

feri facias taken out before the Act. The object of the Act, as stated in the preamble, is to remove doubts as to the applicability of certain portions of the Bombay Land Revenue Code to *táluk-dárs'* estates and to make provision for the revenue administration of the same, and if the sanction of Government had been required by the Act only to insure that object, it might be said that the necessity for the sanction would equally arise where the alienation was in execution of a decree; but the language of the Legislature clearly leaves it absolutely in the hands of Government to refuse such sanction, and thus to prevent the alienation being carried out without assigning any reason whatever; and we think that, without clearer proof than is afforded by the language of the Act, we ought not to conclude that it was intended to be exercised when a decree of the civil Court had already before the Act directed that the property should be sold. The case of *Pryor v. Pryor* ⁽¹⁾ is important as showing how unwilling the Court is to construe an Act in such a manner as to take away an existing right under an unexecuted decree. In that case the Act only affected the particular course of procedure after decree in a partition suit, yet the Court refused to give it a retrospective effect.

We must, therefore, reverse the order of the Court below, and direct the Court to give the necessary instructions to the Collector in accordance with the above remarks.

Order reversed.

(1) L. R., 10 Ch., 469.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, (ORIGINAL DEFENDANT), APPELLANT, *v.* JETHA'BHA'I KA'LIDA'S, (ORIGINAL PLAINTIFF), RESPONDENT.*

Declaratory decree—Declaration of title to land—Specific Relief Act (I of 1877), Sec. 42—Criminal Procedure Code (X of 1882), Sec. 133—Order for removal of an obstruction standing upon certain land—Ownership of such land—Effect of Magistrate's order under Section 133—Jurisdiction of Civil Court after order made.

A Magistrate made an order against the plaintiff, under section 133 of the

* Second Appeal, No. 806 of 1890.

1892.

KALLAN
MOTI
v
PÁTHUBHÁI
FÁ'LJIBHÁ'I.

1892.

April 7.

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL

JETHA'BHA'I
KA'LIDA'S.

Criminal Procedure Code (Act X of 1882), for the removal of a certain *otta* standing in front of the plaintiff's shop as an obstruction to the public way. The plaintiff, thereupon, brought this suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood was his property and not that of the Government.

Held, that the public roads being vested by section 37 of the Land Revenue Code (Bombay Act V of 1879) in the Government of Bombay, they were "interested to deny" the plaintiff's title to the land, and, therefore, under section 42 of the Specific Relief Act (I of 1877), the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and the plaintiff was not called upon to wait until the Government had taken possession of the land.

It was contended that the jurisdiction of the Court to make the declaration prayed for was taken away by the last clause of section 133, which provides that "no order made by a Magistrate under this section shall be called in question in any civil Court."

Held that the Magistrate's order under this section is not a conclusive determination of the question of title.

THIS was a second appeal from the decision of E. M. H. Fulton, District Judge of Ahmedabad.

Suit for a declaration of ownership. The plaintiff sued for a declaration that certain land on which his *otta* stood was his property, and not that of the Government. He alleged that this *otta* had stood in front of his shop for sixty years; that a notice had been issued to him under section 133⁽¹⁾ of the Criminal Procedure Code (Act X of 1882); that, in reply to the notice, he had stated that the land underneath the *otta* was his own, and that notwithstanding the said reply he had been ordered by the Magistrate to remove the *otta*.

The defendant pleaded that the suit was not maintainable, as section 133 provided that no order duly made under it by a Magistrate shall be called in question in a civil Court, and that the land was not the property of the plaintiff.

The Assistant Judge of Ahmedabad (Dayarám Gidumal) found that the suit was not barred under section 133 of the Criminal Procedure Code, but dismissed it on the ground that the land was not the property of the plaintiff.

⁽¹⁾ Section 133 empowers a Magistrate to require the removal of an obstruction from any public place.

The Assistant Judge made the following remarks in his judgment :—

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
JETHA'BHAI
KA'LIDA'S.

