(1880) 09 CAL CK 0007

Calcutta High Court

Case No: None

Mohi Lall Roy	APPELLANT
Vs	
Mutty Ram Sahoo	RESPONDENT

Date of Decision: Sept. 13, 1880

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 521

Citation: (1881) ILR (Cal) 291

Hon'ble Judges: White, J; Field, J

Bench: Division Bench

Judgement

Field, J.

In this case the plaintiff sued to recover possession of two plots of land. As to the second plot I see no reason to interfere with the decree of the Munsif, confirmed by the Subordinate Judge, which declares the plaintiff entitled to half this plot, and directs that the earth thrown upon such half, in excavating defendant''s tank, be removed. Clearly there is no ground of interference on second appeal.

2. The main contention is in respect of plot No. 1. It appears that, in respect of this plot, the defendant made an application to the Magistrate; and the Magistrate, dealing with this application as a case u/s 521 of the Code of Criminal Procedure, made an order directing the plaintiff, who had closed a certain path over this piece of land, to remove the fence put up for the purpose of barring the right of way, and to leave the path open.

3. The plaintiff now substantially contends that this order of the Magistrate was made without jurisdiction, inasmuch as the path or the land over which it runs was not a thoroughfare or public place within the meaning of Section 521, Code of Criminal Procedure; and the Magistrate had therefore no power to make the order just mentioned. He further contends that the land is his private property, and that the defendant has no right of way over it. He therefore asks that the order of the

Magistrate may be set aside, and that he may be declared entitled to the unobstructed possession of this plot of land.

4. Two questions are thus raised for decision, viz.:--(i) Is it competent to a Civil Court to set aside the Magistrate''s order made u/s 521, Code of Criminal Procedure, on the ground that such order was made without jurisdiction, inasmuch as the land is private property, and not a thoroughfare or public place ? (ii) Is it competent to the Civil Court, irrespective of that order, to try the question whether the land is private property, and not a thoroughfare or public place, and to make a decree accordingly, which, if the land is found to be private property, will have the effect of barring any similar order by a Magistrate hereafter ? It may be observed that the order made by the Magistrate has been obeyed, and may be said to be spent. There is no suggestion that that order took the form of a perpetual injunction.

5. It has been contended on the part of the defendant that both these questions are concluded by the authority of the case of Peari Lall Co. v. Rooke 3 B.L.R. A. C 305; sc., 11 W.R. 434. In that case an order had been made apparently u/s 308 of the old Code of Criminal Procedure : and JACKSON J., said :-- "It seems to me quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order.

6. The plaintiff may have civil rights which he may possibly be enabled to enforce in other ways; but it seems to me quite clear that a Civil Court is not competent to declare a road, which has been opened by the order of the Magistrate, to be no public thoroughfare, and to direct that it be closed by the assistance of the officers of the Court." And Markby, J., said:--"In this case, however, an order has been made by the Civil Court, declaring that a road, which is claimed to be a public road, shall be stopped. That appears to me to be an order which, under any state of circumstances, the Civil Court has no power to make." I have referred to the original papers of this appeal, and I think that the question whether an order made u/s 308 of the old Code (which corresponds with Section 521 of the new Code), directing the removal of an obstruction or nuisance from a thoroughfare or public place, is conclusive as to the locus being a thoroughfare or public place, was not directly raised or decided in that case. The plaintiff there sued to have two roads closed, which he alleged that the defendant had made over his land in accordance with an order of a Magistrate. This order was, doubtless, made u/s 308 of the old Criminal Procedure Code. One of these roads was a cart-road, and the other a footpath. The Munsif raised and tried the issue whether these roads had been used by the public or not. He found substantially that the cart-road was not a public road, and the defendant had no right to use it, and that the footpath was a public thoroughfare used by the public, and defendant was, therefore, entitled to use it; and he made a decree accordingly. This decree was confirmed by the Subordinate Judge, who regarded the suit as a suit to set aside the orders of the Magistrate. In the grounds of appeal to the High Court no question was raised as to the jurisdiction of the Civil

