

we do not think it would be right to hold that the cart of the accused was "habitually used" within the limits of the Municipality.

The appeal, therefore, fails, and must be dismissed, and the order appealed from affirmed.

S. C. B.

Appeal dismissed.

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THE LEGAL
REMEM-
BRANCE
v.
SHAMA
CHARAN
GHOSE.

CRIMINAL REFERENCE.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

DUKHI MULLAH AND OTHERS (1ST PARTY) v. HALWAY, PROPRIETOR OF
MANJHAUL FACTORY THROUGH HIS MANAGER R. CROWDY
(2ND PARTY) *

1895
August 5.

*Criminal Procedure Code (Act X of 1882), section 147—Right of fishing—
Easements—Profits a prendre—Parties to the enquiry.*

The words "right to do anything in or upon tangible immovable property" in section 147 of the Criminal Procedure Code include the right of fishing.

The term "easements" includes profits a prendre; it has not been used by the Legislature of this country in the restricted sense in which it is used in English law so as to exclude profits a prendre.

Marginal notes are no part of an enactment.

For the purposes of the enquiry contemplated by section 147 of the Criminal Procedure Code it is sufficient if the persons who claim for themselves the right, though that right is derived from others, are made parties. The proprietors are not necessary parties.

Ram Chundra Das v. Monohur Das (1) and *Bathoo Lal v. Domi Lal* (2) distinguished.

THIS was a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Bhagalpore, recommending that an order of the Joint Magistrate of Beguserai under section 147 of the Code should be set aside. The facts of the case and the grounds of reference were fully stated in the letter of reference, which was as follows:—

"It seems that there is a lake called *Kabar jhil*, three to four miles in breadth

* Criminal Reference No. 167 of 1895, made by C. M. W. Brett, Esq., Sessions Judge of Bhagalpore, dated the 19th of June 1895.

(1) I. L. R., 21 Calc., 29.

(2) I. L. R., 21 Calc., 727.

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and two or three miles in length, situated mainly within the boundaries of Sripur and Examba in the dry season, but in the rains increasing in size and extending over the lands of the other neighbouring villages. The petitioner, second party, is in possession, partly as proprietor, partly as ticcadar of Sripur, Examba, and the attached villages. The first party are mullahs or fishermen residing in the neighbouring villages, in the lands of some of which the lake is partly situated and to the lands of others of which the lake extends in the rains. The first party, *viz.*, the fishermen, claim a right to fish all over the lake on payment of rents settled with their respective maliks. The second party claim exclusive possession and deny the right of the first party to fish in the lake without settlement from and paying rents to them. Since January there have been disputes between some of the fishermen and some of the servants of the factory, second party, the latter attempting to stop the former from fishing in the lake. Criminal cases have been instituted, and on the 7th February 1895 Gajadhar Prosad, a malik of several of the villages over the lands of which the lake extends in the rains, complained that the servants of the second party were preventing his tenants from exercising their rights of fishing in the lake, and that there was a likelihood of a breach of the peace. The second party were called upon to explain their action, and after they had done so the Magistrate passed an order on the 23rd February 1895 that he did not think it necessary to institute proceedings. In that order the Magistrate noticed that the mullahs or fishermen had not complained. On the 27th February 1895 the petition was put in by the mullahs or fishermen first party on which these proceedings under section 147 of the Criminal Procedure Code were instituted. This was clearly the result of the Magistrate's remark in the previous proceedings. The Magistrate afterwards called for an explanation from the second party, and after a very careful and elaborate enquiry, in which no less than 46 witnesses were examined, the Magistrate passed an order under section 147 of the Criminal Procedure Code, in which he directed that the first party should remain in enjoyment of the right of fishing with nets all over the lake at all seasons of the year until any person objecting should obtain the order of a competent Civil Court adjudging him to be entitled to prevent them from so fishing.

"This order should in my opinion be set aside as illegal. In the first place the first party are only tenants of the proprietors of the neighbouring villages and have no independent right to fish in the lake at all. Their right, according to their own case, depends on settlements made by them with those proprietors who must be regarded as the persons directly entitled to the exercise of the right if any such be found to exist. The right of the fishermen depends on the right of the proprietors. These proprietors should have been parties to the proceedings, and as they have not been made so, the proceedings are defective and invalid. This too is obvious from the position in which the second party now find themselves as the result of the Magistrate's order. A series of suits now brought against the tenants might only involve useless

waste of money, for if the tenants removed themselves from the villages their alleged right would cease. The proprietors of the neighbouring villages have not been declared to be in possession of or entitled to the enjoyment of the right claimed. Further, after the order of the 23rd February 1895, when the Magistrate distinctly held on the petition of the proprietor Gajadhar Prasad that it was not necessary to institute proceedings, and considering that nothing is shown to have occurred between that date and the 27th February when the mullahs presented their petition, I do not think that on the later date the Magistrate had sufficient materials before him to satisfy him that a breach of the peace was imminent. For two or two and a half months the first party had been prevented from the enjoyment of their alleged right by the second party, and their remedy lay in a suit in the Civil Court rather than in a forcible attempt to resume enjoyment of the right. I think that if any action at all were necessary it was eminently a case in which the proper course for the Magistrate to adopt was to take proceedings under section 107 of the Criminal Procedure Code.

