
(1869) 09 CAL CK 0024

Calcutta High Court

Case No: Special Appeal No. 432 of 1869

Ujalamayi Dasi

APPELLANT

Vs

Chandra Kumar Neogi

RESPONDENT

Date of Decision: Sept. 3, 1869

Citation: (1869) 09 CAL CK 0024

Judgement

Sir Barnes Peacock Kt., C.J., Loch, Kemp and Macpherson, JJ.

This is in substance a suit brought in the Court of the Moonsiff to set aside an order made by the Magistrate u/s 308 of the Code of Criminal Procedure for the removal of a wall as encroaching on a public road. The order was made against the plaintiff's husband, but the plaintiff in substance alleges that the wall belonged to her, and not to her husband, and that she is not bound by the order made against her husband. If she is not bound by the order which has been passed against her husband, there is no necessity for her to have it set aside. The case must be decided as if the suit had been brought by the husband. Section 308 gives the Magistrate a summary jurisdiction for removing nuisances. It enacts that whenever a Magistrate may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place; or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, "should be suppressed or should be removed to a different place; or that the construction of any building or the disposal of any combustible substance as likely to occasion conflagration should be prevented; or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary; or that any tank or well adjacent to any public "thoroughfare should be fenced in such a manner as to prevent danger "arising to the public,--he may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner, in possession of, or having control over, such building, "substance, tank, or wall as aforesaid, calling on such person, within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove such building, or to alter the disposal of such substance, or to fence such tank or well (as

the case may be,) or to appear before such Magistrate within the time mentioned in the order and show cause why such should not be enforced."

2. Section 309 provides for the service of the order, and then section 310 provides that the person to whom such order is issued shall be bound within the time specified in the order, to obey the same, or to appear before the Magistrate to show cause as aforesaid, or he may apply to the Magistrate by petition for an order for a Jury to be appointed to try whether the order is reasonable and proper.

3. Now these summary powers are given to the Magistrate for the purpose of enabling him speedily to remove nuisances. If when a Magistrate having entered into the question has determined that a nuisance does exist, he is to be restrained by a Court of Civil Judicature from carrying his order into execution, it might be two or three years before the nuisance could be removed, by which time as suggested by the Government pleader, all the injury may have been actually sustained. While the suit is going on, persons may be poisoned by the malaria arising from the nuisance, or the conflagration may take place, or lives may be lost by the falling of a ruinous wall on passengers, or their cattle may be drowned in a tank or well which has not been properly fenced to prevent danger.

4. The object of the Act was to enable the Magistrate to make an order speedily, and speedily to carry that order into execution. Section 311 provides that no suit or action shall be entertained in any Court in respect of anything necessarily or reasonably done to give effect to such order. It would, as it appears to me, be mere trifling with the Act if, when it says that no action shall be entertained by any Court in respect of anything necessarily or reasonably done to give effect to an order of this nature, we should hold that the Civil Court could interfere to restrain the Magistrate from giving effect to his order at all; for that is really what is sought to be done by this suit. If the Magistrate had carried it into effect, no suit could have been brought against him or against any one acting under his order, and yet it is contended that a suit will lie to prevent him from carrying his order into effect.

5. It was said during the argument that no appeal was given from the Magistrate to any other Court. That probably was, because the Legislature thought that the matters to which Chapter XX of the Code of Criminal Procedure related were such as could not be properly left to the delay of an appeal, and therefore a substitute for an appeal was provided by enacting that if the party against whom the order is made, object to the order of the Magistrate, he may require the Magistrate to appoint a Jury to try whether the order was reasonable and proper; and in that case the person against whom the order is issued has a right to appoint two out of the five members of the Jury appointed to try the question.

6. The Act provides in section 310 that the "Magistrate shall suspend the execution of the order pending such enquiry, and be guided by the decision of the Jury, which shall be according to the opinion of the majority;" and in order to prevent any delay, it goes on to say that if the petitioner shall, by neglect, or in any other way, prevent the appointment of

a Jury, or if from any cause the Jury so appointed shall not decide and report within a reasonable time to be fixed in the order for the appointment, their functions shall cease from the date of the expiration of such period, unless they be continued by special order of the Magistrate; and if from any of the above causes no decision be made by the Jury, the order of the Magistrate shall be carried into effect as hereinafter provided. There is thus an express provision that unless the order of the Magistrate is found by the verdict of a Jury to be unreasonable or improper, it is to be carried into effect; and by section 311 no action is to be brought against any one for giving effect to it. Surely, in the face of this enactment, no Civil Court can restrain a Magistrate from carrying into effect an order under this Chapter.

