
(1871) 06 CAL CK 0004

Calcutta High Court

Case No: Application for Review No. 44 of 1870

Tarak Nath
Mukhopadhyaya

APPELLANT

Vs

The Collector of
Hooghly, on behalf of
Government and Baboo
Iswar Chandra Mitter

RESPONDENT

Date of Decision: June 16, 1871

Judgement

Macpherson, J.

This is an application made on behalf of Government for a review of our judgment in Special Appeal No. 1911 of 1869, delivered on the 5th of January 1870. On the special appeal, we held that the plaintiff was entitled to recover damages from the defendant Iswar Chandra Mitter, in respect of an act done by him in his official capacity as Deputy Magistrate of Jehanabad. We also held that the plaintiff was entitled to a declaration of his right to erect and maintain a certain band as against Iswar Chandra Mitter and also as against the Government. The Deputy Magistrate having contended before us that he was protected by Act XVIII of 1850, we were of opinion that he was not protected by it, inasmuch as, in cutting the plaintiff's band (the act complained of), he did not proceed with due care and attention, and therefore did not act with good faith" within the legal meaning of that term.

2. The only ground of review on which we have heard the petitioner, is that indicated in the first and second paragraphs of the written grounds annexed to the petition of review. It is that our judgment is defective, because we do not decide whether the Deputy Magistrate, in removing the band, acted judicially and with jurisdiction. It is argued that, if the Deputy Magistrate was acting judicially and within his jurisdiction, we ought to have decided that he was not liable in a suit for damages, whatever may have been the irregularity of his proceedings.

3. We are prepared to admit that, if the Deputy Magistrate, in cutting the band was acting judicially and within his jurisdiction, this suit against him ought to have been dismissed so far as he is concerned.
4. We also admit that we have not decided distinctly whether the Deputy Magistrate acted judicially, or whether he acted with jurisdiction. That we did not decide these points, however arose from the fact that we were never asked to decide them, and that they were never alluded to in the argument of the special appeal. The sole question then raised was whether the Deputy Magistrate acted bond fide so as to be protected by Act XVIII of 1850. We decided that he did not act bond fide, and was not so protected. But it was not suggested by those who appeared for the Deputy Magistrate and the Government that, whether acting bond fide or not, the Deputy Magistrate (so long as mala fides was not alleged) was protected on the general principle that the act done was a judicial act done by him with jurisdiction.
5. The particular defence now relied on is not distinctly raised in the written statements put in by the Government and by the Deputy Magistrate respectively, nor in the issues fixed for trial in the lower Courts. No doubt, the non-liability of the Deputy Magistrate, because his act was a judicial act, has been pleaded in general and comprehensive terms. But it was never pleaded expressly that, because the act was judicial, and done with jurisdiction, the Deputy Magistrate was not liable, however irregular his procedure.
6. The Judge of the lower Appellate Court has found, that the act was a judicial act done with jurisdiction. But he did not decide the case in favor of the Deputy Magistrate on that ground; indeed it may be doubted, whether it ever occurred to him, any more than to the defendants, that that was in itself a sufficient defence. His decision rests mainly on the ground that the Deputy Magistrate acted bond fide.
7. We have allowed the question to be raised now in review, because as the lower Appellate Court has found that the act was a judicial act done with jurisdiction, our judgment is no doubt defective, as it omits all mention of this matter.
8. We have in our original judgment shown that the proceedings of the Deputy Magistrate were so careless and irregular, that he could not be held to have acted bond fide, within the meaning of Act XVIII of 1850. The precise point now taken is that, when he cut the band he was acting u/s 308 and the other sections of Chapter XX of Act XXV of 1861; that the act was a judicial act done with jurisdiction; and that the Deputy Magistrate is therefore protected, however irregular his proceedings may have been.
9. The lower Appellate Court has not only held that the Deputy Magistrate had jurisdiction, and acted judicially, but has also held in substance, that he acted under Chapter XX of Act XXV of 1861. The Judge says:--Under these circumstances, it appears to me that the Deputy Magistrate was acting in a matter in which he had jurisdiction to pass an order which, if not appealed against, would be definitive, and therefore he acted

judicially. He does not quote the section of the law under which he acted; but it is urged on his behalf that the orders were passed under Chapter XX of the Criminal Procedure Code. I have no doubt that his order in this matter was irregular and illegal. ***** It seems to me that he did not consider it necessary under Chapter XX to examine evidence.

10. Mr. Money for the plaintiff contends that the Deputy Magistrate did not act under Chapter XX; that, even if he did, he had no jurisdiction to cut the band, without following strictly the provisions of that chapter (i.e., that the following the procedure prescribed by that chapter was essential as a foundation for the jurisdiction claimed); that a Deputy Magistrate acting under Chapter XX is not acting judicially; and that, at any rate, under the peculiar circumstances of this case, the Deputy Magistrate acted so irregularly and improperly that he cannot be held to have acted judicially.

11. There is unquestionably Borne evidence to support the conclusion at which the lower Appellate Court seems to have arrived that the Deputy Magistrate was, as a matter of fact, acting under Chapter XX of Act XXV of 1861. We therefore cannot interfere with that finding in special appeal. But whether under the circumstances the Deputy Magistrate acted judicially, and whether he acted with jurisdiction, are matters of law rather than of fact.

12. As the plaintiff relies on the irregularity and recklessness of the Deputy Magistrate's proceedings as evidence that he was acting not judicially and within his jurisdiction, it is necessary to examine those proceedings in detail. They are only partially stated in our original judgment: and we shall therefore now state all that occurred, so far as it is to be gathered from the confused mass of papers which constitute that which is said to be the record of the Deputy Magistrate's proceedings.

13. The overseer's report of the 15th January, in which he states that the water penned back by the plaintiff's band was rising and injuring the Government embankment, &c., consists of a memorandum written by the overseer in his day-book kept by him in English, in his official capacity as ferry fund overseer.

14. The Deputy Magistrate's order of the 17th January that the police were to give orders to the parties interested to cut the band, &c., is not a formal order, nor is it (so far as we have been able to discover) anywhere recorded in the Deputy Magistrate's office as a proceeding under the Criminal Procedure Code, or under any other law: it is merely a memorandum or order written in the margin of the overseer's book.

15. The overseer's report was as follows:--Proceeded to Hurringkola to inspect works on the old Benares road, and found that the construction of the earthen bridge over the Mondeshori has become difficult, as the upper embankment of the river has been cut open since three days, which made the water increase to the height of eight or nine feet. The work will be too expensive unless the lower embankment of the river is cut open to drive the surplus water. The cost estimated at first was Rs. 80; but now I think it cannot

be completed without the expense of Rs. 200 and upwards. I report the matter for your consideration and orders. Opposite this, the Deputy Magistrate writes in English:--Orders to be issued to the police to carry a notice to the party who has erected the band below to cut it, and allow the water to pass, so as not to injure the bridge near Hurringkola.

16. On the 6th of February, the police reported that they had given notice as directed. Thereupon, on the 11th of February, two petitions were presented to the Deputy Magistrate. They were similar in purport, claiming a right by user or custom to erect the band for the purposes of irrigation, and praying for an enquiry. They were presented, the one by Sheikh Danis and other ryots of the plaintiff, the other by Madhusudan Panda, the plaintiff's karpurdaz, or agent. On the same 11th of February, the Deputy Magistrate wrote an order on the back of the petition of Sheikh Danis, directing the petition to be sent to the police, who were to enquire as to the custom.

17. The report of the overseer of the 20th February is written by him in English in the day-book, which we have already mentioned:--In order to have sufficient water, for the boro cultivation, Baboos Taraknath Mookerjee (the plaintiff) of Jonai, Chandi Charan Ghose of Haitpur, Gapi Mohan Mazumdar, naib of late Baboo Rama Prasad Roy, and Hari Charan Mookerjee of Octerparrah, dammed the river Damoodah, and turned its course, so that the water may run to their cultivation through the Saidpore and Singhal khals. But these khals, having open communications with the river Mondeshori, made the water of the river Damoodah run to it, and thereby inundated its parts; and the earthen bridge, lately constructed over it for the convenience of passengers, bullocks, and carts, has been plunged to the depth of three feet, though the bridge was constructed three feet above ordinary water-level. The bridge will come to no use, unless the surplus water is driven off by cutting away the lower embankment, for which an order was issued on the police on the 15th ultimo; and should the Magistrate return to Hooghly by that way, he shall have to undergo a good deal of inconvenience for the crossing of his horses, & c. I report the matter for your consideration and orders.

