

## CRIMINAL REVISION.

*Before Mr. Justice Mitra and Mr. Justice Caspersz.*

DINDAYAL MOZUMDAR

v.

EMPEROR.\*

1907

July 15.

*Security to keep the peace—Wrongful act—Ascertainment of the rights of the parties—Which party should be bound down—Criminal Procedure Code (Act V of 1898) s. 107—Riparian right—Right to khuntagari.*

The preventive jurisdiction of a Magistrate under s. 107 of the Criminal Procedure Code must be exercised with caution. If the existence of a right claimed by one party in a proceeding under the section is denied by the opposite party, and is not quite patent, the Magistrate should always endeavour to ascertain for the purposes of the proceeding their respective rights and liabilities, and not in all cases treat them as matters proper for the Civil Court exclusively. Where a doubt exists as to the existence of the rights and obligations, respectively, of the parties, the Magistrate should bind both parties down. Where, however, there is no doubt, the party in the wrong should be bound down, and not the one who has the legal right.

No order of the Magistracy should in any way encourage the infringement of a legal right, or prevent the exercise of such right in a legal way, or do away with, even temporarily, the performance of an obligation.

The right to the foreshore is a riparian right and ordinarily goes with the land above, and the proprietor has, *prima facie*, the right of *khuntagari* or tolls.

*Dhunput Singh v. Denobundhu Saha*(1) followed.

THE petitioners were the servants of one Srish Chandra Roy and others who were said to be the proprietors of mouza Jhikra which borders on the river Karatia. A bazar was started on the foreshore of the river some years ago to which traders in jute, hemp and other articles used to repair to vend their goods. It was alleged by the petitioners that the local *mahajans* used at first to collect the tolls from the traders and pay the proprietors Rs. 400 annually; that in a few years the bazar grew into an important jute centre and an extensive trade in jute was carried on, in consequence of which they, the petitioners, proposed to the

\* Criminal Revision No. 639 of 1907, against the order of S. C. Mukerjee, District Magistrate of Pabna, dated April 15, 1907.

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*mahajans* to pay enhanced rent, but the latter refused; and that they, thereupon, took the collections in their own hands.

It appeared that thereafter one Hriday Nath Shaha lodged an information at the Ullapara thana, in the district of Pabna, alleging that on account of his refusing to pay enhanced rent the petitioners had thrown down certain drums of jute belonging to them from the heads of the coolies who were carrying them. The Sub-Inspector of Police thereupon held an investigation, and on the 11th October 1906 submitted a report to the effect that up to 1307 B. S. the *mahajans* used to collect the tolls; that in 1308 B. S. the proprietors demanded higher rent which was refused, whereupon they began to collect the same themselves; that the *mahajans* then combined to withhold payment of rent and put every obstacle in the way of collection by the proprietors; and that, if the latter's servants prevented import and export by the *mahajans*, a breach of the peace would ensue. He prayed that both parties be bound down under s. 107 of the Criminal Procedure Code.

On receipt of the police report the Subdivisional Officer of Serajgunge directed a proceeding under s. 107 of the Code to be drawn up only against Srish Chandra Roy, the proprietor, and his servants, the present petitioners. The petitioners appeared on the date fixed for the hearing, and contended that they did not commit any act likely to lead to a breach of the peace; that Srish Chandra Roy and others were proprietors of the market; that on the *mahajans* refusing to pay higher rent notices had been duly served on them on behalf of the proprietors not to hold market on the foreshore; and that since then the petitioners had taken over the collections and realized *khuntagari*, *bhasan* and *dalali*.

On 1st February 1907, the Subdivisional Officer bound down Srish Chandra Roy and his servants to keep the peace for a year. The District Magistrate, on an application under s. 125 of the Code, cancelled the order as against Srish Chandra Roy, but upheld it as against the petitioners.

*Babu Atulya Charan Bose*, for the petitioners. The zemindars, as owners of mouza Jhikra which borders the river Karatia,

were owners of the foreshore and the market. The *mahajans* on their refusal to pay enhanced rent were served with notices not to hold market there. The zemindars were entitled to call upon the *mahajans* either to pay increased rent or to leave. As for the non-resident traders, they were merely persons who went there temporarily for the sale of their goods, and had no other interest in the foreshore. The zemindars had the right to collect "*khuntagari*": *Dhunput Singh v. Denobundhu Saha*(1).

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MITRA AND CASPERSZ JJ. This is a case of the exercise of the preventive jurisdiction of a Magistrate under section 107 of the Code of Criminal Procedure. The petitioners have been directed by the Subdivisional Magistrate of Serajgunge to enter into bonds for Rs. 1,000 each and to furnish two sureties, each for the same amount, to keep the peace for one year. The District Magistrate of Pabna has affirmed the order of the Subdivisional Magistrate.