Court to entertain the suit, but at the hearing a question of jurisdiction did arise. Jackson, J., said:--"The ground of special appeal, which seems to us to arise in this case, which has not been taken in the petition of special appeal, but which we have allowed to be taken, is, that the order made by the Civil Court in this case is one which it was not competent to make. I think the order made is clearly beyond the competency of the Civil Court. The defendant, it seems, has obtained an order from the Magistrate, which I presume was under the 308th Section of the Code of the Criminal Procedure, declaring the road in question to be a public thoroughfare, and ordering it to be kept open. It seems tome quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order." The language which follows appears to embrace a broader proposition; but having regard to the facts of the case, to the view of the Subordinate Judge, and to the language just quoted, I think it clear that the suit was regarded as a suit brought for the purpose of "calling directly in question the Magistrate''s order." Such a suit, no doubt, could not be entertained, if the application made to the Magistrate set forth a case within his jurisdiction u/s 308 of the old Code, and he had exercised jurisdiction accordingly. The cases of Sham Dass v. Bhola Dass (1 W. R. 324) and The Queen v. Janokeenath Bhuttacharjee (2 W.R. Cri. Rul. 36) show that a Magistrate is not entitled to interfere when a place is not a thoroughfare or public place, but is private ground.

7. It is quite possible to suppose a case in which there was a contention before the Magistrate as to whether the place was public or private. The Magistrate would have to decide this question in order to determine whether he ought or ought not to exercise jurisdiction. I take it that his bona fide decision of the point would be conclusive so far as regards an order made u/s 303 of the old, or Section 521 of the new, Code if that order were called directly in question in the Civil Court, on the ground that it was made without jurisdiction inasmuch as the place was not a thoroughfare or public place. It may be observed that what these sections give the Magistrate jurisdiction to do is to remove an obstruction or nuisance from a thoroughfare or public place. There is no jurisdiction to declare a place to be a thoroughfare or public, unless it be incidentally, for the purpose of the order; no jurisdiction to make such a declaration, which shall be binding for the future.

8. In the case of The Queen v. Bolton 1 Q. B. 66 in which a rule for a certiorari was made absolute, Lord Denman, C.J., said:--"Two points were made in support of the order: the first, that the proceedings all being regular on the face of them, and disclosing a case within the jurisdiction of the Magistrates, this Court could not look at affidavits for the purpose of impeaching their decision; the second, that even if those affidavits were looked at, the case would be found to be one of conflicting evidence, in which there was much to support the conclusion to which the Magistrates had come, and that this Court would not disturb that conclusion, even if it might have been disposed to have decided differently had the matter originally come before it.

9. "The first of these is a point of much importance, because of very general application; but the principle upon which it turns is very simple; the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the Magistrates below; in which this Court has no jurisdiction as to the merits, either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed; but as the inquiry is open, ex concessis, to see whether the case was within the jurisdiction of the Magistrates, it is contended that affidavits are receivable for the purpose of showing that they acted without jurisdiction, and this is, no doubt, true, taken literally: the Magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses: in the one it is true; in the other on sound principle, and on the best considered authority, it will be found untrue. Where the charge laid before the Magistrate, as stated in the information, does not amount in law to the offence over which the Statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the Statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned before us. Or, if the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has been presented to the Magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the Magistrate has come to a wrong conclusion, but that he never oughts to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable."

10. "But where a charge has been well laid before a Magistrate, on its face, bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he, undoubtedly, acts within his jurisdiction; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be, that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now, to receive affidavits for the purpose of showing this, is clearly in effect to show that the Magistrate''s decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the

conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry."