18. On the 23rd February, the Deputy Magistrate made on this report another memorandum in English, written on the margin of the overseer's book:--Injunction to be issued through the police on the persons who have thrown up the cross-bands below the bridge, to let off the water, so as to relieve the bridge of the super-abundant waters.

19. By way of giving effect to this order, the Deputy Magistrate apparently issued an order, on the 26th February, to the police, in the following terms (we use the word apparently, because the only copy of this order on the record bears neither signature nor seal of the Deputy Magistrate):--Formerly bands were erected on the Mondeshori for boro cultivation, but the water used to remain lower than the Hurringkola embankment; now, however, there are super-abundant waters. The police will instruct the persons who erected the bands to cut them down in such manner that the excess waters may pass off. The police, on the 5th March, reported service of this order.

20. On the 9th of March the police inspector reported that, on enquiry, he found that the plaintiff had no right by use or custom to erect his band, but that Chandi Charan, the Goldigri talookdar, had a right, by custom, to erect a band lower down the river at Gobra.

21. On the 11th March a petition was presented by Talib Ali Mulla, agent of the said Chandi Charan and another. The petition first states that the Goldigri people had a customary right to erect a band lower down the khal, for the purpose of securing water for the boro crop, and that recently the plaintiff had constructed a band to which he had no customary right, and had thereby prevented the water from reaching the Goldigri band, and caused much loss to the Goldigri ryots. The petition then continues:--Moreover, the erection of the non-customary (bi-mamuli) band (plaintiff's) has caused the Government band at Hurringkola ghat and the Benares road to be overflowed with water, and has thereby done great inconvenience "to the public at large. This matter having been reported "by the ferry fund overseer, the Mookerjee talookdar (the plaintiff) was ordered to let the water run out, but has not cut his band on several excuses," & c. The prayer of the petition was that the plaintiff's band should be ordered to be removed. On the back of this petition, the Deputy Magistrate, on the 11th March, made an order to the following purport:--Ordered, that Sottroghan Ghose, mookhtear of the opposite party, be apprised of this, and that notice be issued to his clients, directing them to cut this band within a week, if it is (bi-mamuli) not a customary band; but if they knew it to be customary (mamuli), let them show cause within that period; and that a perwana be issued upon the overseer Kaliprasanna directing him to enquire and report whether the new bandy erected by the Court's order at Hurringkola, is still under water for the above reason; if so, is it still after the issue of the previous order; and, if not now, how long was it so after my previous order.

22. An order to the overseer, of the same date, after stating that it appeared from the petition of Talib Ali Mulla that the Government bridge was suffering from the plaintiff's band, continues:--You are hereby directed to go and enquire and report whether the Government bridge still continues under water owing to that band, and whether it continued under water after passing the first order to cut it, and if so, for how many days.

23. On the same 11th of March, a notice was issued to the plaintiff to this effect:--It appears from the petition of Talib Ali Mulla, karpurdaz of the Goldigri talookdar, that you have erected a new band at Bheatia, which is too much injuring the boro crops of many ryots. Take notice by this to cut the band within seven days, if you know it to be not customary (bi-mamuli); or show cause within that time if you know it to be customary (mamuli). On the back of this notice is endorsed a receipt, on the part of the plaintiff, of the 4th Chaitra 1273, B.S., corresponding with the 16th March 1867, showing that it was served on him on that day. And there is on the record a return by the police, dated the 18th March, showing that the order of the 11th had been served, but not stating on what particular day it had been served.

24. On the 19th, the overseer reported that the Government embankment was still submerged, and that the band had not been cut.

25. On the 20th March (that is to say, four days after the service of the notice of the 11th calling upon him to show cause within seven days), the plaintiff, by his agent, Madhusudan Panda, presented a petition to the Deputy Magistrate, alleging the report of the police as to the plaintiff's right to the band to be false and made in collusion with the Goldigri people, and praying for a local enquiry by the Deputy Magistrate himself.

26. On the same day, Sheik Sonaula and others, ryots of the plaintiff, presented a petition much to the same purport, saying that if the band were cut the crops of five or six villages would be destroyed, and praying that the Deputy Magistrate would go to the spot and judge for himself.

27. On the 29th of March, the Deputy Magistrate seems to have made a variety of orders. The principal one, which is written on the back of Talib Ali Mulla's petition of the 11th March, is to the following effect:--All the papers on the subject being perused this day,--it is ordered, that summons be issued on the owners of the Bheotea band, calling upon them to appear on the 29th March next, on a charge of disobedience of order and of causing mischief to the Government band by allowing the water to stand upon it after the issue of the order; that orders be issued to the police through the order-book, directing them to send in the names of those persons who are aware that the same order was not carried out; that a perwana be issued to the overseer, Kali Prasad Mookerjee, directing him to furnish a list of such persons who know that there was water upon the Government band after the issue of the former order; that both the police and overseer be written to send in the lists called for within two days; that both the overseer and the police do go to the spot and cut the Bheotea band in such a way that the water runs off about one foot down the Government band, and no more; and if the defendant had cut the band and the water had already gone down one foot of the Government band, then they should not cut the band any more. If it now be necessary to cut the band, then the police should regularly realize the expense from the defendant. Let both parties know that this order is passed only with regard to the Government band. As to the Goldigri band, let summons be issued upon the overseer to appear as a witness on the date fixed for its trial; and let a copy of the overseer's report of the 19th March be kept with the case, and a copy of this order be kept with the original record. A copy of this order appears upon the back of the petition of the 11th February of Madhusudan Panda, the plaintiff's agent; and this copy also bears the signature of the Deputy Magistrate, with the word "copy" above it. On what date this copy was written on the back of that petition does not appear.

28. In our original judgment it is stated, that it was on or about the 11th February that the Deputy Magistrate directed criminal proceedings to be taken against the plaintiff for disobeying his order, &c. This direction, however, was not given till the 20th of March.

29. On the back of Talib Ali Mulla's petition of the 11th March is further to be found an order of the 20th March, to the following effect:--As a different date is fixed with regard to the Hurringkola band, it is necessary also to deal with regard to the Goldigri band separately; therefore it is ordered that the 27th of March be fixed for its trial: and let Mookhtear Sottroghan Ghose and Baikant Nath Roy be directed to produce any evidence they have on that day. An order in similar terms, and of the 20th March, is also endorsed on the petition of Madhusudan Panda of the 19th March.

30. There seem also to have been several other orders issued on the 20th of March,--e.g., one to the overseer, and one to the police,--to cut the band and realize the costs (if any) of so doing, and a summons to the plaintiff's agent to appear on the 27th to answer a criminal charge of disobedience to the Deputy Magistrate's order and causing mischief, & c.

31. We may say here, that although we speak of the Deputy Magistrate having ordered the plaintiff's band to be cut, we are aware that the order given was only an order to cut it to such an extent as was necessary to relieve the Government embankment. But it has been found by the lower Courts that the carrying out this order necessarily led to the destruction of the band. We therefore speak of the Deputy Magistrate having ordered the band to be cut, though we acknowledge the fact that the order he gave was restricted in its terms.

32. On the 24th of March the police reported that they had cut the band the previous day. At the same time they forwarded a list of witnesses who could speak to the band not having been cut in compliance with the previous order to cut it; and of these witnesses the Deputy Magistrate ordered that four should be summoned to appear on the 27th, for which day the criminal case against the plaintiff's agent (for causing mischief and disobedience of lawful orders) was fixed.

