

“decided that the license covers the agent also. See High Court’s Proceedings, 11th December 1871, No. 1982, printed at page 405 of Weir’s Criminal Rulings, 3rd edition. The Senior Assistant Magistrate seems to think that, if the transactions are carried on by an agent while the license-holder is present in the station, though not in the shop, the requirements of the law are fulfilled, but I do not see how his (the license-holder’s) temporary absence elsewhere could affect the question when by the steps he took he sufficiently declared to the authorities that the transactions would be carried on on his behalf and on his responsibility.”

The *Acting Government Pleader (Subramanya Ayyar)* for the Crown.

The Court (Collins, C.J., and Wilkinson, J.), delivered the following

JUDGMENT.—We can see nothing in the Act or the rules which renders sale by the agent of a license-holder illegal. The Government Pleader supports the reference and contends that the conviction is illegal. Although in the rules endorsed on the license the words “or his authorized agent” are not to be found, yet from the wording of rule 6 it would appear that as the license is intended to cover sales effected upon the premises, and as it cannot reasonably be insisted that every sale on the premises of a license-holder must be conducted by the license-holder in person, the sale by an agent was contemplated.

We set aside the conviction and order the fines to be refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

QUEEN-EMPRESS

v.

NARAYANA.*

1889.
May 8.
July 10.

Penal Code, s. 138—Criminal Procedure Code, ss. 133, 134, 135, 136—Service of notice of orders under s. 133.

A Magistrate made an order under s. 133 of the Code of Criminal Procedure requiring N. to fence a certain well in a public street or to appear before him and

* Criminal Revision Case No. 159 of 1889.

QUEEN-
EMRESS
v.
NARAYANA.

move to have the order set aside; a copy of this order was affixed to the house of N., but he did not appear. The Magistrate then adopted the procedure prescribed by ss. 136, 140, and made an order requiring N. to fence the well by a certain date. N. who was personally served with notice of the above order did not comply with it. The Magistrate then sanctioned the prosecution of N. under s. 188 of the Penal Code. N. appeared and produced evidence to prove that he was not liable to fence the well :

Held, that the accused was guilty of the offence of disobedience to an order duly promulgated by a public servant and was not entitled to go behind the order and show that it was one which ought not to have been made.

The mode of service of notice of an order under s. 133 considered.

PETITION under sections 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of H. J. Joseph, Acting Joint Magistrate of Kumbakonam, dated 10th January 1889, made in appeal case No. 91 of 1888, confirming the finding and sentence of the Second-class Magistrate of Kumbakonam Taluk in calendar case No. 186 of 1888.

Mr. Parthasaradhi Ayyangar for the petitioner.

The facts of the case and the arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (*Muttusami Ayyar* and *Shephard, JJ.*).

JUDGMENT.—There is a well in a public street at Swaminalai in the Kumbakonam Taluk, Tanjore District, which required to be fenced in order that no danger might arise to the public. On the 21st July 1888, the Sub-divisional Magistrate of Kumbakonam made an order under section 133, Criminal Procedure Code, calling upon the accused, Narayana Rao Peshwa, either to fence the well or appear before the Second-class Magistrate of Kumbakonam on 10th August and to move to have the order set aside. A copy of the order was affixed to his house, but the accused neither fenced the well nor appeared in accordance with such order either to show cause against it, or to move for the appointment of a jury to try whether it was reasonable and proper. The order was made absolute under section 136 on 30th August, and a notice was thereupon issued as directed by section 140 requiring the accused to fence the well before the 25th September 1888, and informing him that in case of disobedience he would be liable to the penalty provided by section 188, Indian Penal Code. This notice was personally served on the accused, and as he did not fence the well within the time specified, the Sub-divisional Magistrate sanctioned his prosecution on 26th September. Accordingly the accused was charged with an offence punishable under section 188, Indian

Penal Code. His defence was that he was not the owner of the well, that he was not liable to fence it, and that it belonged to one Govinda Ayyan. The accused cited four witnesses, and they, as well as the fifth and seventh witnesses for the prosecution, supported his statement. The Tahsildar-Magistrate, however, observed that their evidence did not appear to be true, and that even if it were otherwise, the accused was liable to the penalty prescribed by section 188, Indian Penal Code. He convicted the accused and sentenced him to pay a fine of Rs. 15 or to suffer simple imprisonment for 15 days. On appeal, the Acting Joint Magistrate upheld the conviction and the sentence, and considered that the accused was not at liberty to go behind the order and to show that it was one which ought not to have been made as he was not the owner of the well. It is urged in revision that the conviction is illegal. We see no reason to interfere. It is not denied that the order in question was made by a Sub-divisional Magistrate, and that such Magistrate was lawfully empowered to make it. Nor is it suggested that the well is not in a public street or that the safety of the public does not require that it should be fenced. Though the conditional order made under section 133 was not served personally on the accused, yet there is nothing on the record before us to show that personal service was practicable, or that service in the mode prescribed by section 71 was not legal in the special circumstances of the case. The main question then is whether the accused is entitled to an acquittal, if he shows in answer to the charge preferred under section 188, Indian Penal Code, that he had no control over the well either as owner or possessor or otherwise, and that the order was made on an erroneous view of his relation to the property in question. We are of opinion that he is not, for the imputability consists, not in the actual existence of any jural relation between the accused and the well ordered to be fenced, but in wilful disobedience of the order lawfully made by a competent Magistrate under section 133. Section 135 imposes on the person against whom such order is made an obligation either to do the act which the order directs him to do or to appear to show cause against it or to ask for a jury to try its validity, and section 136 makes an intentional omission to comply with such direction penal by declaring him liable to the penalty provided by section 188 of the Indian Penal Code and directing that the order shall be made absolute. It is

QUEEN-
EMPRESS
v.
NARAYANA.

true that under section 133 the conditional order can only be made against a person owning, possessing, or exercising control over the well according to the information then before the Sub-divisional Magistrate, but it must also be remembered that when the Magistrate accepts the information and bases a conditional order upon it, and when the party against whom the order is made neither does the act commanded nor takes action to vacate the order, the *ex parte* information becomes conclusive evidence and the omission becomes penal and subjects the party concerned to the penalty prescribed by section 188, Indian Penal Code. Though section 188 refers to the offender as a person directed to abstain from a certain act or to take certain order with certain property *in his possession or under his management*, yet it is not competent to the accused to re-open the question of possession, &c., by reason of section 136 which conclusively presumes that the conditional order was correctly made and directs that he shall be liable to the penalty prescribed by section 188. We take the words "in that behalf" to mean, for his failure to comply with the requirements of section 135, and they do not therefore support the accused's contention. The provisions of section 136 are stringent, because the intention is to create facilities for conditional orders, which Magistrates are authorized to pass under Chapter X in order to prevent danger to the public, becoming final without needless delay and thereby promptly to ensure public safety.

We have no doubt that the accused was properly convicted, and we therefore dismiss this application.