“Section 133 of the Criminal Procedure Code says: ‘No order duly made by a Magistrate *under this section* shall be called in question in any civil Court.’ The order which can be made under this section is merely a conditional order, which after a certain procedure can be made absolute under section 137, Criminal Procedure Code. The plaintiff complained of the absolute order, but his amended plaint raises merely a question of title between the plaintiff and Government without impugning the legality of the magisterial order. The Calcutta High Court has recently discussed the question in all its bearings in a Full Bench judgment (*Chuni Lal v. Ram Kishen*⁽¹⁾), and reviewed all the authorities. That judgment says: ‘In the Bombay Presidency no difficulty arises, because by section 37 of the Bombay Act V of 1879 the soil of the public roads is vested in the Secretary of State. Accordingly every question of highway becomes of necessity a question of conflicting titles to the soil, and can be treated as such.’ And, again, ‘in this Court White and Field, JJ., in *Mutty Ram Sahoo v. Mohi Lal Roy*⁽²⁾ held that the Magistrate’s decision did not preclude a civil Court from enquiring into the question of title. And in the Bombay High Court this view has been repeatedly accepted both under the earlier and the present Acts. It was taken by Melville and Kembal, JJ., in *Lalji Ukheda v. Jowba Dowla*⁽³⁾; by Westropp, C. J., and F. Melville, J., in *Nilkanthapa Malkapa v. Magistrate of Sholapur*⁽⁴⁾; and by Melville and West, JJ., in *Balaram Chaturkalul v. Magistrate of Taluqa Igatpuri*⁽⁵⁾.’ The suit is, therefore, clearly maintainable.”

The plaintiff appealed, and the District Court reversed the decree and allowed the plaintiff’s claim, holding that plaintiff was proved to be the owner of the ground in dispute.

In his judgment the District Judge observed: “It is not

(1) I. L. R., 15 Calc., 460, at pp. 467 and 470.

(2) 8 Bom. H. C. Rep. (A. C. J.), 94.

(3) I. L. R., 6 Bom., 670.

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

(5) I. L. R., 6 Bom., 672.

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
JETHA'BHA'I
KA'LIDA'S.

disputed that at the time when the Magistrate issued his order for the removal of the *otta* as an obstruction to the public way, the ground on which it stood was in possession of the plaintiff. The burden, therefore, of showing that he was not the owner, rested, under section 110 of the Indian Evidence Act, on the defendant, unless the effect of the magisterial order was such as to shift it on to the plaintiff. The learned Assistant Judge appears to have considered that it had that effect, but I am unable to agree with him. He argued, I think, very correctly that the words in section 133 of the Criminal Procedure Code, 'No order duly made by a Magistrate under this section shall be called in question in any civil Court,' were no bar to this suit, in which it is not sought to set aside the Magistrate's order, but to obtain a declaration of title against the Secretary of State. It might, no doubt, have been argued that the plaint, which merely alleges that the plaintiff had received notice from a Magistrate to remove his *otta*, revealed no cause of action against the Secretary of State, who was in no way responsible for the Magistrate's orders. Possibly the suit might have been successfully resisted on the ground that it was premature, and that until the *otta* had actually been removed and the ground thrown into the road—or, in other words, until the Secretary of State had obtained possession under section 37 of the Land Revenue Code,—there could not be any cause of action against him, as Government in its executive capacity had no control over the magisterial order, and, therefore, could not be liable to any suit until he had taken possession of the land from which the Magistrate had directed the plaintiff to remove his *otta*. But this defence was not raised. * * The defence as put forward was understood to mean that under section 133 the Magistrate's order was conclusive as to title, and would continue so after it had been carried out, and the ground has fallen into the possession of the defendant.

“Assuming, then, that the defendant accepted the Magistrate's order as giving Government a right to possession, and did not question the existence of a cause of action otherwise than on the contention that the order of the Magistrate conclusively established his title to the ground, I think the Assistant

Judge was right in holding that the suit could be maintained. The decisions which he has quoted show clearly the opinions of the High Courts of Bombay and Calcutta on the subject, and satisfy me that section 133 is not a final determination as between the person complaining of the interference with his enjoyment of ground in his possession and the Secretary of State on the question of title. It, therefore, remains to consider what effect it has in determining this question. Probably the existence of the order is relevant under section 42 of the Evidence Act, but it is not in itself, I think, sufficient to shift the burden of proof from the defendant to the plaintiff, who was admittedly in possession."

The defendant appealed to the High Court.

Ráo Sáheb *Vásudeo Jagannáth Kirtikar* (Government Pleader) for the appellant :—Section 133 of the Criminal Procedure Code (Act X of 1882) expressly debars a civil Court from calling in question the propriety of an order made by a Magistrate under that section. Although the present suit is brought ostensibly for the declaration of the respondent's title to the ground underneath the *otta*, still the real object of it is to reverse the Magistrate's order. The respondent is indirectly attempting to do what the law forbids him to do directly. Even if this Court makes the declaration asked for, the Magistrate's order for the removal of the *otta* stands untouched. This Court cannot interfere with that order, or the Magistrate may pass a fresh order under the section after the declaration. In such a case the decree of a civil Court would give no relief.

