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plaintiff) it was held by a Division Bench of two Judges of the High Court at Bombay (the Chief Justice, Sir Richard Couch, being one), that proceedings under section 308 are not Judicial within the meaning of section 404 of the Criminal Procedure Code, and the like opinion was expressed more recently, although the question was not immediately before him, by Sir Richard Couch in the course of his judgment in the case of *The Queen* v. *Abbas Ali Chowdhry* (1). In that case a Full Bench of four Judges (the fifth Judge, Phear, J., dissenting) held, as we think rightly, that an order passed under section 62 is not a judicial proceeding within the meaning of section 404. Notwithstanding the opinion which has been expressed by the learned Chief Justice, we look upon proceedings under section 308 and the following sections, as wholly different in principle, as well as in detail from proceedings under section 62: and we cannot say we have any substantial doubt, that a proceeding under Chapter XX, if regular, is a judicial proceeding for the purposes of the present suit. We think it must necessarily be held to be so, if the matter is to be determined according to the principles approved of in the two cases of *Kemp* v. *Neville*, (2) and *Ferguson* v. *The Earl of Kinnoull* (3), to which we have already referred.

There is however the further point,—whether, supposing the act would have been a judicial act if the procedure prescribed in Chapter XX had been followed, it can be said to be so in this particular case, when that procedure was scarcely in any respect observed.

Mr. Bell in trying to re-open this part of the case and to show that the rules prescribed in Chapter XX were sufficiently followed, relied much on the case of *The Queen* v. *Ala Buksh* (4)

(1) 6 B. L. R., 74.
(2) 31 L. J., C. P., 158.
(3) 9 Cl. & F., 311.
(4) *Before Mr. Justice E. Jackson and Mr Justice Mitter.*
*The 6th July* 1869.

THE QUEEN *v.* ALA BUKSH AND OTHERS.

THE facts of the case are fully stated in the judgment of the Court, which was delivered by.

JACKSON, J.—These four cases relate to four different tanneries situated in the town of Chuttuck which the Magistrate has ordered to be removed from the places where they are at present, on the ground that they are injurious

That case, however, even if it be accepted as a sound decision, is very different from the present. The defendants were served with a notice to remove certain tanneries as being a nuisance to the health and comfort of the community.

The Magistrate took proceedings under section 308 of Act XXV of 1861. The proceedings appear to have been founded on a report of the Civil Surgeon of the district, who carefully examined each seperate tannery and made a report upon it. He distinctly states that in his opinion the godowns in question, which he says are situated in a thickly populated part of the town, are offensive to those who live near them, and also to those who have occasion to pass them, and that they must be the cause of illness and disease.

The Magistrate, acting upon these reports, served notices upon the several defendants to remove their trade, or to appear and show cause why the removal should not be enforced.

In accordance with the provisions of section 313, those persons to whom the order of the Magistrate issued, appeared and showed cause against it, and they attempted to satisfy the Magistrate that the order was not reasonable and proper. The Magistrate accordingly went himself to the spot, and was satisfied that these tanneries should be removed, and therefore confirmed his order.

The application before us is on the point that the proceedings of the Magistrate are not legal, inasmuch as he did not record evidence. But it appears to us that if the defendants had asked him to have any witnesses examined, and had brought these witnesses before him, and applied to him to have them examined, the Magistrate would have been bound to examine them. But it does not appear that anything of this kind was done in the present case.

The parties on whom the order was served, had the option of applying to the Magistrate for a jury to try whether such an order was reasonable and proper. The Magistrate in such cases is bound to be guided by the opinion of the majority of the jury. If the defendants were satisfied that their neighbours were in no way inconvenienced by the hide godowns and tanneries, they could easily have asked for a jury and could have obtained a verdict.

But they did not take this step, but attempted between themselves to satisfy the Magistrate, and they failed to do so.

Under these circumstances, looking to the report of the Civil Surgeon, we think that we ought not to interfere. There is nothing illegal in the order passed by the Magistrate, and we therefore reject the applications of the petitioners.

Although there is nothing apparently illegal in the proceedings which would justify our interference, still the proceedings of the Magistrate should have laid down more fully the grounds on which he acted, and also what he saw in each godown and which in his opinion rendered its removal necessary; and, in deciding on the objections of the parties he ought to have recorded in each case the grounds of his rejection of such objections. The summary way in which he has dealt with the matter, no doubt, leads the parties to believe that they have not had justice done to them.

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and injurious to health, &c., or to appear and show cause why they should not be removed. The notice was issued on the report of the Civil Surgeon, who carefully examined each separate tannery and made a report upon it. The persons to whom the order of the Magistrate issued, "appeared and "showed cause against it, and they attempted to satisfy the "Magistrate that the order was not reasonable or proper. The "Magistrate accordingly went himself to the spot and was "satisfied that these tanneries should be removed, and there-"fore confirmed his order." It being objected that the proceedings of the Magistrate were not legal because he did not record evidence, the Court (E. Jackson and Mitter, JJ.) declined to interfere, saying that it did not appear that the defendants had asked the Magistrate to examine witnesses, and that he had refused to do so. The case does practically decide that a proceeding under Chapter XX may be legal, though not supported by evidence on oath, if the Magistrate does in fact enquire fully into the matter and gives the parties a full opportunity of showing all the cause that they desire to show. But the whole circumstances of this case are very different from those of the matter now before us, and the gist of the present case is, that the Deputy Magistrate did not enquire fully or give the plaintiff a fair opportunity of showing cause.