33. On the 26th of March the Police made a return that they had summoned four witnesses.

34. On the 27th of March the trial took place. Madhusudan Panda, the plaintiff's agent, was the defendant. He denied having caused mischief u/s 426 of the Penal Code, but admitted having disobeyed the order to cut the band. The Deputy Magistrate, finding him guilty u/s 188 of disobeying a lawful order, fined him 50 rupees.

35. These criminal proceedings against Madhusudan Panda do not necessarily bear directly upon the issues in the present suit; but they have been filed as evidence, and are in the nuthi. We shall only say that they are a fitting corollary to the rest of the proceedings of the Deputy Magistrate, being equally irregular and indefensible.

36. These details more than confirm the opinion which in our original judgment we expressed of the conduct of the Deputy Magistrate. He had no legal authority to interfere with the plaintiff's band, except by a proceeding with reference to it held as prescribed in

Chapter XX of the Criminal Procedure Code. He was bound under that chapter to fix a day on which the plaintiff might show cause why his band should not be cut, and to give him a full and fair opportunity of being heard and of protecting himself. This being his duty, we find that, on the 17th of January, the Deputy Magistrate having no evidence before him, and acting only on a report written by the road overseer in his day book, ordered the band summarily to be cut. This order is contained only in a memorandum in the overseer's book: no formal proceeding was held or recorded any where; but it was communicated to the plaintiff by the police in the shape of a perwana. On the 11th of February, the plaintiff and others, objecting to the band being cut, and claiming a prescriptive or customary right to erect it (which right both the lower Courts have found the plaintiff really has), and asking for an inquiry, the Deputy Magistrate, instead of himself inquiring into the matter, referred it to the police to inquire into the alleged right. On the 23rd of January, upon another private report made by the overseer in his book, the Deputy Magistrate--still without any formal proceeding--again writes an order in the margin of the overseer's book, directing the band to be cut. And on the 26th of January, he orders the police to see this order carried out, although at that time no return had yet been made to the order directing the police to inquire as to the existence of the prescriptive right claimed. On the 9th of March, the police reported against the right claimed. On the 11th, the Goldigri talookdar prayed that the plaintiff's band might be cut, because it injured the petitioner's band lower down the river, and because it injured the Government bridge. Notice was then given to the plaintiff to cut the band in seven days, or if he claimed customary right to erect it, to show cause within seven days. This notice was not served on the plaintiff until the 16th. On the 20th, the plaintiff's agent did show cause by putting in a petition, asserting his customary or prescriptive right to erect the band, and praying a local examination by the Deputy Magistrate himself. On the 20th March, without in any way disposing of the plaintiff's claim of right, and with absolutely no further grounds to go on than the police report, and the overseer's reports (which last at any rate were made behind the plaintiff's back), the Deputy Magistrate ordered the band to be cut at once, and peremptorily desired the overseer and police to carry out this order. At the same time he fixed a day for trial of the question as between the plaintiff and the Goldigri talookdar of the plaintiff's right to erect the band.

37. Mr. Bell, who has argued in support of his application for review with much ability and care, says that there were two separate matters pending before the Deputy Magistrate,--first, a question between the Government and the plaintiff, and, secondly, a question between the Goldigri talookdar and the plaintiff. There is not the smallest indication that there was any thing of the sort until the 20th of March. On that day, certainly, while the Deputy Magistrate made one order directing the band to be cut, he made another fixing the 27th for trying what is called the Goldigri case. The fact of the Deputy Magistrate on that day making two separate orders in no degree alters the position of the plaintiff. The plaintiff claimed, up to the 20th March, the right by custom or prescription to maintain his band, as it was, against the Government and against the Goldigri talookdar. His claim cannot be altered, nor his legal position damnified, because

the Deputy Magistrate on the 20th chose to say (as he did practically say),--"I dispose of the plaintiff's case as against the Government, by ordering his band to be cut forthwith; but as regards the question between him and the Goldigri talookdar, I fix the 27th as the day upon which they may fight out their dispute." The Deputy Magistrate may, on the 20th of March, have separated the dispute between the plaintiff and the Government from the dispute between the plaintiff and the Goldigri talookdar. But his having done so does not improve his position in the present suit, as no such separation existed until the 20th March, and it then sprang into existence through the spontaneous act of the Deputy Magistrate, which is in no way binding on the plaintiff. There is nothing whatever in the notice to the plaintiff of the 11th March (served upon him on the 16th) to cut the band or show cause within seven days, which indicates that that notice related only to the claim made by the Goldigri talookdar. On the contrary, the notice, on the face of it, relates generally to the plaintiff's right to maintain his band as it was, and any one on whom it was served had a legal right to show cause within the prescribed time, both as against the Government and as against the Goldigri talookdar.

38. Mr. Bell further says, that there was no case to inquire into as against the Government; that there was no doubt about the right; and no question save as to whether the Government band was being injured. The Deputy Magistrate did not choose, any more than Mr. Bell, to recognize the possibility of any right as against Government. But as a matter of fact, the customary right to erect the band was asserted from the first by the plaintiff, and it is not the case that the plaintiff's only point was that his band was not injuring the Government road.

39. Such being the details of the proceedings of the Deputy Magistrate, Mr. Money very justly complains of the difficulty of finding out on what supposed principle the Deputy Magistrate acted as he did, and whether or not he acted judicially and whether or not with jurisdiction.

40. To this hour, the Deputy Magistrate himself has never got any nearer a justification of his conduct than a sweeping allegation made by him in the witness-box, that he acted under the provisions of the Criminal Procedure Code, and in the exercise of his judicial and executive powers.

41. The Government in their written statement say for the Deputy Magistrate that which he never has ventured to say for himself, that some of his proceedings were u/s 62, and others were under Chapter XX of the Criminal Procedure Code. The Court of first instance held that all the proceedings were u/s 62, and were taken by the Deputy Magistrate in his executive capacity : the Judge of the lower Appellate Court held that all the proceedings were judicial, and under Chapter XX.

42. In the absence of any indication by the Deputy Magistrate himself of the law under which he imagined himself to be acting, it becomes important to consider the line of defence adopted in this suit, and the course, generally, which the suit has taken since its

institution.

43. The first paragraph of the plaint states that the band was cut by an unlawful order" of the Deputy Magistrate; and further on, the plaint states that the third defendant, the overseer, reported that a large sum of money would be required for the construction of the bridge on the Government road, unless the plaintiff's band was cut,--"and although your petitioner's (plaintiff's) agent raised objections on that point, the first defendant (the Deputy Magistrate), instead of instituting a thorough enquiry into it, by the appointment of a punchayet, &c., passed an order on the 20th March 1867 for cutting open your petitioner's (plaintiff's) prescriptive (mamuli) band, in excess of the powers vested in him by virtue of his office." The words quoted are taken from a translation of the plaint by the Court translator. This translation is considered by us (after hearing the original read) to be correct, and to give the true meaning of the Bengali words used. Mr. Bell and the Government pleader, Baboo Annada Prasad Banerjee, however allege that, according to the real meaning of the plaint, the omission to appoint a punchayet is the only excess of power or jurisdiction complained of, and that the plaintiffs did not mean to say that the Deputy Magistrate committed any illegality save in not summoning a punchayet. We take the plaint as rendered by the Court translator; and we do not doubt that the allegation in the plaint, that the Deputy Magistrate exceeded his legal powers, was not intended to be restricted, and is not in fact restricted, to the one matter of the not appointing a punchayet. However this may be, it is perfectly clear that the plaint was not read as so limited by those who prepared and filed the written statement on behalf of Government. And no one who takes the trouble to read that statement can for one moment believe that there is the smallest foundation for the assertion made more than once in the argument of this application, that the Government was misled by the plaint, and considered that the only point to be met was that as to the punchayet. The issues fixed and tried in the Courts below, also show that the case was not treated by any of the parties as so limited: and when Government appealed to the Judge from the decision of the Court of first instance, this matter was not alluded to in the grounds of appeal which were filed.