“ And, thirdly, I do not think the provisions of section 147 of the Criminal Procedure Code were applicable to the alleged dispute. It seems to me impossible to describe the right claimed by the first party as an easement, or as a right to do or prevent the doing of anything in and upon tangible immovable property. The right to fish implies more than a mere right to do something in or upon tangible immovable property. It implies a right to certain profits or produce out of such property, and the right is claimed, not as a right in or over the property belonging to another (*viz.*, the second party), but as a right arising out of proprietary interest in the lake claimed by the proprietors of the neighbouring villages, arising partly out of the fact that the lake in the dry season is partly situated in some of those villages, and partly out of the fact that in the rainy season the lake extends over lands of those villages. The right claimed is a proprietary interest belonging to the proprietors of those neighbouring villages, and not an easement over the property of the second party. According to the case of the first party and the findings of the Magistrate the whole of the lake is not comprised within the boundaries of the villages of which the second party are said to be in possession. As to the part outside the limits there can be no claim of any right of easement. There is nothing in the evidence or the findings of the Magistrate to indicate the boundaries of the property in which the right of easement is claimed or to definitely ascertain the right.

“ For the above reasons I am of opinion that the proceedings are bad in law, and that the order passed under section 147 of the Criminal Procedure Code cannot be maintained.”

Mr. Hyde (with Moulvies *Serajul Islam* and *Syed-Mahamed Tahir*) appeared on behalf of the second party in support of the reference.

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The arguments adduced in support of the reference fully appear in the judgment of the High Court (MACPIERSON and BANERJEE, JJ.), which was as follows :—

In this case the first party claimed the right to fish in a certain *jhil* or lake ; the second party, within the limits of whose estate or tenure the *jhil* is partly situated, denied that right ; and the Magistrate, being satisfied that the dispute between the parties was likely to cause a breach of the peace, instituted a proceeding under section 147 of the Criminal Procedure Code, and he has made an order under that section permitting the first party to exercise their right of fishing until the second party obtain a decision of a competent Civil Court authorising them to stop the fishing. This order we are asked by this reference under section 438 of the Code to set aside.

No one appeared before us in support of the original order ; but Mr. Hyde, who appeared for the second party, was heard in support of the reference. The grounds on which we are asked to set aside the order are, first, that there was no likelihood of a breach of the peace arising out of the dispute between the parties, and that the proceedings were therefore improperly instituted and should be set aside ; second, that the proprietors of the *jhil* under whom the first party claim, and not the first party who are mere licensees under them, were the proper persons to be made parties to this case, and the order of the Court below which is made in their absence ought to be set aside ; and, third, that a case like this does not come within the scope of section 147 of the Criminal Procedure Code.

With reference to the first ground it was urged that, as the Magistrate had only a few days before the institution of the present proceeding recorded an order to the effect that no action was necessary to be taken in the matter, as there was no likelihood of a breach of the peace, the present proceeding was instituted really without any foundation. But the simple answer to this contention is that, after recording the order referred to above, the Magistrate had some fresh materials before him upon which he was satisfied as to the existence of the likelihood of a breach of the peace.

In support of the second ground the learned Counsel for the

second party cited the cases of *Ram Chundra Das v. Monohur Roy* (1) and *Bathoo Lal v. Domi Lal* (2), but these cases are clearly distinguishable from the present one. There, with a slight exception, the persons who were made parties had no interest in their own right in the subject-matter of the dispute, but were merely servants of the proprietors, whereas here the persons who are made the first party are the persons who claim for themselves the right to fish, though that right is derived from others. The second ground also must therefore fail.

Upon the third ground the contention was that section 147 of the Criminal Procedure Code relates only to easements and not to a right such as the right to fish, which is not in the nature of an easement. But there is nothing in the section to limit its operation in the manner suggested. The only reference to easements is in the marginal note, which is no part of the enactment [see *Claydon v. Green* (3); *Attorney-General v. Great Eastern Railway Co.* (4); *Sutton v. Sutton* (5)]; but even the marginal note does not restrict the application of the section in the manner suggested so as to exclude the present case from the scope of its operation. For in the first place it speaks of "easements, &c.," and in the second place there is nothing to show that the British Indian Legislature uses the term "easements" in the restricted sense in which it is used in English law so as to exclude profits *a prendre*, while on the contrary a reference to the definition of easements in the Limitation Act (XV of 1877, section 3) which was passed four years before the Criminal Procedure Code, and in the Easements Act (V of 1882, section 4), passed in the same year as the Criminal Procedure Code a little more than a month before, shows that the term is used as including profits *a prendre*. There is then nothing to show that the words "the right to do anything in or upon tangible immoveable property" in section 147 do not include the right to fish in a *jhil*.

The grounds urged before us and relied upon in the reference of the Sessions Judge therefore all fail, and we see no reason to interfere with the order made by the Magistrate in this case under section 147 of the Code of Criminal Procedure.

(1) I. L. R., 21 Calc., 29.

(2) I. L. R., 21 Calc., 727.

(3) L. R., 3 C. P., 511.

(4) L. R., 11 Ch. D., 449 (465).

(5) L. R., 22 Ch. D., 511.

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