

1884
 AMIR
 HASSAN
 KHAN
 v.
 SHEO BAKSH
 SINGH.

Commissioner exercises the same powers as the High Court—
 “may call for the record of any case in which no appeal lies to the High Court if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested and may pass such order in the case as the High Court think fit.” By s. 92 of Act XII of 1879 that section was amended by the insertion after the words “so vested” of the following words, “or to have acted in the exercise of its jurisdiction illegally, or with material irregularity.” The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and, even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

Their Lordships, therefore, think that under s. 622 of Act X of 1877, as amended by s. 92 of Act XII of 1879, the Judicial Commissioner had no jurisdiction in the case. Under these circumstances their Lordships will humbly advise Her Majesty to allow this appeal, and to reverse the judgment of the Judicial Commissioner, and to order the respondent to pay the costs incurred before the Judicial Commissioner. He must also pay the costs of this appeal.

Solicitors for the appellants: Messrs. Watkins & Lattey.

CRIMINAL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

1884
 October 11.

BASARUDDIN BHUIAH (COMPLAINANT) v. BAHA RALI (OPPOSITE PARTY).^o
Right of way used by the public—Public right of way—Criminal Procedure Code, Act X of 1882, ss. 133, 134, 135, 136, 137.

The powers embodied in ss. 133, 134, 135, 136, 137, of the Criminal Procedure Code, with regard to the obstruction of public ways, are not intended to be exercised where there is a *bond fide* dispute as to the

^o Criminal Reference No. 144 of 1884, made under s. 428 of the Code of Criminal Procedure, by W. H. Page, Esq., Officiating Sessions Judge of Dacca, dated the 8th of September 1884, against the order of the Deputy Magistrate of Munshigunge, dated the 1st of August 1884.

existence of the public right. Where there is such a dispute, the Court should pass no order under those sections until the public right has been established by proper legal proceedings, civil or criminal.

1884

BASARUDDIN
BHUIAH

v.

BAHAR ALI.

THIS was a reference made by the Sessions Judge of Dacca to the High Court under s. 488 of the Criminal Procedure Code.

It appeared that one Sheikh Basaruddin presented a petition to the Deputy Magistrate of Munshigunge complaining that Bahar Ali and others had obstructed a public thoroughfare; the Deputy Magistrate ordered an enquiry to be held by a resident of the neighbourhood, and on his report passed the following order: "Notice to issue to the persons complained against under s. 133 of the Civil Procedure Code to remove the obstruction, or show cause within seven days."

In accordance with this order two persons, Bahar Ali and Karim, appeared to show cause; and the Deputy Magistrate, after recording the evidence, found that about a year previous to the complaint Bahar Ali had raised an objection to the village cattle crossing the *khal* at his *ghât*; that in consequence of the objection the zemindary amlah had come to the *ghât* and had given the villagers a new *ghât*, viz., that of Karim; that Karim had now obstructed his *ghât*, so that the complainant and his fellow-villagers were unable to take their cattle across the *khal* either at the *ghât* of Bahar Ali or that of Karim. He further found that the *ghât* of Bahar Ali was a public thoroughfare until a year ago; but that the disuse of a public thoroughfare for a year only, would not deprive the complainant and his fellow-villagers of the right of using it, and came to the conclusion that the obstruction made by Bahar Ali was illegal.

The order recorded by the Deputy Magistrate, after coming to the above conclusion on the facts, was—"the order against Karim is cancelled. I make the order against Bahar Ali absolute, under s. 137 of the Procedure Code."

The Sessions Judge was of opinion that this order was bad in law, because a road through the land of a private person, given up a year ago in pursuance of an arrangement made by common consent of the villagers, could not be said to be a public

1884 thoroughfare, and that, therefore, the Deputy Magistrate had no jurisdiction. He further was of opinion that the limit of time specified in s. 147 should have been applied; and that Deputy Magistrate should have referred the parties to the Court. He, therefore, referred the case to the High Court.

BASARUDDIN
BHUIAH
v.
BAHAR ALI.

No one appeared on the reference.

The order of the Court was delivered by

WILSON, J.—We think the order of the Deputy Magistrate cannot be supported. It has been more than once held by the Court that the powers now embodied in ss. 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a *bona fide* dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, civil or criminal.

Order reversed.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

LEIU TU AND SIX OTHERS (PETITIONERS) v. QUEEN EMPRESS.*

* 1884
October 18. *Misdirection of Jury—Jury trial—Burmah Courts Act of 1875, s. 80—Reference to High Court.*

Three persons, who were attacked and wounded in an affray, informed the police on the same day that the persons who had attacked them were A, B, and C. Eighteen days afterwards the same complainants gave to the Magistrate inquiring into the case the names of four other persons whom they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the additional Recorder of Rangoon and a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by the prosecutors until after eighteen days had passed over. The prisoners were convicted.

Held, that the Additional Recorder misdirected the jury; that under the circumstances the misdirection prejudiced the four persons last accused; and that the verdict must be set aside as far as they were concerned.

* Criminal Reference No. 2 of 1884, made under s. 80 of the Burmah Courts Act, by the Special Court of British Burma, consisting of the Judges, W. E. Ward, Esq., and R. S. T. McEwen, Esq., dated September 15th, 1884, against the order of the Additional Recorder of Rangoon.