

1886
 GIRISH
 CHUNDER
 CHOWDHRY
 v.
 ABDUL
 SELAM.

those cases, we should be inclined to hold that the plaintiff should not be considered to have attained his majority when the plaint was filed.

We reverse the decision of the lower Appellate Court and remand the case to that Court to be decided as between the plaintiff and the defendant No. 5. Costs as between the plaintiff and the defendant No. 5 will abide the result.

The defendants Nos. 1 to 4 must pay the costs of the plaintiff in this appeal.

H. T. H.

Appeal allowed and case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886
 September 8.

KHODABUKSH MUNDUL AND OTHERS (DEFENDANTS) v. MONGLAI
 MUNDUL AND OTHERS (PLAINTIFFS).

*Criminal Procedure Code, Act X of 1882, s. 133—Removal of Nuisance—
 Public way—Suit for declaration of right and confirmation of possession—Cause of Action.*

On the 6th of July 1882 the Joint Magistrate of Krishnagar, on a complaint made by *A*, ordered *B* to demolish a cow-shed which he had built some months previously, the land on which the cow-shed had been built being part of a public way. Thereupon *B* brought a suit against *A* for a declaration of his right to enjoy the land as his private property and for confirmation of possession. The plaint did not allege that *B*, in causing the Magistrate to initiate proceedings against *A*, had been actuated by malicious motives and had acted with the intention of wrongfully injuring the plaintiff.

Held, that the suit would not lie. *Mutty Ram Sahoo v. Mohi Lal Roy* (1), dissented from.

THE facts of this case are stated as follows in the judgment of the Court of first instance, which was delivered on the 28th of March 1883 :—

“ The plaint states that the bit of land defined in the plaint being about 21 cubits in length and 16 cubits in breadth, appertains to the jammai holding of plaintiffs ; that they are in exclusive

* Appeal from Appellate Decree No. 770 of 1885, against the decree of Baboo Nuffer Chandra Bhatta, Subordinate Judge of Nuddea, dated the 19th of January 1885, reversing the decree of Baboo Uma Kant Chatterjea, Munsiff of Krishnagar, dated the 28th of March 1883.

(1) I. L. R., 6 Cal., 291.

possession of the same ; that in Chait, 1288, they erected a cow-shed on the same without any objection being raised by any one ; that on the complaint of the defendants to the effect that the land forms a part of the public way, the Joint Magistrate of this place issued, on the 6th July last, an order requiring plaintiffs to demolish the cow-shed within 15 days ; that as the land is not a part of the public way, and as the same is the private property of plaintiffs, this suit is instituted for declaration of their right to the land and confirmation of possession.

“ Defendants plead that this suit being instituted virtually to set aside the order of the Criminal Court is not maintainable ; that the suit cannot be heard in the absence of Government and of the landlord of the place, and that the land in suit is part of the public way. They also plead limitation.”

The following issues were framed by the Court : —

- (1). Whether this suit is maintainable in spite of the finding of the Magistrate that the land in suit is a part of the public way?
- (2). Whether there is a defect of the necessary parties to this suit ?
- (3). Whether this suit is barred by limitation ?
- (4). Whether the disputed land is the property of plaintiffs, and whether they were in exclusive possession of the same ?

The Court of first instance decided the first issue in the plaintiffs' favour on the authority of *Mutty Ram Sahoo v. Mohi Lal Roy* (1). He also found the second and third issues in the plaintiffs' favour, and in regard to the fourth issue he found that a portion of the land claimed was the property of the plaintiffs and in their exclusive possession. In respect of this portion he gave the plaintiffs a decree. Both parties appealed from this decision to the Court of the First Subordinate Judge of Nuddea, who found the fourth issue in plaintiffs' favour, and gave them a decree for all the land claimed by them. The defendants appealed to the High Court on the following grounds, amongst others,—

- (1). For that the Courts below are wrong in omitting to try the real question in the case whether the land in dispute formed a part of the public thoroughfare, and if it was so, whether the Civil Court had jurisdiction to entertain the suit.

