

cases quoted to us on the one side, and on the other decisions given by their Lordships in the Privy Council. We have carefully considered the terms of those decisions, and we cannot say that any of them are, to our minds, either directly or indirectly in point, and help us therefore to any right determination of the question before us. In our view of the case, we hold that, by the document relied upon, an absolute gift was, in so many terms, made to Rani Dhan Kunwar of the properties in question; that she enjoyed those properties under the gift; that it was whilst she was in enjoyment of such properties that she alienated a part of them; and that as the gift itself was not, in so many terms, or even indirectly, fettered by any restrictions, so it was a gift which entitled her to alienate the estates to the defendants, appellants before us.

In this view of the case, we reverse the decision of the Court below, and dismiss the plaintiff's suit with costs in both the Courts. Appeals, Nos. 237, 239, 245, 247, 255, 257, 259, 260, 264, and 273 are admittedly governed by the decision in this case; therefore, in those cases also we reverse the judgment of the Court below, and dismiss the plaintiffs' suits with costs of both the Courts.

[APPELLATE CRIMINAL].

Before Mr. Justice Bayley and Mr. Justice Markby.

THE QUEEN v. RAM CHANDRA MOOKERJEE.*

Act XXV of 1861, s. 62—Nuisance, Removal of—Power of Magistrate.

1870
May. 14.

Under section 62 of the Code of Criminal Procedure, a Magistrate has no power to issue an order, *ex parte*, to cut down trees, on the presentation of a party, supported by the report of the Police that the existence of the trees was a nuisance.

THE following reference was made by the Judge of the 24-Pergunnas, under section 434 of the Criminal Procedure Code :—

* Reference under Section 434, Act XXV of 1861, from the Sessions Judge of 24-Pergunnas, by his letter No. 57, dated the 30th April 1870.

1870
CHATTAR LAL
SING
v.
SHEWUKRAM,
alias
RAI DURGA
PRASAD.

1870

QUEEN
v.
RAM CHANDRA
MOOKERJEE.

“ I have the honor to submit the papers of a case in which Baboo Sama Charan Chatterjee, the Deputy Magistrate at Bashirhat, has sentenced one Ram Chandra Mookerjee to a fine of rupees 25, or simple imprisonment for one month, for disobeying an order issued under section 62 of the Criminal Procedure Code. I cannot interfere with the sentence, as the Deputy Magistrate has full powers ; but in my opinion the order should be set aside.

“ It appears from the record of the case, that, on the 4th December last, Utam Chandra Chatterjee complained to the Deputy Magistrate that some clumps of bamboos growing close to his house produced sickness by stopping ventilation, and were likely to cause injury to the house. The owner of the bamboos was Ram Chandra Mookerjee, and the petitioner produced a copy of an order passed by the Deputy Magistrate, in September 1866, by which Ram Chandra was desired to remove certain bamboos, growing near the house of the petitioner. On receipt of this petition, the Deputy Magistrate desired the Police to examine the spot, and report the facts.

“ On the following day the Police reported that the bamboos ought to be removed for police as well as for sanitary purposes ; and suggested that the owner might be directed to remove them, receiving compensation from Utam Chandra Chatterjee.

“ On the 10th January, the Deputy Magistrate issued an order purporting to be an order under section 62 of the Criminal Procedure Code, directing Ram Chandra to remove the bamboos within a month ; and threatening him with punishment in case of disobedience.

“ On the 28th January, Dinabandhu, the son of Ram Chandra, presented a petition on the part of his father, stated to be sick, in which he prayed that the Deputy Magistrate would visit the spot, and ascertain from personal inspection whether Utam Chandra had any reasonable ground of complaint. The order on this petition is, that the Deputy Magistrate had already visited the spot, and that a second inspection was unnecessary.

“ On the 11th February, the Deputy Magistrate held a proceeding, in which setting forth the order issued a month previously under section 62, and observing that it had not been obeyed, he

directed that a charge should be preferred against Ram Chandra under section 188 of the Pénal Code. 1870

“ On the 4th February, that is six days before the date of this proceeding, Dinabandhu had asked for the appointment of arbitrators, and the Deputy Magistrate, observing that the case could not legally be submitted to a jury, yet allowed him as a favour to name jurors. On the 14th he did name jurors, but it does not appear that any jury was appointed ; and on the 7th and 16th March; the Deputy Magistrate recorded evidence on the charge under section 188, and on the 23rd March passed sentence. QUEEN
v.
RAM CHANDRA
MOOKERJEE.

