

CRIMINAL REVISION.

Before Mr. Justice Mitra and Mr. Justice Fletcher.

BALAJIT SINGH

v.

BHOJU GHOSE.*

1907

 Aug. 21.

Fishery—Dispute relating to a fishery—Whether proceedings should be under s. 107 or s. 145, Criminal Procedure Code (Act V of 1895).

Where there is a *bonâ fide* dispute relating to a fishery right, the proper course for the Magistrate to adopt is to proceed under s. 145 of the Criminal Procedure Code, and not under s. 107. The words in s. 145 are mandatory, while the language of s. 107 is discretionary.

Dolegobind Chowdhry v. Dhann Khan(1) followed.

UPON the receipt of a police report praying for proceedings under s. 145 of the Criminal Procedure Code to be drawn up against Bhoju Ghose and others, the first party, and Balajit Singh and others, second party, on account of a dispute relating to the possession of a *jalkar*, the Sub-divisional Officer of Madhepura referred the case, by an order dated 15th January 1907, to the District Magistrate of Bhagalpore recommending proceedings under s. 107 of the Code. The District Magistrate, by his order of the 30th January, directed proceedings under s. 107 against the second party. This party in their written statement submitted that they were not going to commit a breach of the peace, and that the dispute being as to a *jalkar*, proceedings under s. 145 and not s. 107 should be drawn up.

On the 20th May 1907, the Deputy Magistrate passed an order directing the petitioners to execute a bond to keep the peace for one year in the amount of Rs. 200, with two sureties in half the amount each. The petitioners then moved the District Magistrate of Bhagalpore against the order binding them down,

* Criminal Revision No. 890 of 1907, against the order of F. F. Lyall, District Magistrate of Bhagalpore, dated June 29, 1907, affirming the order of Banku Behari Sing, Deputy Magistrate of Bhagalpore, dated May 20, 1907.

1907
BALAJIT
SINGH
v.
BHOJU
GHOSH.

but he refused to interfere; whereupon they moved the High Court and obtained the present Rule.

Mr. Caspersz (Babu Joygopal Ghose with him), for the first party. The Magistrate has a discretion to proceed either under s. 107 or s. 145: see *Sheoraj Roy v. Chatter Roy*(1), and *In the matter of Ekram Singh*(2).

Mr. Hug (Babu Sarat Kumar Mitra with him), for the petitioners, relied on *Dolegobind Chowdhry v. Dhanu Khan*(3), *Bejoy Singha Neogi v. Empress*(4), *Bidhu Bhusan Chatterji v. Annoda Churn Kanangui*(5).

[FLETCHER J. referred to *King-Emperor v. Basiruddin Mollah*(6).]

MITRA AND FLETCHER JJ. The dispute in this case concerns *water* and the word "water" includes fisheries. The police recommended in their report that a proceeding under section 145 of the Code of Criminal Procedure should be drawn up between the parties; but the Deputy Magistrate thought otherwise, and he drew up a proceeding, under the directions of the District Magistrate, under section 107 of the Code. The result has been that the petitioner, the second party, has been bound down to keep the peace for one year.

It is clear from the judgment of the Deputy Magistrate as well as that of the District Magistrate that the dispute in this case is a *bonâ fide* one relating to a fishery right, and a large number of documents has been put in on either side to prove the rights of the respective parties and the right to possession to each. In the case of *Dolegobind Chowdhry v. Dhanu Khan*(3), which is a case very similar to the present one, the learned Judges directed that the order under section 107 of the Code of Criminal Procedure, binding down one of the parties, should be set aside, and they expressed their opinion that a proceeding under section 145 of the Code of Criminal Procedure was the proper proceeding. Looking to the words used in section 107 and in section 145, we have

(1) (1905) I. L. R. 32 Calc. 966.

(2) (1899) 3 C. W. N. 297.

(3) (1897) I. L. R. 25 Calc. 559.

(4) (1899) 3 C. W. N. 433.

(5) (1902) 6 C. W. N. 883.

(6) (1903) 7 C. W. N. 746.

no doubt that the proper course for the Magistrate in a case like this was to proceed under section 145 of the Code. The words in section 145 are mandatory. That section says—“Whenever a Magistrate of the District . . . is satisfied, from a police report or other information, that a dispute likely to cause a breach of the peace exists concerning any land or water . . . he *shall* make an order in writing,” etc., etc. Section 107 contains words which are discretionary; the Magistrate *may* institute proceedings binding down either of the parties.

1907
BALAJIT
SINGH
v.
BHOJU
GHOSH.

We are of opinion that this is a case which comes within the rule laid down in the case of *Dolegobind Chowdhry v. Dhanu Khan*(1) referred to above. We accordingly make the Rule absolute, and direct that the order of the Deputy Magistrate binding down the petitioner under section 107 of the Code be set aside. It would be competent to the Magistrate, if he thinks it necessary, that is to say, if there is still likelihood of a breach of the peace, to draw up a proceeding under section 145 of the Code.

Rule absolute.

(1) (1897) I. L. R. 25 Calc. 559.

B. H. M.