the *bund* is not specified. On the other side witnesses were examined, who proved that for a period dating back many years—one witness said 30 years—the public had never been obstructed in this way in crossing the river on foot or in vehicles, the water being never more than ankle deep in the dry season, and the river always fordable in the rains except for a very few days during the freshets. The right to erect a *bund* across the river could only have been an easement, and the petitioner seems by long desuetude to have lost the right, while the public have clearly acquired a prescriptive right of way through the river, which is fordable almost all the year round.

If it be conceded that the petitioner has a subsisting right to dam the river by means of a *bund*, such right is subject to the maxim "*sic utere tuo ut alienum non laedas.*" Here his action has caused obstruction to the public, who were in the lawful enjoyment of a right of way, and who can no longer, even in the dry season, cross the river on foot or in conveyances; the height of the water having been raised to 7 or 8 feet. It would appear that during the last two years the public authorities have made two syphons for the petitioner, so that the river water may flow [934] uninterruptedly from the river through his *pynes* across a public distributary. If those syphons do not completely fulfil the desired purpose, the petitioner should take measures to have them enlarged or otherwise altered, but he is not justified in damming up the water to such an extent as to cause an obstruction and nuisance to the public. It ought not to be difficult to devise a method, whereby the petitioner can secure a sufficient flow of water to irrigate his lands without suddenly raising the river water to the height of several feet to the great inconvenience and unjustifiable obstruction of the public, who have for more than 20 years been accustomed to ford the river with facility.

Under the circumstances we think we must discharge the Rule, as the Magistrate's order was not made in derogation of the petitioner's rights. We think, however, that the petitioner should be allowed time to the 31st May to carry out the Magistrate's order. For the future we trust that the public authorities will give the petitioner adequate and timely facilities

for enlarging the syphons or adopting other measures, consistent with the public convenience, which shall enable him to secure a larger and more continuous flow of water into his *pynes*.

Rule discharged.

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Gr. L. J. 762,

32 C. 935 (=9 C. W. N. 864=1 C. L. J. 216=2 Cr.L. J. 215.)

[935] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

KAROOLAL SAJAWAL v. SHYAM LAL.*

[21st and 22nd February, 1905.]

Magistrate—Jurisdiction—Tenant—Sub-tenant—Omission to state material facts in the order—Criminal Procedure Code (Act V of 1898) s. 144.

Before a Magistrate can take action under s. 144 of the Criminal Procedure Code he must be of opinion that immediate prevention or speedy remedy is necessary, and when he has made up his mind that it is so, he must state the material facts in the order.

Where therefore, a Magistrate passed an order directing the second party not to interfere with the first party in the cultivation of his *khas* lands or the collection of rents from his under-tenants, and it did not appear from the proceedings that he was of opinion that immediate prevention or speedy remedy was necessary and the order made did not state the material facts of the case :

Held that the order was bad and must be set aside.

[*Ref.* 11 C. W. N. 223 ; 14 C. W. N. 234=11 Cr. L. J. 49=5 I. C. 154.]

RULE granted to Karoolal Sajawal and others, second party.

On the 22nd December 1904 Shyam Lal, the first party, filed a petition before the Joint Magistrate of Monghyr stating that he held certain bighas of *jote* lands settled with him by a former manager of the Banaili Raj, but that the present manager was trying to turn him out of his holding, and had told him that he had no legal status, the settlement with the former manager being invalid ; that the peons of the Raj had prevented his servants from reaping his paddy ; that some sub-tenants of his were sent for by the manager and asked to take settlements of his *jote* lands direct and to loot his crops ; that having failed to induce the under-tenants to do so, the manager had sent Mr. Bray, the Circle officer of the Raj, to get his crops looted with the aid of the zemindari peons ; that Mr. Bray had ordered the peons to arrest him, his servants and under-tenants, to bring them into his camp and to beat [936] them in order to compel them to loot the crops. He further alleged that his servant had been arrested, taken into camp and beaten, that he himself was in fear of his life and property, and that the raiyats of the village were ill-treated and harassed severely, in consequence of which he and his servant had lodged two complaints before the Deputy Magistrate against Mr. Bray and the peons ; that his crops were still uncut and he was in fear of life and property ; that as the second party were determined to get the crops looted, there was an apprehension of a serious breach of the peace ; and that the local police deputed to prevent a breach of the peace had not yet taken any steps to do so. He, accordingly, prayed for the issue of an order under s. 144 of the Criminal Procedure Code to prohibit the second party from committing a breach of the peace or from opposing

Criminal Revision No. 89 of 1905 against the order of G. J. Morahan, Joint Magistrate of Monghyr, dated January 6, 1905.