1905 APRIL 19.

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32 C. 783=9 C. W. N. 810 =2 Cr. L. J. 824.

arrest against the four petitioners and the other persons, and on the 11th of October the Deputy Magistrate on that application, recorded the following order :—

"Considering the nature of the case, I do not think it necessary to take action against the other accused persons. The case was grossly exaggerated and the punishment that has already been inflicted is quite sufficient."

Meanwhile the five persons convicted appealed and their appeal was dismissed by the Sessions Judge, and thereupon the District Superintendent of Police reported to the Joint Magistrate his opinion that the four petitioners now before us should be proceeded against, and the Joint Magistrate ordered a summons to issue against them.

The present Rule was issued to shew cause why this order of the Joint Magistrate should not be set aside on the ground "that cognizance had already been taken of the case and the case transferred to the Deputy Magistrate, and the order of the Deputy Magistrate dated 11th October refusing to issue process against the petitioners is still existing."

It appears to me that the decision of the point raised in this Rule must depend on the question whether the Deputy Magistrate had jurisdiction to issue the warrants applied for by the Court Sub-Inspector. If he had no such jurisdiction, his order refusing the application was inoperative. If he had jurisdiction, then it was *ultra vires*, for the Joint Magistrate to grant processes, which the Deputy Magistrate had refused.

It is true that in the A Form submitted by the Police the names of the petitioners were not mentioned, but it appears to me that the order "To Babu M. M. Roy for disposal" means that the whole case was transferred, so that it would have been competent for the Deputy Magistrate to issue processes for the attendance of any person named in the B Form previously submitted who were shown by the evidence to be concerned in the commission of the offence, which the Deputy Magistrate was trying.

This view is in accordance with that taken in *Golapdi Sheikh* v. *Queen-Empress* (1) where it was held that the whole case was [792] transferred, and not merely the case of the persons sent up by the Police.

For the reasons above given I am of opinion that the case having been transferred to the Deputy Magistrate that officer alone had jurisdiction to deal with any application for a summons, until the case was withdrawn from his cognizance. The order of the Joint Magistrate to issue a summons on the petitioners was therefore not warranted by law, and I would accordingly set it aside, and make this Rule absolute.

Rule absolute.

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32 C. 793 (=2 Cr. L. J. 769.)

[793] CRIMINAL REVISION.

Before Mr. Justice Pargiter and Mr. Justice Woodroffe.

RAM GOPAL DAW *v.* EMPEROR.*

[26th May, 1905.]

Breach of the peace—Disobedience of order—Evidence—Penal Code (Act XLV of 1860), s. 188—Criminal Procedure Code (Act V of 1898), s. 144.

* Criminal Revision No. 226 of 1905, against the order of Hari Pada Bhattacharjee, Deputy Magistrate of Burdwan, dated Jan. 30, 1905.

(1) (1900) I. L. R. 27 Cal. 979.

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32 C. 783=2 Cr. L. J. 760.

To constitute an offence under s. 188 of the Penal Code of disobedience to an order issued under s. 144 of the Criminal Procedure Code, there must be *definite* evidence on the record to show that such disobedience is likely to lead to a breach of the peace.

***Brojo Nath Ghose* v. *Empress* (1) referred to.**

RULE granted to Ram Gopal Daw and others, the petitioners.

The facts were briefly these: There was an old *hât* known by the name of Sahajpur *hât*, and one Girish Chandra Samanta was the proprietor of that *hât*. In April or May, 1904, a new *hât* was started at Harharia—a village within a short distance of the Sahajpur *hât*—by Babu Lalit Mohan Sinha, the zemindar of Chakdighi. The police having reported that there was a likelihood of a breach of the peace, the District Magistrate of Burdwan in a proceeding under s. 144 of the Code of Criminal Procedure, ordered on the 16th August 1904, that the Harharia *hât* should not be held on Mondays and Fridays, on which the Sahajpur *hât* used to be held. The Harharia *hât* was thereafter closed. Within 200 yards of Harharia, however, at a place called Bathandanga in the village Boira belonging to the said Lalit Mohan Sinha, another new *hât* was started; and the Sahajpur party having complained against this, the Officiating District Magistrate, on the 12th October 1904, issued a notice upon the proprietor of the new *hât* not to hold any *hât* on Mondays and Fridiays within two miles of the old *hât* of Girish Chandra Samanta.

