

Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF CHUNDERNATH SEN.*

1880
May 28.

Obstruction—Pathway—Order of Magistrate—Functions of Jury—Procedure to be observed by Magistrate—Code of Criminal Procedure (Act X of 1872), ss. 521, 523, 532.

Before a Magistrate can make an order under s. 521 of the Code of Criminal Procedure to remove an obstruction from a path alleged to be a public thoroughfare, he must first, in a proceeding held under s. 532, have come to the conclusion that the path is open to the use of the public.

The only functions which a jury appointed under s. 523 can exercise, are to consider whether the order made by the Magistrate under s. 521 is reasonable and proper, it being no part of their duty to determine the rights of parties in property.

Held therefore, that where a Magistrate, through a mistaken view of the law, ordered the removal of an obstruction on a pathway under s. 521, and had further submitted this order to the consideration of a jury appointed under s. 523, before he had himself come to a conclusion whether such pathway was a public thoroughfare, the only course left open to him under such circumstances was to stay all proceedings initiated under s. 521, and take action under s. 532.

Baboo Bhoobun Mohun Dass for the petitioner.

Baboo Srinath Banerjee and Hurry Mohun Chuckerbutty contra.

THE facts of this case appear sufficiently in the judgment of the Court (MORRIS and PRINSEP, JJ.), which was delivered by

MORRIS, J.—This matter has arisen from a complaint made on 15th February 1879, regarding an obstruction to a public thoroughfare.

It appears that, a few months before this complaint was made, proceedings had been taken under s. 521 of the Code of Criminal Procedure, regarding an obstruction to another portion of the same road, and the matter had been referred to a jury

* Criminal Motion, No. 62 of 1880, against the order of Baboo Trailakya Nath Sen, Deputy Magistrate of Moonsheegunge (in the District of Dacca), dated the 12th July 1879.

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under s. 523. The report of the jury was not unanimous, but the Magistrate, on 6th February 1879, accepted the opinion of the majority, declaring that the road was private, and not public.

The Magistrate, apparently without the consent of either side, directed the same jury to report on the second matter. Shortly after, one of the contending parties objected to one of the jurymen, who had been appointed by the Magistrate, on the ground that he had decided the matter against him in the first case. Without giving notice to the other party, the Magistrate allowed this objection, and appointed another jurymen in the place of his first nominee. The effect of this was to turn the majority to the other side, and to cause the report to be made in favor of the objector, that the road was public and not private.

We are of opinion that the Magistrate should not, at the instance of one party, and behind the back of the other party, have cancelled the appointment of one of the jurors, even though such juror was his own nominee. If the objection taken was good, it was equally applicable to all the jurymen who had previously committed themselves to an opinion in the first case.

It is unnecessary, however, to notice this further, because it is clear to us that the entire proceedings have been taken under a mistaken view of the law regarding the respective functions of a Magistrate and a jury under chap. xxxix of the Code of Criminal Procedure.

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction from a thoroughfare or public place, it must be first found that the place so obstructed is a thoroughfare or public place. If this be disputed by the party on whom the notice to remove the obstruction has been served, the Magistrate should not refer the decision of this matter under s. 523 to a jury. The duty of a jury is declared by that section to be to try whether the Magistrate's order to remove the obstruction is *reasonable and proper*, not whether the way or place obstructed is public or private property. Until this matter has been decided by the Magistrate under s. 532 of

the Code of Criminal Procedure or by a Civil Court, the order under s. 521 should not be carried out or referred to a jury, but should be stayed.

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If, however, a Magistrate under a mistaken view of the law, and in spite of the objection raising the question of the right of way, should appoint a jury, then, as pointed out by Mr. Justice Phear in the case of *Roy Omesh Chunder Sen* (1), the order of the Magistrate to remove the obstruction complained of could not be decided by such jury to be reasonable and proper, because at the outset of their enquiry they would be met by the *bond fide* objection that the road was private and not public property. In such a case they could only submit a report to this effect to the Magistrate, it being no part of their duty to determine the rights of parties in property. The Magistrate ought then either to refer the party complaining to the Civil Court, or in the exercise of his discretion inquire into the matter as provided by s. 532.

We may refer, in support of this view of the law, to the following cases:—*In re Becharam Bhattacharjee* (2), decided by Loch and Mookerjee, JJ.; *Roy Omesh Chunder Sen v. Iohnath Mozumdar* (1); *Petamber Jugi v. Nasaruddyy* (3), decided by Glover and R. C. Mitter, JJ.; and to some proceedings of the Madras High Court, pp. 304 and 305, published by Mr. Weis, in his Collection of the Orders of that Court.

We, therefore, set aside the order of the 12th April, and direct that if the Magistrate finds it necessary to take further action, he do proceed in the manner now indicated.

Order set aside.

(1) 21 W. R., Cr., 64.

(2) 15 W. R., Cr., 67.

(3) 25 W. R., Cr., 4.