1869

MOHAMED AZSSAR ALI v. NASSIR MOHAMED.

regards the only lands of which he admitted and the Court has found possession, that they were rent-free, it was on the plaintiff to start his case by shewing that he had before received rents from those lands. This judgment of the lower Appellate Court seems to us to be in strict accordance with *Hurryhur Mookerjee* v. *Gomanee Kazee* (1), and is correct. *Beebee Ashruffunnissa* v. *Umung Mohun Deb Roy* (2), *Nehal Chand Mistree* v. *Hurry Persaud Mundul* (3), and *Rajah Suttochurn Ghosal* v. *Mohesh Chunder Mitter* (4) on which the pleader for the special appellant relies, are all cases in which the defendant held lands of two descriptions, principally mal, but partly alleged lakhiraj; and in these cases it was held that as the allegation of lakhiraj was evidently an after-thought, and as the greater portion of the lands was admittedly mal, so it was for the defendant to prove his allegation that the balance of the lands he held was lakhiraj. But without stating whether we concur in those decisions that is not the case here. Hence the Judge has found that the ryot has relinquished all the lands that were mal, and that the only land that he now holds are those which he alleges to be lakhiraj.

* * * * * * * *

We therefore dismiss this special appeal with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

PYARILAL AND Co. (PLAINTIFFS) *v.* E. G. ROOKE (DEFENDANT)*

1869 *July* 23

Public Road—Criminal Procedure Code s. 320—*Finding of Civil Court.*

A magistrate's finds, under section 320 of Criminal Procedure Code, on a dispute between R. and P., that the public have been in the habit of using a certain road over P.'s land, for carts, &c., and accordingly directs it to be opened (*i. e.* by removal of obstructions). P. brings a regular suit against R. in which the issue

* Application for Review, No. 174 of 1869, against the judgment of Mr. Justice L. S. Jackson and Mr. Justice Markby, dated the 5th May 1869, in Special Appeal No. 3094 of 1868.

(1) Mar., 523.
(2) 5 W. R., Act X. Rul, 48.
(3) 8 W. R., 183, 184
(4) 3 W. R., Civ. Rul., 178

1869

PYARI LAL & Co. v. E. G. ROCKE

is, whether the road is public or not: this is found in the negative, except as to a foot-path; costs are apportioned, and the cart-way is ordered to be stopped. R appeals, on the merits, and P. files a cross-objection: the first judgment is affirmed. On special appeal by R (as to the mode of dealing with the proofs)—*Held*, the finding of the Civil Court was beyond its competence, and the suit was not such as contemplated by section 320, *viz.*, to test the right of 'exclusive possession.'

THE plaint in this case, as amended by order of Court, states plaintiffs' possession of the land scheduled, under a patta; avers that there is not, nor ever was, any road over the land for carts and animals, either for the public, or for defendant; that defendant being desirous illegally to open a new road complained to the Magistrate, who has thereupon opened out a road, and thereby plaintiffs are injured. Plaintiffs ask, that this new road be closed. The cause of action dates from the Magistrate's order.

The defendant, in his written statement, alleges that the roads are ancient, *i. e.* open for more than twelve years, and in use, by the public, for carriages and horses and men on foot. He annexes to this statement a rubakari of the Sessions Judge which in effect affirms the finding of the Magistrate.

The issue merely contrasts the conflicting statements as to the existence of a public road.

The first Court found, in a modified form, for the plaintiffs *viz.*, "that the suit be decreed with this qualification, that the "defendant shall have the use of the road in dispute through "which only men can pass, and not of the road through which "carts can pass, and that three parts of the costs of the plaintiffs "shall be paid by the defendant with interest, and one half the "costs of the defendant be paid by plaintiffs with interest."

There is, then, a supplemental order, on plaintiffs' petition, that the cart-way be "stopped by the assistance of the Court, "so as to prevent defendant's carts passing through the same."

On appeal by defendant, and cross-appeal, the judgment was affirmed by the Subordinate Judge. Defendant appealed specially, taking objection to the mode in which the evidence had been dealt with by the lower Appellate Court.

The special appeal was argued, and judgment given on the 5th May (1), on the supposition that the Magistrate had acted

(1) 3 B. L. R. Appx., 43.

under the 'Local Nuisance' clauses of the Criminal Procedure Code (chapter XX), and not merely as conservator of the peace, under chapter XXII.

An application was now heard for review of the former judgment. On the first ground of review being opened, *viz.* the mistake as to the character of the jurisdiction exercised by the Magistrate, both Judges intimated, that it was unnecessary to dwell upon that, as the conclusion come to by the Court would have been the same, had they treated the Magistrate's order as made under section 320 : upon which footing, therefore, the case was now argued.

Mr. *Montriou* (Mr. *Sandal* was with him) for petitioner.—This action is brought to try the right to a road or way over plaintiffs' land, claimed by the defendant. The defendant applied successfully, for police protection in use of the road pending determination of the right. Instead, therefore, of plaintiffs suing defendant for a trespass, or, defendant suing plaintiffs for obstruction of the way or for interference with defendant in user of the way, the present form of remedy is of course, consequent on the Magistrate's order. We now ask for 'the decision of a competent Court,' as section 320 contemplates and dictates. [MARKBY, J.—But what has the Civil Court got to do with the establishment of a highway ? JACKSON, J.—The Magistrate finds that plaintiffs have not exclusive possession, and remits them to a Civil Court to contest the defendaut's right. The issue of 'highway or no highway' scarcely seems the right one.]