7. Section 312 says: If in a case referred to a Jury, the Jury shall find that the order of the Magistrate is reasonable and proper, the Magistrate shall give notice thereof to the person to whom the order was issued, and shall add to such notice an order to obey the order first "mentioned within a time to be fixed therein under the penalty provided by the Indian Penal Code as aforesaid. If such latter order shall not "be obeyed, the Magistrate may proceed as in the last preceding section." The Magistrate may order the party to carry out the order; and if he do not carry it out, he is liable to be punished for disobedience under the Indian Penal Code, and the Magistrate may himself proceed to carry the order into effect.

8. To show that the Legislature intended that the order should be carried into execution speedily, and to protect the public even for the short time during which the order is under enquiry by a Jury, section 314 provides that, "if, pending the enquiry by a Jury, the Magistrate "shall consider that immediate measures are necessary to be taken to "prevent immediate danger or injury of a serious kind to the public, it should be lawful for such Magistrate to issue such an injunction and "order to the person mentioned in that behalf in section 308, as shall be required to obviate or prevent such danger or injury, and in default of "such person forthwith taking all necessary measures ordered to be taken "by such injunction or order, the Magistrate may himself use or cause to be used such means as may be necessary to obviate such danger or to prevent such injury, and no suit or action shall be entertained in respect of anything necessarily or reasonably done for that purpose,"-- the latter words being similar to those used in section 311. If a suit will lie to prevent a Magistrate from carrying his order u/s 308 into effect, it may also be contended that if a Magistrate attempts to secure the public u/s 314, a suit will lie against him in a Moonsiff's Court for taking steps to protect the public. It appears to me that the Act would be entirely frustrated if we were to hold that any suit of this nature can lie to restrain a Magistrate from carrying into effect such orders as he may make under the summary powers which are vested in him for the protection of the public.

9. The decision of the lower appellate Court is affirmed with costs.

Bayley, J.

10. As I was the Judge who delivered judgment in the case of Ram Shadoy Ghose v. Jattadari Haldar 7 W.R. 95, holding that Civil Courts had jurisdiction in cases coming under Chapter XX of the Criminal Procedure Code, I wish to add a few words to the judgment just delivered by the Chief Justice and concurred in by the other three Judges.

11. In that case it certainly appeared to me that the question was one of private right between the parties, viz., that the land claimed by the Magistrate as the Government land on the one hand, was claimed by the opposite party as his private land on the other, and that the road claimed by the Magistrate as a public road was distinctly claimed by the other party as his own private road. I then considered after reviewing the case there cited by me that this question of private right, like all other questions of such a character, might form the subject of a regular suit in the Civil Court. I have now had the benefit of a more full argument on the point, and considering the provisions of section 311 to the effect, that no suit or action will lie against a Magistrate for acts done by him under the jurisdiction given in the preceding sections, viz., sections 308, 309 and 310 of the Code, and looking also to the reasons given in the judgment of the Chief Justice based upon a consideration of the character of the acts to be done by Magistrates under those sections, and the necessity for vesting the Magistrates with summary powers in regard to them, the object of which would be defeated by admitting a civil suit against the order of the Magistrate sanctioned by a Jury as provided in Chapter XX, I am of opinion that the view now taken by the Full Bench is the correct one. The proviso of section 311, it seems to me, clearly bars the jurisdiction of the Civil Court, and does so for clear objects in the contemplation of the Legislature; and although there is some slight difference between the actual facts of this case and those in Ram Shadoy Ghose v. Jattadhari Haldar 7 W.R. 95, still the principle, which the Judges of the Division Bench in this latter case intended to uphold, was one distinctly opposed to the principle now laid down by this Full Bench. I am now free to admit that I was wrong in my former decision, and I fully concur in the decision now delivered by the learned Chief Justice.