

(1879) 04 CAL CK 0026

Calcutta High Court

Case No: None

In Re: Maharaja of
Burdwan

APPELLANT

Vs

RESPONDENT

Date of Decision: April 17, 1879

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 532

Citation: (1880) ILR (Cal) 194

Hon'ble Judges: McDonell, J; Jackson, J

Bench: Division Bench

Judgement

Jackson, J.

This case comes before us upon a petition of the Maharaja of Burdwan. He complains of an order passed by Mr. Abbott, Assistant Commissioner, with powers of a magistrate, at Darjeeling, u/s 532 of the Code of Criminal Procedure. The subject to which this order related was a road, which apparently passes over the ground of the Maharaja and is claimed by the Maharaja as being his private road, and is not shown to have been in any sense belonging to or maintained by the public; but it is one over which it may be said the public have a limited right of way.

2. It seems that Major Lowis, who was the Deputy Commissioner of Darjeeling, in the course of his inspection of the station-roads, observed this road with gates or gate-posts at one end of it, and it struck him that the road was, or ought to be, a public thoroughfare. He, thereupon, consulted with the Municipal Commissioners, and the result was, that they authorized him to move in the matter, and, if necessary, take proceedings to establish the supposed right of way. Thereupon, Major Lowis, in his capacity of Deputy Commissioner, instituted proceedings and referred them for hearing and trial to Mr. Abbott; and Mr. Abbott passed the order which is now complained of, viz., that "possession of the road running along the Jhara from the block gates on the cart road, to the block gates on Victoria road, and

lying between these gates, be not taken by the Maharaja of Burdwan to the exclusion of the public and inhabitants of the Darjeeling Municipality, until he shall have obtained the decision of a competent Civil Court adjudging him to be entitled to exclusive possession."

3. When this rule was obtained, our attention was called to the fact that the Magistrate who decided the case was himself the Vice-Chairman of the Municipality, and some comment was made on the position which he and Major Lowis occupied, being in part that of prosecutors and in part Judges in the matter. But we find that, irrespective of the necessity for such plurality of offices, which no doubt occasionally arises, and which leads to Magistrates' occupying a somewhat anomalous position in such proceedings, there really was no valid objection to Mr. Abbott's deciding this case, because it appears that he took no part in those deliberations of the Municipality out of which these proceedings arose.

4. But a more serious question remains as to the authority of the Magistrate to make such order, and the propriety of that order.

5. The terms of Section 532 do, no doubt, differ from those of Section 530 in that the dispute from which these proceedings are supposed to spring, is not described as a dispute likely to induce a breach of the peace, and the learned Standing Counsel, who argued this case with great fairness and ability for the Municipality, is in a manner forced to contend that the dispute described in Section 532 may mean a dispute of any kind, being simply a claim made and denied, or a claim resisted, and he is unable, upon a question put to him, to suggest any limit at which the authority of the Magistrate to enquire into such disputes should stop.

6. It appears to us that, without going so far as to say that the dispute which enables Magistrates to interfere under this section must be a dispute likely to induce a breach of the peace, it must, at any rate, be some substantial dispute necessitating the interference in some way or other of the criminal authorities. It would not be sufficient that there should be a mere discussion or verbal altercation between persons claiming rights of the kind described. There must be an actual dispute.

7. Now, in this case it is clear there was no dispute between the Maharaja and any person until the head of the Municipality, who was himself the Magistrate, proprio motu, and I may say in a purely speculative way, took up the question whether there ought, or ought not, to be a public thoroughfare over this road. The evidence shows that no person had ever been obstructed, no person ever set up any claim to pass over this road otherwise than every one had hitherto been allowed to pass unobstructed over it. Certain correspondence passed between the Magistrate and Mr. Miller, the Maharaja's agent, and the question, which arose in the correspondence, related to a right which, so far as the evidence goes, had never been exercised and never in practice claimed, viz., that of passing over the road during the hours between sunset and sunrise. Now, this not being a question of

public thoroughfare, but a right of way, it is obvious that a right of a limited kind might very well grow up, and I think the owner of the ground over which such a right of way existed would be perfectly justified in taking, and would be wise to take, precautions that the existing right should not be enlarged. Therefore, this so-called dispute being merely of a speculative kind, even if the Maharaja, on being applied to, declared his intention to prevent the right of way going beyond the mode in which it had hitherto been exercised, that did not constitute any dispute such as the Magistrate was entitled to take action upon.

8. But in addition to that, it appears to me that the case was not one in which the Magistrate had authority to make any order, because the section does not enable a Magistrate to make a purely declaratory order. It only enables him to prevent arbitrary interruption by any person of rights actually enjoyed, which have been exercised by the public or a person or class of persons. The only right in question here was, a right of using this road during the night. There is no evidence what ever to show that any person had ever exercised, or claimed to exercise, the right to passing over this road during the night. As I said before, it is quite conceivable that there should be a limited right of way,--that is to say, a right of passing over the road by day and not by night, and the evidence shows that that restricted kind of right has never been interfered with. This was not, therefore, a case in which the Magistrate was entitled to interfere. I think his order in this case was made without authority, and must be set aside.

9. The Deputy Commissioner, when examined in this case, stated very ingenuously, as it seems to me, that the reason why proceedings were taken in this particular form was, that the result would be to throw upon the Maharaja the costs of being plaintiff in the civil suit, which it might be necessary to bring. That, of course, where the contending parties are both private individuals, is a very natural and justifiable course. But the propriety of it is not very clear where one of the parties is the Magistrate himself, in which case the conclusion in the Criminal Court may be said, without any imputation on the presiding officer, to have been somewhat of a foregone conclusion.