1885

QUEEN EMPRESS v. JUGGERNATH.

it seems to me that in every case of the kind it should always be a question of intention. On turning to the evidence of Grish Chunder Ghose, the owner of the shop from which the debt in question was due, and reading Exhibit B by the light of that evidence, it appears to me to be clear that the intention of the parties was that the entry and the signature to it of Juggernath should have the same effect as a receipt

Mr. *Sale* also called our attention to several rulings of this Court. Those decisions I observe were passed under the Stamp Act, of 1869. The present Stamp Act of 1879 is more comprehensive, so far as the definition of a receipt is concerned; and it appears that in the cases in which those decisions were passed, the true question was whether the particular document which was tendered in evidence was admissible in law by reason of no stamp having been used. The question here is a different one; and on examining the observations made by the learned Judges in those cases, it would appear that if any principle of law is deducible from them as applicable to this case, it is a principle rather in favor of the view taken by the Crown than opposed to it.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

MAKHAN LAL SAHA (PETITIONER) *v.* MAKHAN CHORA SAHA (OPPOSITE PARTY.)*

1885 *February* 19.

Public Nuisance—Obstruction—Enquiry under s. 133, *Criminal Procedure Code (Act X of* 1882)*—Previous orders when no bar to such enquiry—Criminal Procedure Code (Act X of* 1882) *s.* 133.

An application was made under s. 133 of the Criminal Procedure Code (Act X of 1882) for the removal of an obstruction in a public thoroughfare, but after a personal local inspection by the Magistrate, and without any evidence being taken, the parties were referred to a civil suit, and the order was refused, the Magistrate holding that the way was not a public way.

A civil suit was then filed, and during its pendency a second application was made under s. 133 of Act X of 1882, with a like object, which was

* Criminal Revision No. 13 of 1885 against the order of Baboo Radha Madhab Bose, Deputy Magistrate of Cutwa, dated the 18th of November 1884.

1885

MAKHAN LAL SAHA v. MAKHAN CHORA SAHA.

refused on the ground that the civil suit was pending, and that there was no likelihood of a breach of the peace.

The civil suit resulted in the way being held to be a public thoroughfare.

A third application was then made under s. 133 to have the obstruction removed, but the Magistrate held that, in face of the two previous orders, he could not interfere.

Held, that the order of the Magistrate was wrong, upon the ground that he was bound to make such enquiry, and as there never had been any enquiry into the matter, the first decision being no decision at all, but a mere dictum of the Magistrate upon a personal local investigation without hearing evidence, and thus not on judicial enquiry, and the second decision being based merely upon the pendency of the civil suit and the previous improper order, and that neither of these orders operated therefore as a bar to the Magistrate enquiring into the matter of the present complaint.

THIS case arose out of an application made under s. 133 of the Criminal Procedure Code (Act X of 1882) for the removal of an obstruction in the shape of a *pucca* building in a public road. It was the third application that had been made with the same object.

The first application was made at a time when the building was in course of erection in 1881, but the Sub-divisional Magistrate, before whom it was made, after holding a local examination, but without taking any evidence, on the 17th July 1881 refused to interfere and referred the parties to the Civil Court. Thereupon a civil suit was instituted for the removal of the obstruction upon the footing of the pathway being a private one, but that suit, which was ultimately taken up on second appeal to the High Court, was unsuccessful, and the defendant's plea that the pathway in question was a public one was substantiated.

Pending the hearing of the second appeal a second application was made under s. 133 for the removal of the obstruction, but the Deputy Magistrate, by an order on the 8th September 1883, refused to interfere, upon the ground that there was no likelihood of a breach of the peace, and that the question as to whether the path was a public or private one was still pending before the High Court. Against this order the applicant moved the High Court, but without success, as the Court refused to interfere till the appeal then pending was decided.

1885

MAKHAN LAL SAHA v. MAKHAN CHORA SAHA.

The appeal was heard on the 6th June 1884 and resulted in a decision that the pathway was a public one.

The present application was then made, and an order was issued calling upon the opposite party to show cause why the obstruction should not be removed. The opposite party appeared and filed a written statement, questioning the right of the Magistrate to entertain the matter in the face of the two previous orders passed by officers holding concurrent jurisdiction with himself, and also on the ground that there was no likelihood of a breach of the peace, and that the proceeding was therefore not justified in law. The Magistrate overruled the said objection, holding that a likelihood of a breach of the peace was not a necessary condition precedent to action being taken under s. 133, but upheld the other objection and refused to pass any order in the matter.

Against that decision the petitioner now applied to the High Court under its revisional powers.

Baboo *Ashutosh Dhur* and Baboo *Ambica Churn Bannerjee* for the petitioner.

Baboo *Ambica Charan Bose* for the opposite party.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follow:—

TOTTENHAM, J.—It appears to me that the Deputy Magistrate was mistaken in supposing that he was precluded from taking up this case by reason of the decisions of his predecessors. The question was whether the obstruction complained of had been erected in a public way. On the first occasion, when an application was made to the Magistrate, it seems that no enquiry was instituted, that is no judicial enquiry; but the Magistrate simply inspected the place, and upon that inspection determined that the way was not a public way, and therefore refused to interfere. Thereupon the complainant went to the Civil Court, and attempted to show that the way was a private one, and that he was specially hindered by the obstruction. In the Civil Court he failed upon the ground that it was a public way, and that he had not made out a case sufficient to entitle him to relief in the Civil Court.

1885

MAKHAN LAL SAHA v. MAKHAN CHORA SAHA.

In the meantime, while the decision of the Civil Court was under appeal, the complainant applied again to the Magistrate upon the strength of the finding of the Civil Court that the way was a public one. The Magistrate then declined to interfere, not absolutely, but upon the ground that the civil suit was still pending, as well as upon the ground that his predecessor had already held that the way was not a public one. Upon the civil proceedings being terminated by the decision of a second appeal to this Court, the petitioner again applied to the present Magistrate. The Magistrate now thinks that, notwithstanding the decision of the Civil Court, he is precluded from interfering, because his predecessor thought that way was not a public one. Thus it appears that the petitioner is defeated in the Criminal Court, because the way is not a public one, and in the Civil Court because it is a public way. We think that the Magistrate is bound to make an enquiry notwithstanding the decisions of his predecessors. The last of these two decisions was upon the ground, partly that there were civil proceedings still pending, and partly that there had already been a decision by the Magistrate. The first decision of the Magistrate strictly speaking was not a decision at all, but simply a dictum on inspection of the place. It is impossible for any Magistrate, without taking evidence, to say whether a road is a public thoroughfare or not.

Under the circumstances we think that the rule must be made absolute, and the Magistrate directed to come to a decision whether or not the way is a public one; and, if so, whether the obstruction raised should be removed. The matter of the removal of the obstruction is one entirely in his own discretion.

GHOSE, J.—I am of the same opinion. It appears to me that neither on the first, nor on the second occasion did the two previous Deputy Magistrates hold any judicial enquiry in the matter of the complaint made before them in accordance with the provisions of s. 133 of the Criminal Procedure Code. That being the case, neither the first nor the second order operates as a bar to the Deputy Magistrate enquiring into the complaint upon the present occasion.

Order set aside.