[794] On the 7th November 1904, when the new *hât* was being held at Bathandanga, the Sub-Inspector of Police came to the place and forcibly stopped the *hât*; and on the 10th of November a prosecution was started against the petitioners, the promoters of the new *hât*, under s. 188 of the Penal Code, for disobeying the order of the District Magistrate issued under s. 144 of the Criminal Procedure Code not to hold a new *hât* within two miles of the old *hât*.

The Deputy Magistrate of Burdwan, who tried the petitioners convicted them under s. 188 of the Penal Code for holding the *hât* in disobedience of the order of the District Magistrate, which "might create a breach of the peace between the men of the rival zemindars," observing as follows:—

"I must state that where a rival *hat* is established within a short distance of an old *hat* on the same days, there is *prima facie* probability of a breach of the peace. The proprietor of the old *hat* must try his utmost to maintain his *hat* and the owner of the new *hat* will do his best to flourish his, and there cannot but be persuasions and coercions exercised on vendors and vendees; and I believe in the present case such measures are being taken."

The petitioners then moved the High Court and obtained this Rule to shew cause why the conviction and sentence should not be set aside on the ground that there were no sufficient materials before the Magistrate to find that the disobedience to his order issued under s. 144 of the Criminal Procedure Code was likely to cause a breach of the peace.

The Deputy Magistrate thereupon submitted an explanation, the material portions of which were as follows:—

"The materials before me convinced me that the men of Lalit Mohan Babu, including the accused persons, were determined to hold a new *hat* on the same two days of the week as the Sahajpur *hat*, notwithstanding the Magistrate's prohibitory order, and thus they courted, as it were, opposition from the other side. It is true that no such opposition had *hitherto* been offered, but when Lalit Mohan's men tried to take away vendors from the Sahajpur *hat*, such opposition was likely to be offered at any time.

(1) (1900) 4 C. W. N. 226.

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32 C. 793=2 Cr. L. J. 760.

"I may submit that the likelihood of a breach of the peace is a future contingency inferable from the circumstances of a particular case, and, in my humble opinion, in the case under notice such circumstances existed, when the accused persons committed the offence of disobedience of the District Magistrate's order of which they have been convicted, &c."

Mr. *Jackson* (Babu *Atulya Charan Bose* with him) for the petitioners. In a prosecution under s. 188 of the Penal Code [795] for disobedience of an order issued under s. 144 of the Code of Criminal Procedure, a breach of the peace cannot be inferred (as the Deputy Magistrate seems to have done), but there must be evidence on the record that there was a likelihood of a breach of the peace; otherwise an order under s. 144 of the Criminal Procedure Code would be improper and illegal. There being no such evidence in this case to show that there was a likelihood of a breach of the peace, the order under s. 144 of the Code was not a proper one, and there could not therefore be any prosecution under s. 188 of the Penal Code for disobedience to it: see *Brojo Nath Ghose* v. *Empress* (1) and *Empress* v. *Surjanarain Dass* (2).

No one appeared to shew cause.

PARGITER AND WOODROFFE JJ. In this case a Rule was granted on the District Magistrate to shew cause why the convictions of these applicants and sentences passed on them under section 188, Indian Penal Code, should not be set aside on the ground that there are no sufficient materials upon which the Magistrate could have found that the disobedience to his order issued under section 144, Criminal Procedure Code, was likely to cause a breach of the peace.

No one has appeared to show cause against the Rule; but the Magistrate has submitted an explanation, and that leaves the matter very much where it was at the trial.

As far as we can see, there is no definite evidence on the record that the disobedience to this order was likely to cause a breach of the peace, and, therefore, according to the ruling *Brojo Nath Ghose* v. *Empress* (1), the conviction is not right in the absence of such evidence. However obvious it would seem that the dispute between rival zemindars concerning two *hâts* close to each other is likely to lead to a breach of the peace, the decided cases require that some evidence should be taken to prove that fact. That appears to have been overlooked in this case.

For these reasons we make the Rule absolute and set aside the conviction and sentence. The fine, if paid, will be refunded.

Rule absolute.

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32 C. 796 (=2 Cr. L. J. 761.)

[796] CRIMINAL REVISION.

Before Mr. Justice Henderson and Mr. Justice Geidt.

GULRAJ MARWARI *v.* SHEIK BHATOO.*

[28th March, 1905.]

Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 145, 146—Possession given by Civil Court—Practice.

* Criminal Revision No. 111 of 1905, against the order of M. N. Roy, Deputy Magistrate of Bhagalpore, dated Dec. 22, 1904.

(1) (1900) 4 C. W. N. 226. (2) (1880) I. L. R. 6 Cal. 88.