(1) I. L. R., 6 Calc., 291.

1886

KHODA-
BUKSH
MUNDUL
v.
MONGLAI
MUNDUL.

(2). For that the Courts below should have held that the present suit was not maintainable for defect of necessary parties,

Baboo *Kuloda Kinkur Roy*, for the appellants.

Baboo *Jugut Chunder Bunerjee*, for the respondents.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

On information given by the defendants the Magistrate proceeded under Chapter X of the Code of Criminal Procedure, and directed the plaintiffs to remove a hut that they had erected on land found by him to be a public thoroughfare. The plaintiffs now sue for a declaration of their title and confirmation of their possession of the land as their private property as against these defendants.

The defendants pleaded that the suit will not lie to set aside the order of the Magistrate that the land forms part of a public thoroughfare.

Both Courts have relied on the judgment in the case of *Mutty Ram Sahoo v. Mohi Lal Roy* (1), in which it was held that a Civil Court can, irrespective of such an order by a Magistrate, try the question whether the land, which formed the subject of that order, is private property and not a thoroughfare or public place as between the parties to such suit and those who claim under them. Field, J., one of the learned Judges who decided that case, seems to have gone even further, but White, J., limited the operation of the order of a Civil Court to the parties before it, and we cannot accept that case as an authority beyond that. But we are of opinion that the law laid down in that case is not in accordance with previous decisions on the point. Those cases were not referred to in the argument raised or in the judgments of the learned Judges.

In *Meechoo Chunder Sircar v. Ravenshaw* (2), Couch, C.J., and Kemp, J., held that, the matter having been tried in the manner provided by the Code of Criminal Procedure, "the plaintiffs have had what the law gives them, and are not at liberty to have the question tried again. The consequence of that would be that there might be another order by the Magistrate, then another suit, and so on."

(1) I. L. R., 6 Cal., 291.

(2) 11 B. L. R., 9 : 19 W. R., 345.

No doubt in that case the question between the plaintiff and the Magistrate had been referred to a jury, who had found that the land in suit was part of a public thoroughfare, but such reference to a jury would be entirely optional with a person in the position of the plaintiffs, and because he had not applied for a jury and preferred to show cause against the Magistrate's order, the finality of that order after termination of the proceedings would be none the less binding. *Rooke v. The Peari Lall Coal Co.* (1), is an authority in the same direction, and in *Chinta Monee Bapoolee v. Digambur Mitter* (2), it was held that there would be no cause of action against persons who cause the Magistrate to initiate proceedings unless it could be shown that they "were actuated by malicious motives and with the intention of wrongfully injuring the plaintiff."

If the orders of the lower Courts be maintained, and it be held in accordance with the precedent cited that, as against defendants the plaintiffs had established a private right of property, and if the plaintiffs were again to erect a building on that spot the Magistrate would not be precluded from acting as before or even enforcing his previous order which is still in force. If therefore a decree in the present suit is inoperative as against the Magistrate (and the decision in *Mutty Ram Sahoo v. Mohi Lal Roy* goes to that extent) the interminable procedure condemned by Couch, C.J., in *Meechoo Chunder Sircar v. Ravenshaw* would result. But upon the authority of the case of *Chinta Monee Bapoolee v. Digambur Mitter* reported in 10 W. R., 409, no case would lie against the defendants before us. These cases are not

referred to in the decision of *Mutty Ram Sahoo v. Mohi Lal Roy*, we are therefore not embarrassed with that precedent. We observe that the Code of Criminal Procedure, 1882, passed before that judgment was delivered, in s. 133 declares that no order made by a Magistrate under that section shall be called in question in any Civil Court.

The suit must therefore be dismissed with costs in all Courts, the orders of both the lower Courts being set aside.

O'K.

Orders set aside and suit dismissed.

(1) 3 B. L. R., Ap. 43 : 11 W. R., 434.

(2) 10 W. R., 409 : S. C. 2 B. L. R., S. N. 15.

1886
KHODA-
BUKSH
MUNDUL
v.
MONGLAI
MUNDUL.