

## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

1911  
 May 26.

KAMINI MOHAN DAS GUPTA

*v.*

HARENDRA KUMAR SARKAR.\*

*Prohibitory order—Excavation of a tank—Injury to adjoining house—Likelihood of a breach of the peace—Order passed on personal apprehension of the Magistrate without evidence taken or urgency recorded—Criminal Procedure Code (Act V of 1898) s. 144.*

The petitioner excavated a tank on his own land, adjoining the house of the opposite party, and the latter objected to the excavation on the ground that his house would be thereby rendered unsafe. No likelihood of a breach of the peace appeared from the police report or the written statements of the parties, but the Magistrate made the order under s. 144 of the Criminal Procedure Code without inquiry or recording any urgency:

*Held*, that the order was illegal, and that s. 144 was not applicable without inquiry or recording any urgency.

THE petitioner, Kamini Mohan Das Gupta, and the opposite party, Harendra Kumar Sarkar, were pleaders practising in the Civil Courts at Magura in the district of Jessore. In February 1911 the former commenced to excavate a tank on his own land about 10 feet from his residential house. The latter, who had a house about the same distance from the western bank of the tank, objected to the excavation on the ground that it would render his house unsafe. On the 6th April 1911, the Sub-Inspector of police of Magura inspected the locality, and submitted a report to the Sub-Divisional Magistrate of Magura stating that the parties were "contesting regarding the excavation of a tank," and that, "if the tank is excavated, then sooner or later the house of the first party (Harendra Kumar), which is adjacent to it, will go down to its bed." He prayed that action under s. 133 of

\* Criminal Revision, No. 497 of 1911, against the order of A. L. Gupta, Subdivisional Magistrate of Magura, dated April 19, 1911.

the Criminal Procedure Code might be taken. Upon the receipt of the report the Sub-Divisional Magistrate passed an order calling upon the petitioner and the opposite party "to show cause, on the 10th April, why an order under s. 144 of the Code should not be passed requiring the former to abstain from either the excavation of the tank or the exercise of any right over the disputed portion of the land."

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Notice was issued on the petitioner on the same day in the following terms:—

Whereas it has been reported to me that a quarrel has arisen between you and Harendra Kumar Sarkar, owing to the excavation of a tank by you on the western side of your house, and as there is a likelihood of a breach of the peace regarding the land on the western bank of the tank, you are required to appear before this Court, on the 10th April, to show cause why an injunction under s. 144, Cr. P. C. should not issue against you.

Notice was also issued on the opposite party to the following effect:—

As there is a police report that there is a likelihood of a breach of the peace with Kamini Babu on account of his excavating a tank on the eastern boundary of your house, you are required to show cause why an order under s. 144 should not be passed.

The parties filed their written statements on the 10th April. The petitioner alleged that he had done nothing to cause a likelihood of a breach of the peace; that the land on which the tank was being excavated, including the western bank, was his own; that he had no quarrel with the opposite party regarding the land, of which he was in undisputed possession; that the tank would not injure the house of the opposite party, and that there was no likelihood of a breach of the peace with respect to the excavation of the tank. Harendra Kumar in his written statement submitted that the excavation would bring his house down; that there had been as yet no settlement of the boundary line between their lands; that if the petitioner was allowed to excavate further, he (Harendra) would have great difficulty in proving the boundary line; and that immense loss would be caused to him. On the 11th April the Magistrate, after perusing the written statements, made the following order: "Unless the parties

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compromise their dispute by the 19th instant the rule will be made absolute." Neither party appeared on the 19th nor was any evidence recorded but the Magistrate passed an order in these terms:—

Nobody applies for further time. The rule is made absolute. Ordered under s. 144 Cr. P. C. that, whereas I am satisfied that there are grounds to apprehend a breach of the peace, in connection with a dispute that exists between Kamini Mohan and Harendra Kumar, in connection with some land between their homesteads, no party shall exercise any right of possession on the western bank and slope of the tank excavated between their homesteads. Further excavation of the said tank on the said side is hereby forbidden.

The Magistrate submitted in his explanation to the High Court that from his personal knowledge, his local inspection and his interview with the parties, he was satisfied that there was a likelihood of a breach of the peace between them, and that he had, therefore, taken action under s. 144, instead of s. 133 of the Code, as recommended by the police.

*Mr. H. N. Sen and Babu Trailakya Nath Ghose*, for the petitioner.

No one appeared to show cause.

CASPERSZ AND SHARFUDDIN JJ. We are asked in this Rule to set aside an order of the Sub-Divisional Magistrate of Magura, purporting to be under section 144 of the Criminal Procedure Code, on two grounds, namely, *first*, that the terms of section 144 of the Criminal Procedure Code were not duly complied with, and, *secondly*, that there is no probability of a breach of the peace.

The facts of the case are sufficiently trivial. They appear to be these. The parties are pleaders at Magura. The petitioner began to excavate a tank near his house, and the police apprehending that, if he continued to do so, the house of the opposite party would sooner or later go down into the bed of the tank, approached the Magistrate to take action under section 133. The Magistrate appears to have had an interview with the pleaders, and to have advised them to compromise. Then, on the 19th April 1911, and without

further enquiry and without recording any urgency in the matter, the Magistrate made his Rule absolute not on the ground reported by the police but, as appears from his present explanation, from his personal apprehension that the parties would break the public peace.

It appears to us that the order is entirely misconceived, and it cannot possibly be sustained. No cause is shown, but we have examined the papers and read the explanation of the Sub-Divisional Magistrate. It is obvious from a bare recital of the facts that section 144 of the Criminal Procedure Code was not applicable, and that the order was not passed on any real apprehension properly arrived at. Orders under section 144 are not intended for the purpose to which the Magistrate has applied his powers under that section. The section is ordinarily to be used in cases of urgency, and should not be allowed to take the place of any other provision of the law which might more appropriately apply. If the opposite party had been so advised, he might have obtained against the petitioner an injunction to prevent him from continuing the excavation of the tank. In this view, we make the Rule absolute, and set aside the order complained of.

E. H. M.

*Rule absolute.*

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