The petitioners are servants of the zemindar of Jhikra, an important jute centre in the Serajgunge subdivision. Jhikra is on the Karatia river and during the jute season an extensive trade is carried on there on the bank of the river. The zemindar claims to be the proprietor of the foreshore, and Jhikra, with the foreshore is alleged to be in his *khass* possession. The traders who come to the place with jute have no permanent interest in the land, and the zemindar claims from them certain cesses, for the use of the land and the foreshore, under the heads of *khuntagari*, *samati* and *dalali*. The traders deny the right of the zemindar to levy such cesses, and they have combined not to pay the same. Interference with the local jute trade must be a necessary consequence of the claim on one side and its denial by the other, and if both sides persist, a breach of the peace is not unlikely.

But the preventive jurisdiction of a Magistrate must be exercised with caution. Where its exercise may lead to the infringement of an undoubted civil right, where an obligation which the law of the country imposes becomes incapable of being

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enforced owing to the exercise of such a jurisdiction, and where the breach of the peace apprehended by the Magistrate is a likely result of the enforcement of his legal right by a party in a legal way and the illegal denial of the corresponding obligation by the other party, the Magistrate should not bind down the party who has the legal right in him. In a case involving the question of possession of land, a finding as to present possession may be sufficient. But, in most other cases, if there are doubts as to the respective rights and obligations, both parties may be bound down until the rights and obligations are determined by a proper tribunal. To bind down one and not the other party in such a case encourages the infraction of legal rights under cover of legal authority, a state of things which ought to be avoided. If the Magistrate bind down both parties, his order would not be detrimental to either. Where, however, no doubt exists, the party in the wrong should be bound down and prevented from illegally exercising an alleged claim, or, in other words, the party who has clearly the legal right should be allowed to exercise such right without opposition, the other party being bound down.

If the existence of the right in a party in a proceeding under section 107 of the Code be denied by the opposite party and is not quite patent, an endeavour should be made to ascertain, for the purposes of the proceeding, the respective rights and liabilities of the parties. To leave all questions of civil rights, however easy of summary ascertainment, to the determination by the Civil Courts, and to bind down one party to a proceeding and not the other, may lead to very undesirable consequences in the shape of infringement of rights and resultant damage without the means of obtaining redress in future. An attempt to ascertain legal rights should always be made by the Magistrate before he directs one party to be bound down. No order of the Magistracy should encourage, in any way, the infringement of a legal right in a person by another, or prevent the exercise of a legal right in a legal way, or do away with, even temporarily, the performance of an obligation. The duty of every Judge administering either civil or criminal justice is to respect and allow the exercise of legal rights and to prohibit the performance of acts detracting from such rights.

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In the present case no attempt was made by the Subdivisional Magistrate to ascertain the truth or otherwise of the allegations of either of the parties. Speaking of the foreshore he says, "It is impossible for me to decide with certainty that the present foreshore is the *khās* property of the landlord. This is a matter which will have to be decided in a civil suit." He left the matter there. Speaking again of the landlord's right to claim enhanced cesses such as *khuntagari* or tolls, he says—"It is unnecessary for this Court to decide whether the zemindar is within his legal rights to make such demands. This is also a matter for the Civil Court." The Magistrate made no attempt to determine the only important question raised in the case, and he left them open. If the questions were not easy of solution by him, if he had doubts which were not easily removable, he should not have directed the landlord's men to be bound down and not the other party. Breach of the peace could not take place without action and counter-action, and if the rights and obligations of the respective parties, in the opinion of the Magistrate, were enveloped in obscurity, there was no reason for his order binding down one party only.

The Subdivisional Magistrate also lays down his duty, with reference to the facts of the case, in these words:—"It is my duty merely to point out that the zemindar has no title or right to enforce payment when payment is withheld." That is true in one sense. The zemindar, if payment is withheld, cannot take the law into his own hands and thus enforce payment. But he may prevent the landing of goods or prevent the driving of pegs into his land: *Dhunput Singh v. Denobundhu Saha*(1). He may thus indirectly enforce his right and compel payment by stopping all trade. Thus the reason given by the Subdivisional Magistrate for binding down the petitioners, without an attempt to adjudicate upon or ascertain the respective rights and liabilities of the parties, is not sound.

*Primâ facie*, the owner of the soil is entitled to the fullest use of it and to prevent its use in any way by strangers. By contract or custom his *primâ facie* right may be detracted from, but the reason of such detraction must be proved. The rights

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however originating and claimed against the proprietor must be established. If the proprietary right be denied, as in this case it has been with respect to the foreshore, the right must be established, but the right to the foreshore is a riparian right, and ordinarily goes with the land above and, except as to certain well recognised rights appurtenant to navigation, etc., the proprietary right is seldom capable of denial. As held by Morris and Tottenham JJ. in *Dhunput Singh v. Denobundhu Saha*(1), the master of the petitioners had *prima facie* the right to prevent *khuntagari* or to levy cesses for *khuntagari*.

It is unnecessary for us to go further into the matter of title. We are of opinion that, for the reasons we have given, the order of the Subdivisional Magistrate binding down the petitioners cannot be sustained, and we accordingly set it aside.

It may, however, be competent to the Magistrate to institute fresh proceedings against both parties, if he be of opinion that such proceedings are necessary for the prevention of a breach of the peace, and to direct such order to be taken as he may think proper having regard to the observations we have made. In the result, he may bind down either both or one of the parties or neither of them.

*Rule absolute.*

E. H. M.

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