[SARGENT, C. J.:—A party may after getting a declaratory decree go to the Magistrate and pray for a cancellation of his order, because the section proceeds on the assumption that the ground forms part of a public road.]

We submit that a Magistrate has no power to cancel his own order. There was no clause in the former Criminal Procedure Code similar to the clause in section 133; nevertheless the rulings in *Burodu Pershád Moostafee v. Gora Chand Moostafee* ⁽¹⁾ and

(1) 12 W. R., 160 Civ. Est.

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
JETHA'DHAR
KA'LIDA'S

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
v.
JETHA'BHA'I
KA'LIDA'S

Meechoo Chunder v. J. H. Ravenshaw⁽¹⁾ show that the jurisdiction of civil Courts in such matters was barred: *a fortiori* it is barred now when there is a specific clause to that effect in section 133. *Khodabuksh Mundul v. Monglai Mundul*⁽²⁾ supports our contention. The rulings of the Bombay High Court referred to by the Assistant Judge were under the old Act, and the present question was not raised and discussed. The Full Bench decision in *Chuni Lall v. Ram Kishen*⁽³⁾ is against us, but it proceeds upon the assumption that the Bombay cases were decided under the present Code. We further submit that the respondent has no cause of action against the defendant. It is the order of the Magistrate that is prejudicial to him, and not any act of the Executive Government. In any event, his cause of action has not yet arisen, because the ground is not yet closed by the removal of his *otta*. The suit is, therefore, premature. The lower Appellate Court wrongly placed the burden of proof upon us. The order of the Magistrate raises a presumption in our favour—*Navalchand v. Amichand*⁽⁴⁾.

Chimanlal Hirálal Setalvad, for the respondent, was not called upon.

SARGENT, C. J.:—The plaintiff in this case seeks for a declaration that certain land on which he had erected an *otta* was his property and not that of Government. It appears that the Magistrate had made an order, under section 133 of the Criminal Procedure Code (Act X of 1882), for the removal of the *otta* as an obstruction to the public way. The public roads are vested by section 37 of Bombay Act V of 1879 in the Government of Bombay, who are thus “interested to deny” the plaintiff’s title to the land and, therefore, under section 42 of the Specific Relief Act (I of 1877) the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land. Under the circumstances, it appears to us to be a proper case for a declaratory decree, as we cannot think that the plaintiff was called upon to wait until the Government had taken possession of the land. These objections, moreover, as

(1) 19, W. R., 345 Civ. Rul.

(2) I. L. R., 14 Calc., 60.

(3) J. L. R., 15 Calc., 460.

(4) P. J. for 1889, p. 259.

the District Judge remarks, were not expressly taken in the first Court.

It has, however, been throughout contended that the jurisdiction of the Court is taken away by section 133 of the Criminal Procedure Code, which provides that "no order duly made by a Magistrate under this section shall be called in question in any Civil Court." We entirely agree with the lower appeal Court that the decisions of this Court, as well as of the Calcutta High Court, are distinct authorities that the Magistrate's order is not a conclusive determination of the question of title—*Ohani Lall v. Ram Kishen* (1).

With respect to the *onus* of proof we agree with the District Judge that the existence of the Magistrate's order does not of itself shift the *onus* of proof from the defendant to the plaintiff who is in possession. It was for the Court itself to appreciate the whole of the evidence and to come to a conclusion whether it was such as to rebut the ordinary presumption of ownership derived from possession. The District Judge held that it did not rebut it, and was, therefore, right in making a declaration that the plaintiff was the owner of the land on which the *otta* stands. We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) L. L. R., 15 Calc., 460.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

SWA'MIRA'O, APPLICANT, *v.* THE COLLECTOR OF DHA'RWAR, OPPONENT *

Land Acquisition Act (X of 1870)—Assessor—Disqualifications in an assessor—Bias—Objections to assessor's appointment not raised in time—Waiver—Estoppel—Minor—Assessor not competent to act as witness.

Certain land belonging to the applicant, a minor, was taken by the Municipality of Hubli under the Land Acquisition Act (X of 1870). The Mámlatdár of Hubli,

1892.

THE
SECRETARY
OF STATE
FOR INDIA
IN COUNCIL
".
JETHA'BHA'I
KA'LIDA'S.

1892.

June 20,