44. To return to the proceedings subsequent to the plaint. The Deputy Magistrate, in his written statement, filed on the 8th of April 1868, says,---first, that, inasmuch as it is alleged that he acted in his official capacity, Government ought to be made a party; second, that as it was not alleged that he acted in bad faith, the suit would not lie, according to the latter portion of section 38 of Regulation XI of 1822, and Act XVIII of 1850; third, that he acted under a general order of the Magistrate; and fourth, that the Magistrate should be a party to the suit. "It has been said that I acted beyond my powers only in not having appointed a punchayet. But the law which provides for the appointment of a punchayet also provides that the party objecting should apply for it. No such application was made." In the fifth and last paragraph the Deputy Magistrate gives his version of what occurred, in very general terms,--not showing under what particular law he acted or meant to justify, save that he contends in a general way that he acted in good faith, and did nothing illegal. On the 26th of May, the Collector of Hooghly, on behalf of

Government, filed a petition, praying that the Government might be made a party. This petition states that the plaintiff had sued the Deputy Magistrate for having exceeded his powers and cut a band;" that it had been represented to the Court that the Deputy Magistrate had acted in connection with the cutting the hand in his judicial capacity, and consequently the suit cannot lie;" but the Court had done nothing as to making the Government a party. Then it goes on: The Deputy Magistrate passed orders in connection with cutting the band either in his judicial or executive capacity, and in either case the Government ought to appear." The Government prayed to be made a party, and to be allowed to file a written statement. On the 29th May the prayer was granted, notwithstanding the opposition of the plaintiff.

45. Thereupon, on the 17th of July 1868, the Collector of Hooghly, on behalf of Government, put in a written statement it is in English, and too long for us to give it in full; but the following is its general purport:--First, Government denies the plaintiff's prescriptive right to erect a band as claimed by him, and pleads that Mondeshori is a natural water-course, and therefore cannot be the subject of any right injurious to the public. Secondly, Government says that the plaintiff's allegations that his band did not injure the public road are false, and facts are stated to show that they are false. Thirdly, Government states, that the convenience of the public requiring a temporary bridge, the Deputy Magistrate, under the general instructions of the District Magistrate, directed the Ferry Fund Overseer to construct the Government bridge in January 1867. It appeared, however, that the plaintiff's band was certain to cause injury to this bridge, so the Deputy Magistrate ordered the plaintiff to remove it. This order was not attended to, and the Government bridge was constructed at additional cost in consequence. On the 20th of February the overseer reported an overflow of the Mondeshori and the submersion of the Government bridge, by reason of the plaintiff's band, and the Deputy Magistrate again ordered the plaintiff to cut the band. On the 11th February, the plaintiff's gomasta and some ryots presented a petition to the Deputy Magistrate, objecting to the order, and demanding an inquiry,--and an inquiry was accordingly ordered. Meanwhile, a servant of the talookdar of Goldigri complained to the Deputy Magistrate, that the plaintiff's band illegally prevented water reaching the Goldigri band. The Deputy Magistrate thereupon ordered a fresh notice to issue to the plaintiff to cut the band, or show cause within a week why it should not be cut. In the meanwhile, as the overseer reported that the bridge was still submerged, the Deputy Magistrate ordered the band to be partly cut, & c., and it was cut. Under these circumstances, the Government pleads that the Deputy Magistrate acted judicially within his jurisdiction, in good faith, believing that he had jurisdiction; That the orders issued on the reports of the overseer were in effect orders u/s 62 of the Code of Criminal Procedure; that the order of the 11th March on the petition of the Goldigri talookdar was in effect an order u/s 308; that the plaintiff did not apply for a jury, hut for an inquiry; that the order for cutting the band was also issued under the spirit of section 314; and that, under these circumstances, the suit was barred by Act XVIII of 1850. It was also pleaded that if it be admitted, for argument's sake, that the Deputy Magistrate acted in his executive capacity, he acted for the public safety and welfare, &c; and further, that

the right claimed by the plaintiff C was of such a large and comprehensive nature as would extinguish the ordinary rights and uses of the public thoroughfare : and cause danger to traffic and human life, &c.,--a right inconsistent with all law and precedent.

46. It is to be observed that, in this statement, Government pleads not what the orders of the Deputy Magistrate were, but only what they were in effect. The orders issued on the reports of the overseer (which include, according to the written statement, the actual order to cut the band) were in effect orders issued u/s 62; but the order of the 11th March on the petition of the Goldigri talookdar was in effect u/s 308, while it is added that the order to cut the band was also issued under the spirit" of section 314. Doubtless, it was a difficult matter for the advisers of Government to justify the proceedings of the Deputy Magistrate, who did not know how to justify them himself. That the difficulty was keenly felt is very apparent from the vagueness and uncertainty of the justification pleaded in the written statement; the only distinct line of defence taken on that part of the case being that the Deputy Magistrate acted in good faith, and was therefore protected by Act XVIII of 1850.

47. The issues on which the case went to trial are set forth in the judgment of the Court of first instance. Is the suit barred by section 38 of Regulation XI of 1822, and Act XVIII of 1850? Has the plaintiff all along erected the disputed band "to keep the water for the cultivation of boro paddy in his "talook, and did the defendants, having cut the band in the manner described in the plaint, cause the alleged injury to "the crops; or was the band cut in good faith in order to prevent inconvenience in the use of the public road, and has "the plaintiff sustained no loss thereby? If the defendants did so in good faith in the discharge of their official duty, are they liable for the plaintiff's claim, and if so, which of the defendants is liable?

48. Did the Deputy Magistrate, defendant, receive any order "from the Magistrate to cut the band?"

49. Is the river Mondeshori a natural water-course? and if so, can the plaintiff claim a prescriptive right to erect a band "in it?

50. Is the act of the Deputy Magistrate justifiable under the circumstances?

51. At the trial, the Deputy Magistrate was examined as a witness, but approached no nearer to legal justification of his acts than to declare that he ordered the band to be cut under the provisions of the Criminal Procedure Code and in the exercise of his judicial and executive powers. The Court of first instance held, that the Deputy Magistrate acted in good faith and not beyond his jurisdiction, and that u/s 62 of the Criminal Procedure Code, he had jurisdiction to order the band to be cut. The Subordinate Judge says in his judgment: "As the Deputy Magistrate did the act carefully in his executive capacity, and it is not proved that he did not act in "good faith, therefore, under Act XVIII of 1850, neither he, nor those acting under him, are liable in damages." Finally, the Subordinate Judge

says, "if it be considered that the said act was beyond the Deputy Magistrate's jurisdiction, yet when "the defendants believed him to have jurisdiction, they cannot "be liable * * * * The plaintiff's prescriptive right to erect the disputed band is declared, and the claim for damages is dismissed; and in the circumstances of the case each party will bear his own costs."

52. There were no fewer than four separate appeals to the Judge from this decree. The plaintiff appealed as a matter of course, his claim for damages having been dismissed. The Government appealed, being dissatisfied with the declaration of right which the plaintiff had obtained. The Deputy Magistrate and the Ferry Fund Overseer also appealed. Each appealed separately and entered a separate appearance in the Judge's Court.

53. The Judge has in substance, though in rather an undecided manner, found, as we have already said, that the Deputy Magistrate acted in good faith, judicially, with jurisdiction, and under Chapter XX of the Code of Criminal Procedure. His judgment ends thus:--The order of the lower Court must be modified, and the plaintiff be declared entitled quoad the present defendants to erect a band in the river, whereby the irrigation of the fields for boro grains in the villages in the plaint is secured, with the reservation that channels be cut in the banks of the river within three feet of their top, to allow the exit of the water to prevent it overflowing the river banks; that the claim for damages be dismissed; and that the lower Court's order declaring the plaintiff's proprietary right in the river be set aside. On the question of costs, as the plaintiff has not succeeded in his special claim for damages against defendants, Nos. 1,2, and 3 (the Deputy Magistrate, the Overseer, and the Police Inspector), they must be made liable for their costs in both Courts in proportion. The Government defendant will pay his costs in the Appellate Court, and recover costs from the plaintiff in the lower Court in proportion." * * * * .