11. "We will cite only two authorities in support of this reasoning. The former, that of Brittain v. Kinnaird 1 Brod. & Bing. 432 and the admirable judgment of RICHARDSON, J., at page 442 are too well known to make it necessary to state them at length. There, in the case of a conviction under the Bumboat Act, it was asked, shall the Magistrate, by calling a seventy-four gun ship a boat, give himself jurisdiction and preclude inquiry ? The learned Judge gave the answer--''whether the vessel were a boat or no was a fact on which the Magistrate was to decide; and the fallacy lies in assuming that the fact which the Magistrate has to decide is that which constitutes his jurisdiction.'' And it is obvious that if it were, whenever an action were brought against a Magistrate for issuing his warrant upon his conviction, in order to show his jurisdiction, without which he would have no defence, he would be bound to prove the facts on which his conviction proceeded. The second case is a recent decision in the Common Pleas of Cave v. Mountain (1 Man. & Gr. 257), which we cite only for the rule, which seems to us very clearly and satisfactorily laid down by the Lord Chief Justice:--'' There can be no doubt but that if a Magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the Magistrate has jurisdiction, the Magistrate''s jurisdiction cannot be made to depend upon the truth or falsehood of the facts or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation. These cases were both of them actions of trespass against the Magistrate convicting, but they are authorities not on that account the less in point on the present occasion."

12. We conclude, therefore, that the inquiry before us must be limited to this, whether the Magistrate had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true; for it has not been contended that there was any irregularity on the face of their proceedings."

13. The marginal note to Brittain v. Kinnaird (1 Brod. & Bing. 432) is:--"In trespass against a Magistrate for taking and detaining a vessel, a conviction by the defendants under the Bumboat Act, no defect appearing on the face of the conviction, is conclusive evidence that the vessel in question is a boat within the meaning of the Act, and properly condemned. In an action against a Magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the

fact contained therein."

14. In the judgment of RICHARDSON, J., to which Lord DENMAN refers, it is said:--"Whether the vessel in question were a boat or no, was a fact on which the Magistrate was to decide. If a fact, decided as this has been, might be questioned in a civil suit, the Magistrate would never be safe in his jurisdiction. Suppose a conviction under the Game Laws for having partridges in possession, could the Magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge ? and yet it might as well be urged in that case that the Magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for Seeping dogs for the destruction of game, without being duly qualified to do so; after the conviction had found that the offender kept a dog of that description, could he in a civil action be allowed to dispute the truth of the conviction ? In a question like the present we are not to look to the inconvenience, but the law; but surely, if the Magistrate acts bona fide, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action. Upon the general principle, therefore, that where a Magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think, &c, &c."

15. The present case is not brought against the Magistrate, who made the order u/s 521, Code of Criminal Procedure; but I think the above cases indicate the principle applicable and the extent to which the Magistrate''s declaration or finding that the place is a thoroughfare or public place is conclusive. Such declaration or finding is conclusive so far as regards any attempt to call the order itself directly in question. It appears to me, therefore, that the answer to the first question ought to be that it is not competent to the Civil Court to set aside the order of the Magistrate made u/s 521, Code of Criminal Procedure, on the ground that such order was made without jurisdiction, inasmuch as the land is private property, and not a thoroughfare or public place.

16. The second question is, however, a very different one. The contention that because a Magistrate has made an order for the removal of an obstruction or nuisance from a certain place, and for the purpose of such order has found or declared such place to be a thoroughfare or public place, therefore those persons who appeared before the Magistrate in those proceedings are for ever concluded from saying that such place is not a thoroughfare or public place, but private ground, appears to me to be untenable. The Code of Criminal Procedure does not require the Magistrate to take evidence or to proceed according to judicial forms before declaring a place to be a thoroughfare or public place. No appeal is allowed from the Magistrate''s finding. It is very right that a Magistrate should have a summary power of removing an obstruction or nuisance from what appears to him to be a thoroughfare or public place; but it would be very unreasonable, and serious

consequences would ensue, if a Magistrate could, in such summary fashion, without evidence, or the form of judicial proceedings, make an order declaring valuable land to be a thoroughfare or public place, which would have the effect of a judgment inter parties between all persons who appeared before him. Looking at the whole scope of the Code of Criminal Procedure, I am unable to gather that such was the intention of the Legislature.