“ The Deputy Magistrate had no legal power to order the removal of the bamboos, and therefore he had no power to punish Ram Chandra for disobedience to it. It may be that the bamboos amount to a public nuisance, for I am satisfied that bamboos do injuriously affect the atmosphere under certain circumstances ; but it is evident from the order of the 4th February, that the Deputy Magistrate did not consider them to come within the provisions of Chapter XX of the Criminal Procedure Code. On the case, as it appears from this record, the Deputy Magistrate, when he issued the order under section 62, could not have been satisfied that Utam Chandra had reasonable ground for asking for the removal of the bamboos ; and might have left it to Utam Chandra to remove his own house, if he found the situation unhealthy. If one man erects a building which intercepts light and air from the dwelling of another, the latter has his remedy in the Civil Court, and not under section 62. Section 62 is a wide and dangerous provision of the law ; necessary it may be, but requiring to be watched, that it may not become an engine of oppression. It appears to me that the proceedings of the Deputy Magistrate in this case have been arbitrary and unjust, and I recommend that they be set aside *ab initio*.”

The following was the opinion of the High Court :

MARKBY, J.—In this case the Deputy Magistrate, having the full powers of a Magistrate, directed one Ram Chandra to cause

1870
 QUEEN
 v.
 RAM CHANDRA
 MOOKERJEE.

the removal of certain bamboos, because (as we gather), in the opinion of the Deputy Magistrate, they were injurious to the health of a neighbour who had complained to the Deputy Magistrate. The bamboos were growing on Ram Chandras own land. Some attempt was subsequently made to induce the Deputy Magistrate to proceed, not under section 62, but under section 308, and to appoint a jury. It is not very clear what steps the Deputy Magistrate took upon that application, but a jury was, in fact, never appointed. Subsequently, the bamboos not having been removed, proceedings for disobedience to the order of the Deputy Magistrate were taken against Ram Chandra, and he was sentenced to pay a fine of rupees 25. The case has been sent up to us by the Sessions Judge for consideration, with a view to its being set aside. The operation of section 62 has already been greatly restricted by the construction which this Court has put upon it in the case of *in the matter of Hari Mohan Malo v. Jai Krishna Mookerjee* (1). It was there held that, in any of the cases specified in section 308, the Magistrate had no discretion, but was bound to follow the more special directions of that section, which gave to the owner of the property an opportunity of showing cause before it can be removed or affected. The case before us is not one of those specified in section 308 ; this decision, therefore, does not apply.

It is impossible, however, to suppose that the Legislature intended to give to a Magistrate summary power to issue, without hearing the party concerned, an order such as that issued in this case, by which a man's property would be greatly injured, and could not be restored to its original condition, should it afterwards turn out that the Magistrate was wrongly informed, or that he had acted under a wrong impression. We think that the Magistrate has no power, under section 62, to issue any order which is by its very nature irrevocable. All that he has power to compel the owner of property to do is "to take certain order" with it. That does not appear to us to extend to an order to cut down a large quantity of trees.

(1) 1 B. L. R., A. Cr., 20.

We find that a somewhat similar view has been taken by this Court in the case of *Queen v. Sheikh Golam Darbesh* (1). 1870

We, therefore, consider the conviction was founded on an illegal order; and that the conviction as well as the original order of the Deputy Magistrate ought to be set aside, and the fine, if paid, restored. QUEEN
v.
RAM CHANDRA
MOOKERJEE.

[APPELLATE CIVIL].

Before Mr. Justice Bayley and Mr. Justice Markby.

HARGOPAL DAS AND ANOTHER (DEFENDANTS) v. RAM GOLAM SAHL AND OTHERS (PLAINTIFFS) AND ANOTHER (DEFENDANT).* 1870
April 23.

Partition, Expenses of—Ameen, Remuneration of—Lieutenant-Governor—Board of Review—Commissioner—Collector—Reg. XIX of 1814—Act XI of 1838—Act XI of 1859, ss. 5 and 33.

On 12th June 1867, some of the proprietors of an estate applied to the Collector for a partition under Reg. XIX of 1814. On the same day, the Collector issued a notice to all the shareholders, including the plaintiff in this suit, calling upon them to come in within one month, and shew such cause, and offer such objections, &c., as they should think fit. It did not appear that the plaintiffs did come in or did anything upon this. Similiar applications were made by other shareholders. On 19th August 1877, the Collector drew out a tabular statement, purporting to be in pursuance of section 4, Regulation XIX of 1814. In it was a column giving the shares into which the expenses of the partition were to be divided. On the same day, a notice was issued to the proprietors, ordering them to pay their respective quotas of the expenses accordingly. It was said by the defendants that the apportionment was confirmed by the Commissioner on the 20th January 1868. On the 6th March 1868, it was ordered by the Collector that a proclamation should be issued in accordance with paragraph 4 of section 5 of Act XI of 1859, directing the plaintiffs, as defaulters in two sums of rupees 251-3-2 and 9-9-6, to pay the Government revenue. On the 28th March, such proclamation was issued accordingly. Subsequently, one of the plaintiffs came in, and offered to pay all that was then due and outstanding. His application was rejected; and on the same day, the 8th April, the sale proceeded, and the whole interest of the plaintiffs was sold for rupees 16,900. The plaintiffs

* Regular Appeal, No. 271 of 1869, from a decree of the Officiating Subordinate Judge of Tirhoot, dated the 28th August 1869,

(1) I. B. L. R., S. N., 27.