54. Against this judgment the plaintiff appealed specially to this Court.

55. As to Mr. Money's contention that an officer acting u/s 308 and the other sections of Chapter XX is not acting judicially, even if he proceeds regularly, we are clearly of opinion that a proceeding under Chapter XX, if regular and such as the law prescribes, is a judicial proceeding. Our view of the duties of officers acting under that chapter has been stated in our judgment now under review. It appears to us, that under Chapter XX a Magistrate cannot legally act without first calling on the person with whose property he proposes to interfere, to appear and show cause.

56. If cause is shown, the Magistrate must deal with it judicially, must take evidence if necessary, and come to a decision upon the whole matter. He has to summon, hear, and determine, and has a discretion to exercise : and this is certainly a judicial power, and the officer exercising the power and acting as the law prescribes, will, on general principles, be protected though he be only a Deputy Magistrate. See *Kemp v. Neville* 31 L.J., C.P., 158, *Ferguson v. The Earl of Kinnoull* 9 Cl. & F., 311.

57. In the case of *Ashburner v. Keshavallad Tuku Patil* 4 Bom. H.C. Rep., A.C., 150, which seems to be an authority directly in favor of the present plaintiff) it was held by a Division Bench of two Judges of the High Court at Bombay (the Chief Justice, Sir Richard Couch, being one), that proceedings u/s 308 are not judicial within the meaning of section 404 of the Criminal Procedure Code, and the like opinion was expressed more recently, although the question was not immediately before him, by Sir Richard Couch in the course of his judgment in the case of *The Queen v. Abbas Ali Chowdhry* 6 B.L.R., 74. In that case a Full Bench of four Judges (the fifth Judge, Phear, J., dissenting) held, as we think rightly, that an order passed u/s 62 is not a judicial proceeding within the meaning of section 404. Notwithstanding the opinion which has been expressed by the learned Chief Justice, we look upon proceedings u/s 308 and the following sections, as wholly different in principle, as well as in detail from proceedings u/s 62: and we cannot say we have any substantial doubt, that a proceeding under Chapter XX, if regular, is a judicial proceeding for the purposes of the present suit. We think it must necessarily be held to be so, if the matter is to be determined according to the principles approved of in the two cases of *Kemp v. Neville* 31 L.J., C.P., 158 and *Ferguson v. The Earl of Kinnoull* 9 Cl. & F., 311, to which we have already referred.

58. There is however the further point,--whether, supposing the act would have been a judicial act if the procedure prescribed in Chapter XX had been followed, it can be said to be so in this particular case, when that procedure was scarcely in any respect observed.

59. Mr. Bell in trying to re-open this part of the case and to show that the rules prescribed in Chapter XX were sufficiently followed, relied much on the case of *The Queen v. Ala Buksh*³. That case, however, even if it be accepted as a sound decision, is very different from the present. The defendants were served with a notice to remove certain tanneries as being a nuisance and injurious to health, &c., or to appear and show cause why they should not be removed. The notice was issued on the report of the Civil Surgeon, who carefully examined each separate tannery and made a report upon it. The persons to whom the order of the Magistrate issued, "appeared and showed cause against it, and they attempted to satisfy the Magistrate that the order was not reasonable or proper. The Magistrate accordingly went himself to the spot and was satisfied that these tanneries should be removed, and therefore confirmed his order." It being objected that the proceedings of the Magistrate were not legal because he did not record evidence, the Court (E. Jackson and Mitter, JJ.) declined to interfere, saying that it did not appear that the defendants had asked the Magistrate to examine witnesses, and that he had refused to do so. The case does practically decide that a proceeding under Chapter XX may be legal, though not supported by evidence on oath, if the Magistrate does in fact enquire fully into the matter and gives the parties a full opportunity of showing all the cause that they desire to show. But the whole circumstances of this case are very different from those of the matter now before us, and the gist of the present case is, that the Deputy Magistrate did not enquire fully or give the plaintiff a fair opportunity of showing cause.

60. Although we consider it clear that the procedure prescribed by Chapter XX was observed as little as it could well be by anybody acting under that Chapter at all, still, as the Deputy Magistrate did, as the lower Appellate Court finds he did, in fact act under Chapter XX, and did call upon the plaintiff to show cause, and did hold a sort of enquiry (however irregular) through the police, we do not think we can say that the Deputy Magistrate was not proceeding judicially. We think he was proceeding judicially, though carelessly and irregularly.

61. Then was the cutting of the band an act within his jurisdiction? "We take it for granted that it was, if he had proceeded regularly under Chapter XX. But does the irregularity or incompleteness of this procedure so affect the matter, that the jurisdiction did not attach? For the same reasons which induce us to hold that the proceeding was a judicial proceeding, though irregular, we hold that the Deputy Magistrate was acting with jurisdiction. As the Deputy Magistrate, acting on the report of the overseer, considered it necessary that the band should be removed, and as he u/s 308 passed an order calling upon the plaintiff to remove it, or show cause to the contrary within seven days, and as there was in fact a species of enquiry through the police, we think that the jurisdiction attached, and that the Deputy Magistrate cannot be held to have acted without jurisdiction. On the whole, as we must accept it as a fact, that the Deputy Magistrate in cutting the band was acting under Chapter XX of the Criminal Procedure Code, we are of opinion that he did act judicially and with jurisdiction, and therefore that he ought not in this suit to have been held liable in damages to the plaintiff.

62. When this application for review came on to be heard in Court, we were under the impression that it was the application of the Deputy Magistrate, as well as of the Government. Mr. Bell repeatedly spoke of the Deputy Magistrate as his client: and there is no doubt that the whole matter was argued throughout in the belief on the part of the Court, of Mr. Money, and of Mr. Bell, that the Deputy Magistrate joined in the application. It appears, however, that the petition of review is that of the Government alone. We labored under a mistake in supposing that the Deputy Magistrate joined in it.

63. A very curious state of things thus arises. The Deputy Magistrate, of whose conduct alone the plaintiff complained and against whom alone he got a decree for damages, remains quiet and does not seek to disturb our judgment; but the Government, a mere volunteer in the suit, against whom the plaintiff made no complaint and sought no relief, comes in and applies for a review, on the ground that the Deputy Magistrate might have had judgment in his favor if he had justified his acts in a manner in which he never did justify them, and if he had relied on a defence on which he really never did rely. The position is manifestly absurd: and if it is to be dealt with strictly, there is no doubt that the application for review must be rejected wholly. Under the circumstances, however, we think we ought not to deal strictly in this matter. There is no question that the intention, throughout, was to apply for a review on behalf both of the Deputy Magistrate and the Government, and that the argument upon the application was conducted on the footing that the Deputy Magistrate was a petitioner for review.

64. We propose therefore even now to allow the petition of review to be amended by adding the Deputy Magistrate's name as a petitioner, if he prays that it may be so amended. Having so amended the petition, we shall reverse our decree of the 5th of January 1870, so far as it affects the Deputy Magistrate, and, reversing the decrees of the lower Courts also, so far as they affect him, shall dismiss the plaintiff's suit as against the Deputy Magistrate altogether.

65. While, however, we grant the review, so far as concerns the Deputy Magistrate, we shall not grant it so far as it regards the declaration of the plaintiff's right as against the Government to maintain the disputed band. The issue as to the right to erect the band having been fairly raised and tried between the Government and the plaintiff, there is no reason why the plaintiff should now be deprived of the benefit of the decree which he has obtained declaring his right as against the Government. As regards the Deputy Magistrate, the suit was against him personally for damages, and if any question of right to the band could be properly raised against him at all (which it probably could not), it could be so only as incidental to the main issue, that of his personal liability for the consequences of his illegal act. If the Deputy Magistrate's defence had been conducted with reasonable care and skill, he would have declined all issues as to title, on the ground that they were immaterial; and he would have merely pleaded that he was acting judicially with jurisdiction, and was therefore not liable. The Deputy Magistrate as a private individual (in which capacity alone he was sued) was in no way interested in the plaintiff's title; and we think that when the suit fails so far as its object is to establish his personal liability, it must also fail so far as its object is to obtain incidentally a declaration of title or right as against him.

