
(1874) 03 CAL CK 0006

Calcutta High Court

Case No: Appeal No. 1 of 1874

Brijo Bullub Gooyee

APPELLANT

Vs

Chunder Narain Singh,
Deputy Magistrate of
Cutwa

RESPONDENT

Date of Decision: March 24, 1874

Final Decision: Dismissed

Judgement

Sir Richard Couch, Kt., C.J.

In this case, which was an appeal from the judgment of Markby, J., as the senior Judge, sitting with Birch, J., the first ground of appeal is that the Magistrate in his proceeding under Sched. K. of Beng. Act VI of 1868 acted judicially, and in discharge of his judicial duty, in directing the removal of the obstruction which was removed by him, and for the removal of which the plaintiff brought the suit against him and another person, and that therefore Act XVIII of 1850 is a bar to a suit against the Magistrate. The second ground is more general, being that Markby, J., ought not to have held that the powers and duties mentioned in Sched. K., with the exception of the powers to punish an offence, are not judicial. Act XVIII of 1850 provided that no Judge or Magistrate, &c., or other person acting judicially, shall be liable to be sued in any Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he in good faith believed himself to have jurisdiction to do or order the act complained of. The object of that Act was not to introduce the rule that a Magistrate acting judicially was not liable to a suit, but the further rule that he was not liable, although the act was not within the limits of his jurisdiction, if he Bond fide believed it to be.

2. The question in this case is, whether the removal of the obstruction by the Magistrate in exercise of the power given to him by the first clause of Sched. K. is a Judicial act.

3. The clause is:--"Whoever builds any wall, or erects or sets up any fence, rail, post, or other obstruction or encroachment in any public highway, or in or over any open drain,

sewer, or aqueduct, along the side of any such highway, shall be liable to a fine not exceeding Rs. 50; and the Magistrate shall have power to remove any such obstruction or encroachment, and the expense of such removal shall be paid by the person erecting the same, and shall be recoverable from him in the manner provided in s. 83 of this Act."

4. If the whole of this clause is to be read as one single provision, and the power of the Magistrate to remove an obstruction only exists where the person building or setting up the obstruction has been convicted and: punished by a fine, it might be said that the conviction of setting up the obstruction and imposition of the fine and the removal of the obstruction being one act, and the order by the Magistrate that it should be removed being part of the judicial proceedings for punishing the offender, the whole was a judicial act,--that the removing the obstruction could not be separated from the awarding the punishment of the fine. But it appears to me that this would not be a reasonable construction of the clause, for then it would not provide for the cases where it may be necessary for purposes of conservancy that the obstruction should be removed, and yet no person can be discovered who could be punished for setting it up and made liable to pay a fine, or from whom even the expense of the removal could be recovered. This clause, although it contains two provisions, one for the punishment of the author of the obstruction, and the other for the removal of the obstruction, must be looked at as if it was in fact two clauses; one providing for the judicial act of determining who the offender is and punishing him, and the other for what may be done separately and without any offender being punished, namely, the act of removing the obstruction, which may properly be called an executive or ministerial act.

5. In other parts of the schedule also we find clauses, some of which relate to judicial acts, namely, powers of fining for offences. For instance, there is the 3rd clause, where, if a person being ordered to remove a projection, encroachment or obstruction does not do so, he shall be liable to a fine not exceeding Rs. 50, and the Magistrate in such a case may remove or alter the projection, encroachment or obstruction. Others are, cl. 8 where if a person neglects or refuses, after notice from the Magistrate, to keep a drain, privy or cesspool in a proper state, he shall be liable to a fine; and the 9th clause, where the fouling of water by bathing, washing, throwing rubbish, &c., is made punishable by a fine. Then there are powers which are not judicial, as in the 10th clause, which gives to the Magistrate the power of filling up unwholesome tanks in private premises, and provides in the same way as the 1st clause that the expense incurred thereby shall be paid by the occupier of such premises and shall be recoverable from him in the manner provided in s. 83 of the Act; and the 11th, which gives the Magistrate power to clear noxious vegetation and improve bad drainage; and the 12th, which gives him power to drain off and clean stagnant pools in open places; and the 13th, which gives him power to cause places near public highways which are dangerous to passengers to be repaired, protected, and enclosed.

6. Here are various acts which may be done by a Magistrate by virtue of this schedule, which are not judicial. They are ministerial acts, and acts which may in some cases be

done by virtue of the Act by persons who are not Magistrates, namely the Town Committee. They in no way partake of the nature of a judicial proceeding.

7. It seems to me that the schedule to the Act gives power to the Magistrate for purposes of conservancy to do things which are merely ministerial. It also gives him power in certain cases to punish an offender by a fine. But these are distinct acts, and the circumstance, that in this instance there has been the imposition of a fine upon the person who is said to have set up the obstruction, does not make the act of the Magistrate which followed it, the act of removing the obstruction, in any way a judicial act. It does not protect him from an action being brought, not to try the legality of his decision in punishing the offender by a fine, and not to interfere with that, but to try the question of right whether the person to whom the place belongs has a right to have the steps there or not. I cannot construe this Act as being intended to put in the power of the Magistrate acting as a conservancy authority the decision of questions of property which might be of the utmost importance to persons and to do so without there being any appeal from his decision; for I cannot regard the provisions of s. 92, which seems in one stage of this suit to have been relied upon as protecting the magistrate from an action, as being in any way whatever a remedy by appeal. It seems to me to have been intended for quite a different purpose.

8. I think, therefore, that Markby, J.'s decision that the action was not barred either by Act XVIII of 1850 or by the general law, is a right one, and that this appeal ought to be dismissed with costs.

Jackson, J.

I entirely concur in the judgment which has been just delivered, and have very little to add. I can only say that it seems to me that it would be matter of the most serious consequence if Magistrates, in addition to being protected in the discharge of their purely judicial functions, were also so far inviolable in their executive capacity, that they should be at liberty to make orders in the conservancy branch of their duties which should not be liable to question in any form or shape. It would be simply placing property in towns, where such Acts come into operation, absolutely at the disposal of the Magistrate for the time being. The section referred to by the learned Chief Justice is manifestly one, I think, intended to give the Government, and the Commissioner the power of controlling in an executive way the proceedings of the Magistrate under the Act, and it would be, if it could be need at all for such a purpose, a very inadequate substitute for that right which every subject ought to have of submitting questions of this kind to the decision of the Civil Courts.