A right of way is, in its nature, distributive and divisible. It may be public or priviate; it may be for carriages, for horsemen or a mere foot-path. The Civil Court, when trying the existence and character of the easement, cannot refuse to find the highway, if proved. Although not a mere private right, nor, merely as a highway, subject of a Civil suit, yet, it involves private rights, and must be civilly triable as a justification, *viz.* a right to use another's land. The plaint and issue are both unskilfully drawn ; but the grievance is stated with sufficient certainty, there is a material finding, which defines and limits the way,

1869

PYARI LAL & Co. v. E. G. ROOKE.

as a public foot-path, and the judgment is, substantially, a declaration of right to that effect. The supplemental order may, perhaps, be quashed as irregular. No question of jurisdiction arises: the existence and character of the easement claimed has been effectively tried and decided by a competent Court. The only speciality in the case is that before adverted to, *viz.*, that the successful effort of the defendant in moving the police, has necessarily substituted that very effort and its consequence, the order under section 320, for some private act of trespass or of obstruction, which must otherwise have been the cause of action, upon which the claim of right of way would then have been adjudicated; as it now has been, *de facto* and *de jure*.

Baboo *Jaggadanand Mookerjee* (for the opposite party) was not called upon.

JACKSON, J.—It appears to me that we ought not to alter the judgment complained of in this case. It is now pointed out to us by the learned counsel who appeared for the petitioner that the order of the Magistrate was not pssed under section 308, but section 320 of the Code of Criminal Procedure. That section is in these words, "if a dispute arising concerning the "right of use of any land or water, the Magistrate within whose "jurisdiction the dispute lies, may enquire into the matter, and "if it shall appear to him that the subject of dispute is open "to the use of the public, or of any person, or of any class of "persons, the Magistrate may order that possession thereof shall "not be taken or retained by any party to the exclusion of the "public, or of such person, or of such class of persons, as the "case may be, until the party claiming such possession shall "obtain the decision of a competent Court adjudging him to be "entitled to such exclusive possession."

Now if we accept the argument of the learned counsel, that the effect of a decision by the Magistrate under section 320, is to alter the position of the parties in respect of their remedies in the Civil Court, or in respect of their right to bring an action, and if we take the finding, as we must take the finding of the Court below, in respect of the facts, then we find that this

1869

PYARI LAL & Co. v. E. G. ROOKE.

was a piece of land of which the plaintiff claimed to be entitled to the exclusive use. He denied that the public or any persons had any right whatever in any way to make use of the land in dispute. The Magistrate found, and the Civil Court has also found, that he was not entitled to such exclusive use, and that the public were entitled to walk over that road, and to use it as a foot-path. That being the case, I think the Magistrate's order was perfectly right; namely, that he was quite right in ordering that the possession should not be taken or maintained by this plaintiff to the exclusion of the public until the party claiming such possession shall obtain a decision adjudging him to be entitled to such possession.

Then what is the decision which the plaintiff would have to obtain for the purpose of getting rid of the effect of that order? The section shows that it was a decision adjudging him to be entitled to such exclusive possession. It is quite clear that the Court could not adjudge him to be entitled to such possession. The Court could indeed say that the suit was groundless; that the public was entitled to the right of way, a right to walk over that land; and that the Court could not deprive the public of that privilege. But if any person should go beyond the right which was found, that is, the right which the public had to walk over that land, and should take his carts over the land in dispute, and the plaintiff should be endamaged thereby, the plaintiff would have a right of action against such person for the trespass. I still think that the Civil Court in trying this suit went beyond its jurisdiction, and made an improper order.

I also think that we could not take the course suggested by the learned counsel, namely of correcting the error in point of form committed by the lower Appellate Court, and confirming merely its finding upon the issues, because neither of the issues was the issue contemplated by section 320, nor do I think was the lower Court competent to try the issue whether the road in the first was or was not a public road.

For these reasons I think our decision was right, and we ought not to interfere with it. This application must therefore be refused with costs.

1869

PYARI LAL & Co. v. E. G. ROOKE

MARKBY, J.—I am of the same opinion. My judgment in the former case in no way proceeded upon any distinction between section 308 and sections 318 and 320 of the Criminal Procedure Code. It proceeded entirely upon this ground, to which I still adhere, that the Civil Court has no jurisdiction to enquire into a public right *per se*. As ancillary to an enquiry whether a person has been injured in private capacity, it may enter upon such an enquiry; but obstructedly and otherwise than as collaterally to a suit arising out of a private injury, a Civil Court has no jurisdiction to enquire into a public right: and on this ground, and this ground alone, I would refuse this application.

Nor can I imagine by any possibility how such a suit as this can be looked upon as a proceeding to set aside the order of the Magistrate, and in some way or other to question the rightness or vagueness of the Magistrate's order. I must own that I do not understand such a suit, nor do I think that any such suit is contemplated or created by the sections of the Code of Criminal Procedure which have been referred to.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

NILMADHAB SING DAS AND OTHERS (DEFENDANTS) v. FATTEH CHAND SAHU (PLAINTIFF.)*

1899
July 26

Act XX. of 1866, *ss.* 17 *&* 49—*Unregistered Deed—Bye-bil-wafa or Deed of Conditional Sale—Admissibility in Evidence as a Covenant.*

A deed of bye-bil-wafa, or conditional sale, is a deed which, under section 17 of Act XX of 1866, requires registration before it can become admissible as evidence. But so far as it is a covenant or agreement for the repayment of the money lent on a particular day, it is not an instrument requiring registration; and therefore for such purposes notwithstanding section 49, it is admissible in evidence.

Mr. *R. E. Twidale* for appellant.

Mr. *J. S. Rochfort* and Baboo *Annada Prasad Banerjee* for respondent.

* Regular Appeal, No. 174 of 1868, from a decree of the Subordinate Judge of Bhagulpore, dated the 10th June 1868.