66. But the position of the Government is very different. The Deputy Magistrate appeared to defend himself, and the Government had really no interest one way or other in the suit. Doubtless the Government might properly have undertaken the defence of the suit for the Deputy Magistrate in the manner provided for in Section 70 of Act VIII of 1859. Instead of following that course, the Government chose to come forward and to insist on being made a defendant, and on itself contesting the plaintiff's right to erect this band. It was a fatal blunder in Government to interfere as it did. But its advisers apparently considered that (as the Judge of Hooghly says in his judgment) Government represented the public in the case, whose rights were endangered by the acts of the plaintiff." It appears to us to be clear that the Government, having as a defendant raised and tried certain issues of title or right as between itself and the plaintiff, must remain bound by the decision on those issues which it has brought on itself, whatever becomes of so much of the suit as concerns the Deputy Magistrate. A party who forces himself into a suit as defendant, is exactly as much a defendant in all respects as if he had been originally named a defendant by the plaintiff in his plaint. And if issues are raised by such a defendant as between himself and the plaintiff, and if those issues are properly tried as between them, and judgment passes upon them, that judgment will stand and will bind the parties, whatever may be the judgment on the original question between the plaintiff and those

against whom alone he in his plaint sought relief. We think therefore that the application for review should be rejected, so far as it seeks to affect the declaration of the plaintiff's right to erect and maintain the band as against the Government.

67. Considering the very good reason which the plaintiff had to complain of the conduct of the Deputy Magistrate,--considering also the manner in which his defence has been conducted, we think that the Deputy Magistrate is not entitled to recover any costs from the plaintiff, but that he ought not to be ordered to pay any costs; and we shall alter the decree which has been made accordingly. But as regards the Government our decree for costs will remain unaltered: and the Government must, moreover, pay the plaintiff his costs of this application for review. It is impossible to apportion the costs in this case so as to charge the Government only with such a share of costs as would represent the plaintiff's claim for a declaration of right, as apart from his claim against the original defendant personally for damages. His suit was substantially a suit for damages, and was valued as such only. The Government came in, and, contesting the plaintiff's right on its own account, in fact altered the whole nature of the suit. The sum at which the plaintiff values his suit, although based solely on the amount of damages claimed, is not in excess of the value which might have been put upon the suit, had it been one instituted originally merely for the purpose of establishing the plaintiff's right as against Government; and under all the circumstances we are clearly of opinion that it is only fair to the plaintiff that he should receive full costs from the Government.

68. The manner in which this suit has been conducted on behalf of Government is most extraordinary. The line adopted through out has been such as to put the Government to the greatest possible expense with the least possible chance of benefit. The suit was instituted against an individual for damages for an act done by him illegally in excess of his jurisdiction as Deputy Magistrate. The Government had nothing to do with the suit, and would neither directly nor indirectly have been affected by its result. If the Government was of opinion that the Deputy Magistrate acted rightly, it would have been perfectly fair and reasonable that the Government should (under section 70 of the Civil Procedure Code) have undertaken the defence of the suit. Or if it was not thought desirable to proceed u/s 70, the advisers of Government might have been instructed to conduct the defence for the Deputy Magistrate, and the Government might have indemnified him against any damages or costs he might be ordered to pay. Had this latter course been followed, the Government would have done all that could possibly be done for the Deputy Magistrate, while it would have itself remained clear of, and unaffected by, the suit. The Government advisers, however, for reasons best known to themselves, chose (instead of merely undertaking the defence of the Deputy Magistrate) to insist upon Government being formally placed upon the record as a defendant,--a step from which no good could possibly accrue to Government or to the Deputy Magistrate, and from which much harm could accrue, and has in fact accrued, to Government. Having become a defendant, the Government puts in a written statement which is vague and weak in the extreme. The case goes to trial, and is not properly put before either of the lower Courts,

or even before us at the hearing of the special appeal; the best, if not the only real defence which the Deputy Magistrate had, not being relied on, or we may say, thought of, till it is brought up before us on an application for a review of our judgment. Finally, this defence is urged before us, and a review is prayed for, by the Government, and not by the Deputy Magistrate who alone could properly urge the plea now relied on. It appears to us to be a very serious matter that litigation on behalf of Government should be conducted after such a fashion.

¹ 21 Geo. III, c. 70, s. 24.--"And whereas it is reasonable to render the Provincial Magistrates, as well natives" as British subjects, more safe in the execution of their office; Be it enacted that no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the Country Courts for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court.

2

28.04.1870

Inhabitants of Mahalingpore Vs. Anderson

Bayley, J.

The plaint in this suit was presented to me in Chambers on the 19th instant by Mr. Anstey, who called my attention to the question of jurisdiction, and cited some authorities for the purpose of showing that this Court might receive the plaint in its extraordinary original civil jurisdiction. I shall consider, first, whether the plaint discloses any cause of action; and, secondly, whether this Court has jurisdiction to receive it.

The plaintiffs, two in number, state in paragraph 1 that they are inhabitants of Mahalingpore, a village in the territories of the Chief of Moodhool; that they are Hindoos and belong to a caste called "Kurwin Setti;" that the said caste of the plaintiffs consists of 300 families or thereabouts, and numbers about 3,000 souls, all or the greater part of whom reside in the said village of Mahalingpore; that the plaintiffs are the heads of, or principal persons in the said families, and are acknowledged as the leading persons in the said caste; and they submit that for the purposes of the present suit they sufficiently represent the members of the said caste, residents of the aforesaid village.

In the second paragraph of the plaint they state that the defendant, at the time of the committal by him of the wrongful acts thereafter complained of, was and still is Political Agent at the Court of the said Chief of Modhool, and as such then was, and now is, entrusted with, and in fact then exercised and still exercises, exclusive civil jurisdiction throughout the territories of the said Chief and amongst other places in the aforesaid village of Mahalingpore; that the Court of the defendant wherein he exercises such

jurisdiction as aforesaid is a Court subject to the superintendence of the High Court of Judicature of Bombay. (The learned Judge stated the rest of the plaint, and then proceeded.)

The plaint prays that Colonel Anderson may be ordered to pay Rs. 5,000 damages in respect of each or any cause of action, and it also prays for an injunction.

It is charged against Colonel Anderson, first, that on receiving the report of the karbaris, who are stated in paragraph 5 to be executive officers in the said territories, and without allowing to the plaintiffs an opportunity of showing cause against the said report, or of producing evidence to prove the incorrectness and falsity thereof, he did as such Political Agent, and in his executive capacity, and not then acting in a judicial or magisterial capacity, make two orders, dated the 23rd January and 2nd June 1868, and forbade the Guru of the said sect or caste of the plaintiffs to be conducted into the village of Mahalingpore, or to be present at, or solemnize marriages between members of the said caste or sect at the houses of the persons contracting the said marriages.

And it is charged, secondly, against Colonel Anderson that, on the plaintiffs preferring a petition of complaint to him as such Political Agent, whose duty it was as such Political Agent to receive such petition and to allow the plaintiffs to appear before him in support thereof, he, Colonel Anderson, neglecting his duty in that behalf, did wrongfully and illegally refuse to receive the said petition or to allow the plaintiffs to appear before him; and in consequence thereof the plaintiffs have been unable to obtain redress against the said Vanis, and to convey the said vessels filled with sacred water into the said village, and the said water in such vessels has become valueless and lost to the said caste of the plaintiffs to the great damage of the said caste.

Bearing in mind the nature of the claims set up by the plaintiffs, the allegation in paragraph 2 of the plaint, that Colonel Anderson, as Political Agent at the Court of the Chief of Modhool, is entrusted with and exercises exclusive civil jurisdiction throughout the territories of the said chief; and that the Court wherein he exercises such jurisdiction is a Court subject to the superintendence of the High Court of Bombay, it may be doubted whether the allegation is strictly true that Colonel Anderson's aid was invoked, and whether he acted in his executive, and not in a judicial or magisterial capacity. Neither the complaints to the karbaris, nor the complaints or petitions to Colonel Anderson, are annexed to the plaint. It may be that they have been withheld, lest they should show that the matters brought before Colonel Anderson were so brought in order that he might exercise the civil jurisdiction with which he is entrusted.

