

(1923) 11 PAT CK 0010
In the Patna High Court

Narendra Nath Sarkar and Others

APPELLANT

Vs

East Indian Railway and Others

RESPONDENT

Date of Decision : 12-11-1923

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 144, 147

Citation : AIR 1924 Patna 717

Hon'ble Judges : Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—On the 24th, July, 1923, the petitioners filed a petition before the Senior Deputy Magistrate of Dhanbad, wherein they stated that there was a road within the jurisdiction of the Dhanbad Municipality commencing from, Dhanbad old Station road towards the east of the Indian Railway Institute and leading to Manaitanr village. They claim the said road to be public road and in existence from a very long time. They stated that at any rate the public and the residents of Manaitanr had been using it as public road for over 70 years and they claim to have acquired a right of easement over the said road. It was stated that the second party, namely the East Indian Railway Company, their Chief Engineer Mr. Johnstone and their District Engineer Mr. Kaokforbh were trying to convert the road to a private road and to obstruct or prevent the petitioners and the public from using the road. On the 21st July, 1923, they had published a notice in the Amrita Bazar Patrika to the effect that "It was notified for the information of all concerned that the East Indian Railway private road commencing from the Dhanbad old Station road towards the east of the Indian Railway Institute and leading to Manaitanr Village will be closed against all traffic from 1st August, 1923." They stated that the description of the road as a private road in the said notice was incorrect and false and it was alleged that the said notice had been published with the object of marking the road a private one and that it was the first attempt on the part of the Railway Company to close the road which had been used by the public during the last 70 years. They stated in their petition that they had plenty of documentary and oral evidence including

old registered deeds to support their case and they alleged that any attempt on the part of the Railway Company to close the road on the 1st August, 1923, would lead to a serious breach of the peace. They accordingly after stating these facts prayed for a notice upon the Railway Company restraining them from closing the road on the 1st August, 1923. The petition was headed as one under Sections 144 and 147 of the Criminal Procedure Code, and having regard to the urgency of the matter it was prayed that notice should at once issue to the Railway Company restraining them from closing the road on the 1st August, 1923. Upon receipt of this petition the learned Deputy Magistrate passed the following order on the 24th July, 1923. "I shall enquire into the matter and pass order on the 30th July, 1923." Before the 30th July, 1923, the learned Deputy Magistrate adopted a procedure which is not warranted by law. Instead of holding any enquiry as provided by law either u/s 147 or Section 144 he went over to the office of the District Engineer, examined certain documents and correspondence relating to the road and made certain enquiries in the office and he ascertained what he calls the history of the road. He held no enquiry as provided by Section 147, Criminal Procedure Code at all. He never heard the petitioners, never drew up any proceeding u/s 147 and never called upon the parties to adduce evidence or file written statement. Without asking the petitioners to adduce any evidence and without hearing the petitioners he passed his order on the 30th July, 1923 wherein he set out what he calls the history of the road from the information he gathered by examining the documents and making enquiries in the office of the District Engineer. He came to the conclusion that the road was a private road belonging to the Railway Company. He nowhere comes to conclusion as to whether the petitioners or the public had acquired any right over that private road by way of easement. After discussing the documents and after placing upon the file a copy of the agreement executed by one Mr. Mathews in favour of the Railway Company which he had obtained from the District Engineer's office he came to the conclusion that the right of the Railway Company had been established and towards the end of his order he states: "It is true that the road has been used not only by the lessee but by others as well for a considerable time but that does not to my mind affect the Company's right. I can not therefore issue an order u/s 144, Criminal Procedure Code as prayed for by the petitioners restraining the Railway Company from exercising their ordinary proprietary rights over their own land. If the petitioners have any grievance they may go to the Civil Court. There can be no breach of the peace unless instead of doing this they take the law into their own hands which they will do at their own risk."

2. Now to my mind this is in effect deciding the case u/s 147 i.e., declaring the right of the 2nd party without complying with the provisions laid down under the law. If the learned Deputy Magistrate had come to the conclusion that there was no likelihood of a breach of the peace and therefore no action need be taken either u/s 144 or u/s 147, Criminal Procedure Code, he would have been justified in doing so; but instead of disposing of the matter in that way he takes evidence

ex parte by going over to the office of the 2nd party. He makes enquiries in the absence of the petitioners and without giving them an opportunity of adducing their own evidence and examining witnesses and coming to a distinct finding as to the alleged right of easement set up by the petitioners he comes to the conclusion that the right is with the Railway Company and that if the petitioners go upon the land they do so at their own risk. In effect he makes an order in favour of the 2nd party u/s 147 and prevents the petitioners from going upon the land. Such a procedure is wholly unjustifiable. When the petitioners went up before the Additional District Magistrate he declined to interfere. He observed that the whole history of the road in dispute was that it was constructed as a carriage approach road to two bungalows especially that of Mr. Mathews and that when the Railway land was acquired and that fencing put up it was never suggested that the access to the village of Manaifcanr was being closed. Where he gets these facts from it is difficult to say. There does not appear to be anything on the record from which he could come to this conclusion. He says that he went to the locality and made local inspection. Now these facts could not be ascertained by mere local inspection. It was necessary to take evidence to come to a finding upon this point and the learned Additional District Magistrate upon the same materials from which the Deputy Magistrate has come to the conclusion that the Railway Company had established its right to the land has affirmed the order of the Deputy Magistrate and refused to interfere with it. He says " the petitioners have not made out a prima facie case that this is a right of way or that it is the only access to the village or that any breach of the peace is likely unless they deliberately provoke it" without giving them an opportunity to adduce evidence. This is not a satisfactory mode of dealing with the petition and I am constrained to set aside the order of the Deputy Magistrate as well as of the Additional District Magistrate. The petition treating it either as a petition for action u/s 144 or one u/s 147, Criminal Procedure Code must be dealt with according to law. No doubt it would be open to the Magistrate to reject the petition upon the ground that there was no longer any likelihood of a breach of the peace, but he must dispose of it according to law and not by a finding upon evidence in contravention of the procedure laid down by the law.

3. The order of the learned Deputy Magistrate as well as of the Additional District Magistrate must therefore be set aside.