

Promotha Nath Bose Vs. Basanta Kumar Bose

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Court : Kolkata

Decided On : May-25-1910

Reported in : 6Ind.Cas.777

Judge : Harington and ;Teunon, JJ.

Appellant : Promotha Nath Bose

Respondent : Basanta Kumar Bose

Judgement :

1. This is a Rule calling upon the District Magistrate and on the opposite party to show cause why the order complained of should not be set aside on the ground that the Jury who decided the question was not a Jury legally constituted under the provisions of Section 138 of the Criminal Procedure Code and also on the ground that there was no jurisdiction to make the order.

2. The facts of the case are very simple. On the 16th September 1909, a notice was issued under Section 133 on the petitioner to remove or to show cause on October 2nd why he should not remove the obstruction complained of. On October 2nd, the petitioner filed a petition in which he denied that the place encroached upon was a public road. He said that it was a private land purchased by the petitioner's son and that he had no interest in the land and lastly added a prayer that a jury might be appointed under Section 138 of the Code to try whether the Magistrate's order was a proper one. The Magistrate considered the petition on the

14th October and made an order to the effect that both the parties applied under Section 135, Criminal Procedure Code, for trial by a jury and under Section 138 the following persons were appointed as a Jury. He then named five persons in accordance with the provisions of the Code, of these persons only four jurors dealt with the case, one of them being ill and unable to attend. The four jurors reported that the petitioner had encroached on the public road and in consequence the conditional order was made absolute. It is quite clear that the order must be set aside because the law provides that the Jury must be an uneven number of persons not less than five. In this case the number of persons who adjudicated was only four. Notwithstanding that the Jury as a body can act by a majority, that act must be by a majority out of a jury of five people who investigated the case. To hold otherwise would be in effect to say that a jury of three persons would be sufficient because that would be a majority out of a jury of five persons. The Rule must be made absolute setting aside the order on the ground that it has not been adjudicated upon by a jury of not less than five persons as required by law. In setting aside this order it is necessary to set aside the order appointing the Jury, because the time by which they were directed to return their verdict has long gone by.

3. But the petitioner says that after setting aside this order, we should direct the Magistrate to hear evidence on his behalf, before making any order for the attendance of the Jury, on the question as to whether the locus in quo is a public road or is a private land. A number of cases have been cited and it appears that the authorities are not completely in accord as to whether the Magistrate should take this course or whether when a party applies for a Jury he must be taken to have waived the trial of the particular issue before the Magistrate and to have consented to the question being decided by a Jury, Considering the state of the authorities we are doubtful whether we could decide this question if it legitimately arose without a reference to a Full Bench. But we do not think it right to take that course for the purpose of ascertaining what directions, if any, should be given to the Magistrate. We think the answer of the Full Bench would be that all that this Court had to do was to say whether the particular order complained of should stand or not and that it was beyond its province to dictate to the Magistrate the course he should pursue when the order is set aside. It is to be assumed that the

Magistrate, if proceedings go on, will deal with the case in accordance with the provisions of law. Should he make an order which contravenes its provisions then it will be open to the petitioner to come up to this Court to have it set aside. But seeing the order in the present case must be set aside on the objection taken to the constitution of the Jury, we think all that we can do is to set aside the order and leave it to the Magistrate to deal with the case in accordance with law.

4. We do not think it appropriate to refer to the Full Bench a question which does not involve the question whether a particular order is right or wrong but a question whether the Magistrate is to be given directions to act in one way or another for in our opinion, this is outside the province of the Court in setting aside an order made in revision.

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