17. In the cases to which Section 530 relates, and which are cases of private property merely, a Magistrate can interfere only when there is a probability of a breach of the peace; and such interference is limited to declaring one of the two contending parties to be in possession, and entitled to retain possession until ousted by due course of law. The question of private right is left for the adjudication of the Civil Courts. So with respect to cases falling u/s 532.

18. It appears to me that the provisions of Section 521 were not intended to take away from the Civil Courts the right of deciding whether private rights exist in any particular Immovable property. The jurisdiction of the Magistrate has, for its immediate objects, the removal of obstructions and nuisances from public places. In order to the exercise of this jurisdiction in particular cases, the Magistrate may have to decide summarily whether a certain piece of land is a public or a private place. But such decision of this question for an incidental purpose cannot, in my opinion, have the effect of an estoppel in another proceeding brought in the proper forum, for the purpose of obtaining an adjudication of a disputed right. This view is in accordance with a decision in Gooroo Pershad Roy v. Proobhoo Bam Chatterjee (19 W. R. 426).

19. If the plaintiff succeed in proving that the locus is not a thoroughfare or public place, but his private property, the Magistrate may be precluded in future (will certainly be precluded, upon any application made by the defendant in this suit), from dealing with the place u/s 521 of the Code of Criminal Procedure. But this is different from interfering with or setting aside the order already made by the Magistrate, and which has been obeyed.

20. It is next contended that the plaintiff in the present case, by submitting to the Magistrate''s jurisdiction and asking for a jury has estopped himself from saying now that the place is not a thoroughfare or public place.

21. No doubt this is a matter which may be considered as evidence, but I think it would be going too far to say that, because, in ignorance of his right to for other cause, he asked for a jury for the decision of the question whether her Magistrate''s order was reasonable and proper, he thereby admitted that the place was a thoroughfare or public place.

22. It is to be observed that the decision of the question whether the place is a thoroughfare or public place does not rest with the jury. The Magistrate has in the first place to decide that question for himself. If he decides it in the affirmative, he

will then proceed to take action; but, if in the negative, he has no authority to act. In the majority of cases this preliminary decision of the Magistrate is not, and, as has been already observed, it is not required by law to be, based upon evidence judicially taken or recorded. The Magistrate may, and probably ought to, consider any objection that the place was not public or private; but he usually proceeds upon a Police report, or some other information, or upon his general view of the whole matter. If the Magistrate decides to treat the place as a public place, I think the fact of the person concerned asking for a jury who shall decide the only question which the Code leaves to them, i.e., whether the order for the removal of the obstruction or nuisance is reasonable and proper, cannot be treated as an admission that the place is a thoroughfare or public place.

23. I am, therefore, of opinion that the second question ought to be answered in the affirmative, and that it is competent to a Civil Court, irrespective of an order made u/s 521 of the Code of Criminal Procedure, to try the question whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit, and those who claim under them. In the present case I think it is clear that plot No. 1 is not a thoroughfare or public place, and that the defendant has no right of way over such plot. This has been found by both the lower Courts upon the evidence, and the finding cannot be impeached in second appeal.

24. I think, therefore, that we must dismiss this appeal as regards both plots; but so much of the decree of the lower Court as sets aside the order made by the Magistrate u/s 521, Code of Criminal Procedure, must be expunged.

White, J.

25. I agree with my brother FIELD that although the plaintiff is not entitled in this suit, or indeed, by any proceeding in a Civil Court, to set aside the order made by the Magistrate u/s 521, yet that he is entitled to have the question tried in a civil suit as to whether the defendant has a right of way or not over the land in dispute.

26. There is nothing in Section 521, or the following Section, relating to orders made by Magistrates u/s 521, which gives the Magistrate exclusive jurisdiction, for the purpose of determining whether a place is a thoroughfare or public place, nor is there anything in these Sections from which it may be inferred that the jurisdiction of Civil Court to determine that point is ousted.