CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon

1910

July 8.

HARENDRA KUMAR BOSE

v.

GIRISH CHANDRA MITRA.*

Dispute relating to land—Witnesses—Failure of witnesses summoned to attend—Duty of Magistrate to summon or compel the attendance of witnesses at the instance of the parties—Denial of justice—Interference by High Court—Criminal Procedure Code (Act V of 1898), s 145 (4)

Section 145 of the Criminal Procedure Code does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties, or to compel their attendance after they have been summoned but failed to appear.

Tarapada Biswas v. *Nurul Huq* (1) followed.

Where a Magistrate has acted in accordance with law, it would be necessary to show the High Court very clearly, in order to warrant its interference, that the procedure adopted, though right in law, has in fact amounted to an absolute denial of justice.

Where it did not appear what evidence the absent witnesses would be able to give regarding the question of actual possession, and there was nothing to show what efforts the party had made to procure their attendance, the High Court refused to interfere.

Upon the receipt of a report of the Police Sub-Inspector of Keranigunge thana, dated the 1st November 1909, and a sequent report, the Additional District Magistrate of Dacca drew up a proceeding under s. 145 of the Criminal Procedure Code between Harendra Kumar Bose and others, the petitioners, and Girish Chunder Mitter and others, the opposite party. During the hearing of the case before Babu B. K. Ganguli, Deputy Magistrate of Dacca, the petitioners obtained summonses for the attendance of, amongst others, four witnesses, who, however, failed to appear. The Magistrate refused to compel their attendance, and by his order, dated the 4th February, 1910, declared the opposite party to be in possession. The petitioners thereupon moved the High Court and obtained the present Rule.

* Criminal Revision No. 480 of 1910, against the order of B. K. Ganguli, Deputy Magistrate of Dacca, dated Feb. 4, 1910.

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Babu Harendra Narain Mitter, for the petitioners.

Babu Atulya Charan Bose (with him *Babu Akhil Bandhu Guha*), for the opposite party.

HARINGTON AND TEUNON JJ. This is a Rule calling on the District Magistrate and on the opposite party to show cause why the order complained of in this petition should not be set aside on the ground that the Magistrate neglected to enforce the summons issued to compel attendance of the applicants' witnesses.

The order which is complained of is one under section 145 of the Code of Criminal Procedure, and the question which we have to decide is, *first*, whether in a proceeding under this section it is obligatory on the Magistrate to enforce the attendance of any witness at the instance of the parties; and *secondly*, if it is not so obligatory, whether his action in this particular case has resulted in such a denial of justice to the parties bound by the order as to make it incumbent on us to interfere under the special powers placed in our hands by the Charter.

On the first point, the observation which we have to make is that, under the law, the Magistrate is the sole judge as to whether proceedings under section 145 of the Criminal Procedure Code should or should not be set on foot. The section enables him, in his sole and absolute discretion, to take proceedings under it when he thinks that such proceedings are necessary to enable him to discharge the duty which the law places on his shoulders of preserving the peace in the district under his care. No private person has any right whatever to cause proceedings under that section to be taken. The Magistrate can act on his own motion, and no steps which are taken by a private party can render it incumbent on the Magistrate to act if, in the Magistrate's discretion, he thinks that the proceedings are not necessary. That being so, it is necessary to look to the section to see what it directs the Magistrate to do when he exercises these particular powers. It provides that he shall, without

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reference to the merits of the claims of any of such parties to a right to possess the property which is the subject of dispute, peruse the statements put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order in possession of the land which is the subject matter in dispute. Reading that section we should have been prepared to hold that the section neither contemplated the summoning of witnesses at the instance of the parties nor rendered it obligatory on the Magistrate to compel the attendance of any witnesses unless he, in his discretion, thought it necessary to take the evidence of those witnesses. It is unnecessary for us to discuss this point because the whole matter has been dealt with in the case of *Tarapada Biswas* v. *Nurul Huq* (1) where this very question was considered with great minuteness and great care, and the conclusion come to was that in proceedings under section 145 of the Criminal Procedure Code, the Magistrate was not under any obligation to compel witnesses to attend at the instance of the parties. The law and the authorities having been very elaborately discussed in that judgment and that judgment being one with which on this point we are in entire agreement, it is quite unnecessary for us to go through the cases which have been there discussed with great care and elaboration. All we can say is that we agree with the conclusion come to by the learned judges who decided that case, and we think that the law does not impose on the Magistrate a duty at the instance of a party to compel the attendance of witnesses at the hearing.

The learned vakil who has appeared in support of the Rule has conceded very frankly that he cannot point to any section of the Code requiring a Magistrate to compel the attendance of witnesses in cases under section 145 of the Criminal Procedure Code, but he says that the refusal of the

(1) (1905) I. L. R. 32 Calc. 1093.

Magistrate to do so amounts to a denial of justice to the parties, and that on this ground we ought to interfere; and this brings us to the second point which has been argued before us. We have perused the affidavit before us which states that four material witnesses did not appear and complains that the Magistrate did not enforce their attendance. But in a case where the Magistrate has acted in accordance with law, it would require very strong circumstances to justify our interference, and it would be necessary to show us quite clearly that the procedure, though right in law, has in fact amounted to an absolute denial of justice. Looking at the facts disclosed and the materials before us, it is quite impossible for us to say the petitioners have made out anything like a case of denial of justice. It does not appear what evidence these witnesses were going to give. There is nothing to show what efforts the petitioners have made to procure their attendance. In so far as the materials before us go, these witnesses may be unable to speak to any fact relevant to the issue as to who was in possession of the land in question and their absence may be due to the neglect of the petitioners to ask them to appear. We are entirely in the dark on the evidence and on the materials before us as to whether the petitioners have made any serious efforts to produce the witnesses before the Magistrate. This concludes the two points which have been argued before us.

Then it is said that the matter ought to be referred to a Full Bench. We do not think it necessary to take that step in this case. It is conceded that there is no particular section which gives the petitioners the right they allege that they ought to have, and the question whether, on the facts of this particular case, there has been a denial of justice rendering it incumbent upon us to interfere under the Charter, is a question which of course could not be referred.

For these reasons we discharge the Rule, and we think it unnecessary to make the reference asked by the learned vakil for the petitioners.

E. H. M. *Rule discharged.*