

manner prescribed in s. 318. No appeal is given and the President is constituted the sole judge of the necessity.

The defendants must pay the costs of this reference.

Solicitors for plaintiffs—*Barclay & Morgan.*

THE
MUNICIPAL
COMMISSION-
ERS FOR THE
CITY OF
MADRAS
v.
PARTHA-
SARADI.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Parker.

QUEEN-EMPRESS.

against

BOLAPPA.

1888.
Feb. 29.

District Municipalities Act, 1884 (Madras), s. 173—Obstruction of public street.

Section 173 of the District Municipalities Act, 1884 (Madras), provides that no person shall deposit anything so as to cause obstruction to the public in any street without the written permission of the Municipal Council:

Held, that the depositing by any person of an article in the street without the permission of the Municipal Council amounted to an obstruction.

CASE referred by H. Goodrich, District Magistrate of Bellary, under s. 438 of the Code of Criminal Procedure.

The facts were stated as follows:

“The accused in this case, a merchant of Bellary town, was charged by the Municipality under Bye-law 61, s. 255 of the District Municipalities Act IV of 1884 with having stored jaggery bags on the bazaar road within the Municipality. It was proved by the witnesses for the prosecution that the accused stored about 50 bags of jaggery on the public road in front of his shop, occupying a portion of the road surface measuring 5 yards long and 4 yards broad and causing obstruction to passengers. The accused admitted having stored 20 bags occupying about 2 yards in width of the road surface, but pleaded that he had a right to do so, as no obstruction was hereby caused to the public. In spite of this admission the accused was acquitted under s. 245 of the Code of Criminal Procedure, the Bench of Magistrates having held by a majority that the act of the accused did not constitute an offence.

“In their order, No. 559, dated 23rd March 1887, Government have sanctioned the levy of a fee of Rs. 12 a year from each grain

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merchant by the Bellary Municipality, who might desire to acquire the privilege of utilizing a space of 2 yards of the road in front of his shop for unloading, measuring, and storing his consignments of grain for two hours on the weekly market day and on the day preceding it, provided room was left for traffic. No permission of any sort was obtained by the accused in the present case, nor any fee paid by him.

“The Municipal Council moved Government to direct the Public Prosecutor under s. 417 of the Code of Criminal Procedure to present an appeal to the High Court from the order of acquittal passed in this and three other similar cases.

“Government gave in their order, No. 2681, Judicial, dated 24th November 1887, observed that the point involved was one of law and instructed me to refer the plainest case to the High Court under s. 438 of the Code of Criminal Procedure and to ask that the law on the point may be authoritatively declared and a new trial directed.

“The act of the accused in the present case falls under s. 173 of the District Municipalities Act and Bye-laws 57, 61, and 62 of the Municipality sanctioned in G.O., No. 1010, dated 7th June 1878. In s. 173 and Bye-law 61 the words, “So as to cause obstruction to the public,” occur, and these words do not seem to have been defined anywhere. It is doubtful whether these words throw on the prosecution the burden of proving that the public could not pass at all by reason of the obstruction or whether, the public having the right to pass freely over all portions of the street, an obstacle in any part of the roadway is an obstruction within the meaning of the section.

“I am of opinion that the act of the accused amounts also to a public nuisance as defined in s. 268 and punishable under s. 290 of the Indian Penal Code. The case of *Umesh Chandrakar, in re*(1), is analagous to the present one.

“I have therefore the honor to request that the Honorable Judges may be pleased to issue orders declaring the law on the point authoritatively and to direct the retrial of the case.”

The Public Prosecutor (Mr. *Powell*) for District Magistrate.

The Court (Kernan and Parker, JJ.) delivered the following

(1) I.L.R., 14 Cal., 656.

JUDGMENT :—The depositing by any one of any article on the high road except with the license of the Municipality under s. 173 is an obstruction. The public are entitled to the whole width of the road unimpeded by any article deposited thereon. The Bench having found that articles were deposited on the road without license, should have found that such deposit caused obstruction. The deposit might not be very great, but in law it was an obstruction.

We set aside the acquittal and direct the accused to be retried before the Bench.

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APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Parker.

RUPABAI AND OTHERS (PLAINTIFFS, NOS. 1, 2, AND 3), APPELLANTS,
and

AUDIMULAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

1887.
Nov. 4.
1888.
Jan. 17.

Presumption that person paying off a mortgage intends to keep the security alive—Power of court to order refund of money wrongly paid out of court in another suit—Limitation Act, sch. II, art. 29.

In 1861 B granted a lease of his zamindari to A for 30 years, A undertaking to pay off all debts then due by B. B died in 1882 and his successor sued A and obtained a decree that on payment of Rs. 1,20,000 A should give up possession of the zamindari. This sum having been paid into Court, A lost possession of the zamindari. On January 5th, 1875, A had mortgaged the whole zamindari, which consisted of 22 villages, to M to secure a loan of Rs. 1,00,000 borrowed by A to pay off the debts of B which A undertook to pay in 1861. On June 27th, 1879, A being indebted to M in the sum of Rs. 1,78,000 paid M Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, M releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A executed a mortgage of the 22 villages to L to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M and Rs. 30,000 was a prior debt due by A to L. Of the Rs. 1,00,000 paid to M, Rs. 27,000 was specially applied to discharge so much of the charge created by the mortgage of January 5th, 1875. On January 30th, 1875, A borrowed from S Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zamindari. In 1885 S sued L to have her debt declared a first charge on the money paid into court by the zamindar. The Subordinate Judge held that L had a prior claim on the fund and dismissed the suit :

Held on appeal, following the principle of decision in *Gokaldas v. Parannal* (L.R., 11 I.A., 126) that L was entitled to a first charge on the fund to the extent

* Appeal No. 84 of 1886.