The Chief of Modhool, within whose territories the alleged causes of action arose, is a member of the Gorepurai family, one of the three large families of which the Southern Mahratta jaghirdars consist.

The Gorepurai family rose to eminence under the Mahomedan Kings of Bijapore, from whom they received their estates, and though the most determined opponents of Sivaji during his early conquests, on the overthrow of the Mahomedan power, they joined the Mahrattas, and accepted military command from the Peishwa. In 1815, the then Chief of Modhool, Narayan Rao, died, and was succeeded by his son Vencut Rao, Rajah Gorepurai, who was selected by the Peishwa in preference to the elder son, Govind Rao, by a junior wife.

On the fall of the Peishwa the estate was continued to Vencut Rao under certain terms granted by the East India Company on the 27th December 1819 to him, regarding the lands which he held of His Highness the Peishwa for the payment of his contingent, which were then comprised within the territories of the British Government, and were then graciously granted to him for furnishing a contingent of twenty horse to Government in consideration of his family being of old standing.

These terms, consisting of 11 articles, are to be found in Vol. VI. (p. 173) of a Collection of Treaties, Engagements, and Sunnuds relating to India and neighbouring countries," compiled by Mr. Aitchison, then Under-Secretary to the Government of India in the Foreign Department, and published at Calcutta in 1864, and compiled partly from information supplied by the Secretary and by certain Political Agents in the service of the Bombay Government.

Article 7 of the terms so granted is as follows:--

You will attend to the prosperity of the ryots of your jaghi, to the strict administration of justice, and the effectual suppression of robberies, murders, tullee, arsons, and other crimes. Should that not be done, and the Government gives orders regarding any complaint made in your jaghi, you will act accordingly in the settlement of the matter. Any decision of Government regarding the administration of justice which may be made on investigation must be duly executed. If any obstruction should be offered, or should the country fall into great disorder, and robberies and other offences begin to be committed, the Government will make such arrangements for the surinjami lands as it may deem proper." Article 11 states:--

The British Government, will maintain your rank and dignity as it was maintained under His Highness the Peishwa in former times. It will attend to any of your representations, and will decide equitably upon them, You shall in no respect suffer injury.

There are no treaties or engagements with the Chief of Modhool of a more recent date than those in Vol. VI. of Mr. Aitchison's compilation.

The present Chief is a minor, and the Modhool Sawasthan or State is administered by officers of the British Government, though by virtue of an arrangement sanctioned by the Government of Bombay in 1862, the mother of the young Chief is consulted on all reasonable occasions.

The acts of Colonel Anderson now complained of must, I presume, have been done by him either in his executive capacity of a Political Agent, or in his judicial or magisterial capacity.

If he acted in his judicial or magisterial capacity, I think that he is not liable in a civil suit like the present.

In *Kemp v. Neville* 10 C.B., N.S., 523; S.C., 31 L.J., C.P., 158 (decided in 1861) which was an action against the Vice-Chancellor of the University of Cambridge for assaulting the plaintiff, a young female, and imprisoning her in a place called the Spinning House, and compelling her to take off her clothes and put on a prison dress, Sir William Erle, Chief Justice, in delivering the considered judgment of the Court of Common Pleas, by which it was directed that the verdict should be entered for the defendant, thus expressed the opinion of that Court upon the subject of the immunity of judicial persons: The rule that a judicial officer cannot be sued for an adjudication according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, have been uniformly maintained." After citing numerous decisions, he proceeds: Throughout these cases and many others the vital importance of securing independence for every judicial mind is earnestly recognized. The principle applies in its full extent to the judicial duty to be performed by the Vice-Chancellor, and he is therefore entitled to the same protection."

Such being the state of the law in England, the reason why the plaintiff alleges that Colonel Anderson acted exclusively in his political capacity becomes apparent--no suit could be brought against him for acting judicially.

Next, treating the alleged grievances as committed by him in his executive capacity as Political Agent, does the plaintiff disclose any cause of action? I am of opinion that it does not.

Colonel Anderson in his character of Political Agent acts, I presume, under the instructions and as the agent of the British Government, subordinate directly and immediately to the Government of Bombay, immediately and indirectly to the Government of India and the Secretary of State for India.

Now, it is quite settled that a Governor is not liable to a suit in a Court of law or equity for an action done by him in his political capacity as an act of State--*Tandy v. Earl of Westmoreland* 27 Howell's State Trials, 1264; *Nabob of Carnatic v. East India Company* 1 Vesey, 371; and 2 Vesey, 56; *Elphinstone v. Bedrechund* 1 Knapp., P.C., 316; *Secretary of State for India in Council v. Kammachee Boye Sukaba* 7 Moore's I.A., 476; *Wadeer, ex-Rajah of Coorg, v. East India Company* 29 Beavan, 300.

The first of those authorities, *Tandy v. Earl of Westmoreland* 27 Howell's State Trials, 1264, which was cited by Mr. Anstey, was an action against the Earl for an act done by him in his political capacity of Lord Lieutenant of Ireland, and the Lord Chief Baron of

Ireland says (p. 1264): Where there is an executive power it is necessary to the end of government that it should be sacred and inviolable, for the moment the liberty of the person of the executive power is restrained, the moment the free agency is taken away, that instant the Government falls, there is an end of all government the moment the executive power is violated;" and he quotes Locke"s Essay on Government, to the effect that it is better a private mischief should ensue to an individual than the peace and security of government should be violated by any attack upon the magistrate executing the power of State, and the Lord Chief Baron proceeds in these words (p. 1265), "But I am happily relieved from the necessity of giving any opinion upon the point "whether he may be sued for any act done by him in a private capacity," when it appears now by unquestionable evidence under the hand and seal of the plaintiff that he avows he sues him for an act done by him as Lord Lieutenant: I am satisfied he cannot be sued in that capacity."

I cannot, I confess, see what difference there is in principle between suing a British Political Agent in foreign territory in India for an act done by him in his political capacity and as agent for the British Government, and suing, or rather attempting to sue, His Excellency the Governor of Bombay for an act done by him in his political capacity as an act of State. Not, however, having had the benefit of hearing the point argued before me by counsel on both sides, I abstain from giving a decided opinion, or from saying more than that as at present advised I do not see that the act complained of by the plaintiffs forms the subject of a civil suit against Colonel Anderson,

No malicious or improper conduct is charged in the plaint against that officer, but so far as the second alleged cause of action is concerned, that he neglected his duty and wrongfully and illegally refused to entertain the application of the plaintiffs. The first alleged cause of action contains no such allegations.

Mr. Anstey cited cases to show what has long been settled, viz., the law as to the civil liability of the Governor of a colony to an action brought against him in England for a wrong committed by him while holding the office of Governor--*Mostyn v. Fabrigas* 1 Cowp., 161, to which may be added the recent case arising out of the disturbances in Jamaica of *Phillips v. Eyre* L.R., 4 Q.B., 225, which, with other authorities, clearly establish the principle that a Governor is liable to an action in England for a wrong done by him during his government.

In *Dutton v. Howell* Parl. Cas., 24, decided in Parliament at the end of Charles the Second"s reign, it was decided that the Governor of a colony could not be sued in England for imprisoning a person guilty of official delinquency under his government, but the decision proceeded on the ground that the Governor and Council had acted judicially.

A case in the Privy Council was cited to me, *Hill v. Bigge* 3 Moore"s L.A., 465, but all that was held there was that the defendant, the Lieutenant-Governor of the island of Trinidad, could be sued in an action of debt in one of the Courts of the Colony in respect of a bond

executed many years before, but that though judgment be given against him, his person would probably not be liable to be taken in execution while resident in his government.

The criminal liability of a Governor was also mentioned by the learned counsel for the plaintiffs, and General Picton's case 30 Howell's State Trials, 225 was referred to by him.

Before noticing that case, I may mention that Ex-Governor Wall was tried in England in 1802 for a murder committed by him by inflicting excessive corporal punishment in the island of Goree in 1782, he being at that time Governor of the island, and he was convicted and hanged 28 Howell's State Trials, 51.

