
(1869) 01 CAL CK 0007

Calcutta High Court

Case No: None

In Re: Banka Bihari
Ghose

APPELLANT

Vs

RESPONDENT

Date of Decision: Jan. 9, 1869

Judgement

Sir Barnes Peacock, Kt., C.J.

We think that the order of the Magistrate dated the 16th of July 1868, and the warrant issued thereon ought to be set aside. The petitioner, against whom the warrant was issued, was the lessee of the tolls to be collected at a certain toll-gate. Certain arrears of rent payable under the lease being unpaid, the Magistrate issued a summons for the appearance of the petitioner. It does not appear, on the face of the summons, under what law the Magistrate was proceeding; but the summons recites that a complaint having been preferred against the petitioner for the offence of not paying the sum of Rupees 262 for arrears of rent, the petitioner was summoned to appear before the Magistrate to answer the charge. From the use of the word "offence," it would seem that the Magistrate was treating the case as one of a criminal, and not of a civil nature. The petitioner did not appear in pursuance of the summons; but he sent a kaifiat to the effect that the road having been out of repair and carriages and passengers having been unable to pass along it, he had been unable to collect the tolls in respect of which the rent was payable. Upon that the Magistrate made the order in question. The order is in these words: "Since the debtor has not appeared in person, he has thereby disobeyed the order of the Court; therefore, it is ordered that a warrant be issued to arrest the defendant;" and a warrant was issued accordingly.

2. It does not appear, on the face of the order, under what provision of law the Magistrate was acting in ordering a warrant to be issued for default of appearance according to the terms of the summons. The only law of which I am aware which could give any colour of justification for the issue of the warrant, is Section 73* of the Code of Criminal Procedure, which authorizes a Magistrate, after default made to a summons, to issue a warrant of arrest against the person summoned.

3. If the order was made and the warrant issued under the provisions of the Code of Criminal Procedure, this Court, under the power of revision vested in it by Section 404, may set aside the proceedings for an error in law.

4. If the Magistrate considered that the non-payment of the rent due under the lease was a criminal offence, it appears to me that he was wrong in point of law; and that he had no power under the Code of Criminal Procedure to arrest the prisoner for not appearing to the summons, and the Court in that case would have no difficulty in quashing the order and warrant, and all proceedings taken under them.

5. When the rule for setting aside the order was made by this Court, the Magistrate was authorized to show any cause he might think fit why the order should not be quashed, and the Magistrate in his letter of the 23rd December 1868, has stated his reasons.

6. He contends, first, that the petitioner as farmer of a toll-gate, under Act VIII of 1851, is under Clause 2 of that Act, subject to the same responsibilities as he would have been if similarly employed in the collection of land revenue; and that he was, consequently, liable to be dealt with u/s 23, Regulation VII of 1799.

7. That Act authorizes the local Government to fix the rates of tolls to be levied upon any road made or repaired at the expense of the Government, and to place the collection of such tolls under the management of such persons as may appear to them proper; and it is enacted by the section to which the Magistrate refers, that all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of the land revenue.

8. It is unnecessary to consider, under what provision of the law the tolls were leased to the petitioner by the Magistrate, for it appears to me that the lessee of tolls is not a person employed in the management and collection of the tolls within the meaning of Act VIII of 1851. If he was a manager and collector of tolls he would be liable to pay over the tolls when collected and to be punished for embezzlement if he should appropriate them to his own use. But a farmer or lessee of tolls collects them for his own use, and pays the rent in consideration of which the tolls are made over to him for the term of the lease. It appears that the warrant was issued on the same day on which Regulation VII of 1799 was repealed by Act VII of 1868. I will not stop now to enquire whether a warrant issued on the very day on which the Regulation was repealed, could be justified by the Regulation, because I am of opinion that if the warrant had been issued whilst the regulation was in full force, it would not have been justified by the Regulation.

9. Section 23, Clause 2, authorized proceedings to be taken in the event of any arrear of revenue being undischarged on the 1st day of the month succeeding that for which the arrear should have become due. The section extended not only to arrears of revenue properly so called, but to arrears of revenue as described in Section 2, Regulation XIV of 1793. It applied, therefore, to arrears of rent due from a farmer of land. The procedure

thereby pointed out, was to require payment of the arrear due with interest, and, if not paid, it authorized the attachment of the estate of the proprietor from whom the arrear should be due; or, in the case of a farmer, both the attachment of his farm and the arrest of his person. The arrest was to be made by the Collector as a fiscal, not as a criminal officer, in the mode prescribed by Section 5, Regulation XIV of 1793. The procedure pointed out by that section was very different from that adopted in the present case. In particular, the amount of the arrear due from the defaulter was to be specified in the warrant. In this case the order for the arrest of the petitioner was not for non-payment of the arrear, but for disobeying the order of the Court in not appearing personally, according to the tenor of the summons; and the order was made not in the character of Collector, but in the character of Magistrate.

10. Further, the Collector contends that the position of the petitioner was very analogous to that of the farmer of a ferry under Regulation VI of 1819, by Section 10 of which recovery of arrears may be made in the mode prescribed for the recovery of money embezzled by native ministerial officers in accordance with Section 7, Regulation XVIII of 1817. It is unnecessary to refer to this contention of the Magistrate further than to say that however analogous the position of a farmer of tolls and the farmer of a ferry may be, the law which is applicable to the farmer of a ferry has not been extended to the farmer of the tolls of a road.

11. The lease of the tolls did certainly stipulate that, if the rent should not be paid, it might be recovered in the mode prescribed for the recovery of money embezzled by native ministerial officers; but I apprehend it is perfectly clear that such a stipulation could not legally be made, and that the Magistrate as lessor of the tolls had no right to reserve a remedy other than that which the law provided.

12. If a zemindar should stipulate upon the grant of a talook that if the rent should not be paid, the lessee may be dealt with in the same manner as a native ministerial officer who embezzles money, and that it should not be necessary for him to proceed under Act X of 1859, such a stipulation would not be binding. The Magistrate could do more stipulate that any particular law should be applicable to the rent reserved in the lease in question than a zemindar could make a binding stipulation to the effect to which I have referred.

13. In this case, the Magistrate was proceeding in his character of Magistrate, and not in his character of Collector, and it appears to me that he had no authority whatever to issue the warrant; and that this Court has the power under the Code of Criminal Procedure, to quash it upon revision; and further, it appears to me that if the case did not fall within the Code of Criminal Procedure, this Court under its general power of superintendence would have power to quash an order made by a Magistrate for the issue of a warrant in a case in which he had no jurisdiction whatever so to proceed. We are of opinion, therefore, that the order must be quashed, and all subsequent proceedings thereon, including the warrant, set aside, the petitioner having undertaken not to take any legal proceedings for any thing done under the warrant or order. This undertaking, of course, does not extend

to any proceedings which the Magistrate or Collector may have instituted or may institute with reference to the conduct of the mofussil officers in executing the warrant, pending the rule, contrary to the orders of the Magistrate and of this Court.

*Notwithstanding summons, warrant may issue in certain cases.

Sec. 73:--A Magistrate may (notwithstanding such summons), either before the appearance of the accused person, as required by such summons, or after default made by him so to appear, issue a warrant of arrest against such person.