Lord Campbell, however, says in his *Lives of the Chief Justices*, Vol. III., p. 149: "Then a very young man, just entered at Lincoln's Inn, I was present at the trial, and carried away by the prevalent vengeful enthusiasm I thought that all was right; but after the lapse of half a century, having dispassionately examined the whole proceeding, I came to a very different conclusion."

A few remarks as to General Picton's case 30 Howell's State Trials, 225--966 cited by Mr. Anstey.

In 1806 General Picton was tried before Lord Ellenborough, Chief Justice, and a special jury, in the Court of King's Bench at Westminster, for a misdemeanour in causing torture to be inflicted upon Luisa Calderon, a free mulatto woman, in the island of Trinidad, of which he had been Governor. Lord Ellenborough left to the jury the question whether the punishment of torture was allowed by the law of Trinidad at the time of the cession of the island by Spain to England in 1797. They found that there was no such law existing at the time of the cession, and a verdict of guilty was recorded. A rule for a new trial was afterwards made absolute; and on the second trial the jury found a special verdict, setting out the facts of the case, and stating that, whether the defendant were upon these facts guilty or not they were wholly ignorant. They found that by the law of Spain torture existed in the island at the time of the cession of the island, and that no malice existed in the mind of the defendant independent of the illegality of the act. The proceedings in that case lasted from 1809 until 1812, when the Court ordered the defendant's recognizance to be respited until further orders, and no judgment was finally pronounced. The prosecution was still pending when General Picton fell at Waterloo, gloriously leading his division to a charge with bayonets, by which one of the most serious attacks made by the enemy upon our position was defeated," to quote the terms in which his death is commemorated by the Duke of Wellington in the despatch announcing the victory of Waterloo as published in the London Gazette. A monument to the memory of Sir Thomas Picton was afterwards erected in St. Paul's by the unanimous vote of the House of Commons.

I have been unable to see how that case is an authority in favour of the plaintiffs in the present suit.

On the first point, therefore, I think that the plaint discloses no cause of action against Colonel Anderson.

Assuming, however, that it does, has this Court jurisdiction to receive it? I am of opinion that it has not.

By Section 9 of the High Courts Act, 24 & 25 Vict., c. 104, "each of the High Courts to be established under the Act shall have and exercise all such civil jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by Letters Patent grant and direct, subject however to such directions and limitations as to the exercise of original civil jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby." It is clear the alleged causes of action do not come within the ordinary original civil jurisdiction.

It is argued, however, that by a liberal construction of the words "any suit" in clause 18 of the Letters Patent, the case can be brought into this Court under the provisions of that clause.

Clause 18 is as follows:--

And we do further ordain that the High Court of Judicature at Bombay shall have power to remove and to try and determine as a Court of extraordinary original jurisdiction any suit being or " felling within the jurisdiction of any Court whether within or without the Presidency of Bombay subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court.

In view to the provisions of that clause the averment in paragraph 2 of the plaint was probably made that "Colonel Anderson as Political Agent at the Court of the Chief of Modhool exercises exclusive jurisdiction throughout the territories of the said Chief, and that the Court wherein he exercises such jurisdiction is a Court subject to the superintendence of the High Court of Bombay."

Now, before the aid of the High Court in respect of a cause of action arising within the territories of the Chief of Modhool can be invoked, there must, I think, be a suit pending in some Civil Court in those territories, and such suit must be one before the Political Agent in his capacity of Judge in his civil jurisdiction, as I conceive that a suit or proceeding before him in his executive or political capacity only would not authorize the application by this Court of clause 13 of the Letters Patent.

The power given by that clause to this Court is to remove and to try and determine any suit. I am now asked to accept a plaint and so allow an entirely new suit to be instituted in the High Court of Bombay for causes of action which are alleged to have arisen in the

territories of the Chief of Modhool. No suit being now in existence, there is nothing to remove. The materials upon which I can act through the medium of clause 13 of the Letters Patent are wanting. This Court is bound to follow the provisions of that clause, and ought not for purposes of the present application to extend or put an enlarged construction on the language of that clause, because the late Supreme Court had, until it was abolished in 1862, more ample jurisdiction than the High Court now has in matters defined and specified in the Supreme Court Charter of 1823.

Whether an appeal lies to the Appellate Side of the High Court if preferred within proper time from an order of Colonel Anderson in his capacity of Civil Judge, I have no materials before me to enable me to form an opinion. The case of Nilowa v. Fakirappa 6 Bom. H.C. Rep., A.C., 75 shows that a special appeal lies to the High Court from a decision of Colonel Anderson as the Political Agent of the Southern Mahratta Country passed in Regular Appeal.

Assuming, however, that there was and is something to remove, I think that it must be a civil suit within the jurisdiction of the Court in the territories of the Chief of Modhool and not a suit or a matter before the Political Agent in his executive or political character of an officer acting under and bound to carry out the orders of the Government of Bombay.

Moreover, a suit is only to be removed under clause 13 "when the High Court shall think proper to do so either on the agreement of the parties to that effect or for the purposes of justice." It would not in my judgment conduce to the interests of justice that Colonel Anderson and all the witnesses should be brought to Bombay for the purposes of this suit. It has been held by Mr. Justice Markby in the High Court of Bengal, and I am not disposed to disagree with him, that in the absence of agreement it must be made out that there will be inconvenience amounting to this, that if the case be tried in the Court in which it was originally laid, the trial will be unsatisfactory, and that the mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred--Rajah Ojooderam Khan v. S.M. Nobinmoney Dossee 1 I.J., N.S., 396. For these reasons I am of opinion that this Court has no jurisdiction to receive this plaint, and I accordingly reject it and direct the Prothonotary to return it to Mr. Pestonjee Dinshaw, the attorney for the plaintiffs.

3

06.07.1869

The Queen Vs. Ala Buksh and Others.

E. Jackson and Mitter, JJ.

Jackson, J.

These four cases relate to four different tanneries situated in the town of Chuttuck which the Magistrate has ordered to be removed from the places where they are at present, on the ground that they are injurious to the health and comfort of the community. The Magistrate took proceedings u/s 308 of Act XXV of 1861. The proceedings appear to have been founded on a report of the Civil Surgeon of the district, who carefully examined each separate tannery and made a report upon it. He distinctly states that in his opinion the godowns in question, which he says are situated in a thickly populated part of the town, are offensive to those who live near them, and also to those who have occasion to pass them, and that they must be the cause of illness and disease.

The Magistrate, acting upon these reports, served notices upon the several defendants to remove their trade, or to appear and show cause why the removal should not be enforced.

In accordance with the provisions of section 313, those persons to whom the order of the Magistrate issued, appeared and showed cause against it, and they attempted to satisfy the Magistrate that the order was not reasonable and proper. The Magistrate accordingly went himself to the spot, and was satisfied that these tanneries should be removed, and therefore confirmed his order.

The application before us is on the point that the proceedings of the Magistrate are not legal, inasmuch as he did not record evidence. But it appears to us that if the defendants had asked him to have any witnesses examined, and had brought these witnesses before him, and applied to him to have them examined, the Magistrate would have been bound to examine them. But it does not appear that anything of this kind was done in the present case.

The parties on whom the order was served, had the option of applying to the Magistrate for a jury to try whether such an order was reasonable and proper. The Magistrate in such cases is bound to be guided by the opinion of the majority of the jury. If the defendants were satisfied that their neighbours were in no way inconvenienced by the hide godowns and tanneries, they could easily have asked for a jury and could have obtained a verdict.

But they did not take this step, but attempted between themselves to satisfy the Magistrate, and they failed to do so.

Under these circumstances, looking to the report of the Civil Surgeon, we think that we ought not to interfere. There is nothing illegal in the order passed by the Magistrate, and we therefore reject the applications of the petitioners. Although there is nothing apparently illegal in the proceedings which would justify our interference, still the proceedings of the Magistrate should have laid down more fully the grounds on which he acted, and also what he saw in each godown and which in his opinion rendered its removal necessary; and, in deciding on the objections of the parties he ought to have recorded in each case the grounds of his rejection of such objections. The summary way

in which he has dealt with the matter, no doubt, leads the parties to believe that they have not had justice done to them.