Although we consider it clear that the precedure prescribed by Chapter XX was observed as little as it could well be by anybody acting under that Chapter at all, still, as the deputy Magistrate did, as the lower Appellate Court finds he did, in fact act under Chapter XX, and did call upon the plaintiff to show cause, and did hold a sort of enquiry (however irregular) through the police, we do not think we can say that the Deputy Magistrate was not proceeding judicially. We think he was proceeding judicially, though carelessly and irregularly.

Then was the cutting of the *band* an act within his jurisdiction? We take it for granted that it was, if he had proceeded regularly under Chapter XX. But does the irregularity or incompleteness of this procedure so affect the matter, that the jurisdiction did not attach? For the same reasons which induce us to hold that the proceeding was a judicial pro-

ceeding, though irregular, we hold that the Deputy Magistrate was acting with jurisdiction. As the Deputy Magistrate, acting on the report of the overseer, considered it necessary that the *band* should be removed, and as he under section 308 passed an order calling upon the plaintiff to remove it, or show cause to the contrary within seven days, and as there was in fact a species of enquiry through the police, we think that the jurisdiction attached, and that the Deputy Magistrate cannot be held to have acted without jurisdiction. On the whole, as we must accept it as a fact, that the Deputy Magistrate in cutting the *band* was acting under Chapter XX of the Criminal Procedure Code, we are of opinion that he did act judicially and with jurisdiction, and therefore that he ought not in this suit to have been held liable in damages to the plaintiff.

When this application for review came on to be heard in Court, we were under the impression that it was the application of the Deputy Magistrate, as well as of the Government. Mr. Bell repeatedly spoke of the Deputy Magistrate as his client: and there is no doubt that the whole matter was argued throughout in the belief on the part of the Court, of Mr Money, and of Mr. Bell, that the Deputy Magistrate joined in the application. It appears, however, that the petition of review is that of the Government alone. We labored under a mistake in supposing that the Deputy Magistrate joined in it.

A very curious state of things this arises. The Deputy Magistrate, of whose conduct alone the plaintiff complained and against whom alone he got a decree for damages, remains quiet and does not seek to disturb our judgment; but the Government, a mere volunteer in the suit, against whom the plaintiff made no complaint and sought no relief, comes in and applies for a review, on the ground that the Deputy Magistrate might have had judgment in his favor if he had justified his acts in a manner in which he never did justify them, and if he had relied on a defence on which he really never did rely. The position is manifestly absurd: and if it is to be dealt with strictly, there is no doubt that the application for review must be rejected wholly. Under the circumstances, however, we think we ought not to deal strictly in this matter. There is no question that the

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intention, throughout, was to apply for a review on behalf both of the Deputy Magistrate and the Government, and that the argument upon the application was conducted on the footing that the Deputy Magistrate was a petitioner for review.

We propose therefore even now to allow the petition of review to be amended by adding the Deputy Magistrate's name as a petitioner, if he prays that it may be so amended. Having so amended the petition, we shall reverse our decree of the 5th of January 1870, so far as it affects the Deputy Magistrate, and, reversing the decrees of the lower Courts also, so far as they affect him, shall dismiss the plaintiff's suit as against the Deputy Magistrate altogether.

While, however, we grant the review, so far as concerns the Deputy Magistrate, we shall not grant it so far as it regards the declaration of the plaintiff's right as against the Government to maintain the disputed *band*. The issue as to the right to erect the *band* having been fairly raised and tried between the Government and the plaintiff, there is no reason why the plaintiff should now be deprived of the benefit of the decree which he has obtained declaring his right as against the Government. As regards the Deputy Magistrate, the suit was against him personally for damages, and if any question of right to the *band* could be properly raised against him at all (which it probably could not), it could be so only as incidental to the main issue, that of his personal liability for the consequences of his illegal act. If the Deputy Magistrate's defence had been conducted with reasonable care and skill, he would have declined all issues as to title, on the ground that they were immaterial; and he would have merely pleaded that he was acting judicially with jurisdiction, and was therefore not liable. The Deputy Magistrate as a private individual (in which capacity alone he was sued) was in no way interested in the plaintiff's title; and we think that when the suit fails so far as its object is to establish his personal liablity, it must also fail so far as its object is to obtain incidentally a declaration of title of right as against him.

But the position of the Government is very different. The Deputy Magistrate appeared to defend himself, and the Government had really no interest one way or other in the suit

Doubtless the Government might properly have undertaken the defence of the suit for the Deputy Magistrate in the manner provided for in Section 70 of Act VIII of 1859. Instead of following that course, the Government chose to come forward and to insist on being made a defendant, and on itself contesting the plaintiff's right to erect this *band*. It was a fatal blunder in Government to interfere as it did. But its advisers apparently considered that (as the Judge of Hooghly says in his judgement) "Government represented the public in the case, whose rights were endangered by the acts of the plaintiff." It appears to use to be clear that the Government, having as a defendant raised and tried certain issues of title or right as between itself and the plaintiff, must remain bound by the decision on those issues which it has brought on itself, whatever becomes of so much of the suit as concerns the Deputy Magistrate. A party who forces himself in to a suit as defendant, is exactly as much a defendant in all respects as if he had been originally named a defendant by the plaintiff in his plaint. And if issues are raised by such a defendant as between himself and the plaintiff, and if those issues are properly tried as between them, and judgment passes upon them, that judgment will stand and will bind the parties, whatever may be the judgment on the original question between the plaintiff and those against whom alone he in his plaint sought relief. We think therefore that the application for review should be rejected, so far as it seeks to affect the declaration of the plaintiff's right to erect and maintain the *band* as against the Government.

Considering the very good reason which the plaintiff had to complain of the conduct of the Deputy Magistrate,—considering also the manner in which his defence has been conducted, we think that the Deputy Magistrate is not entitled to recover any costs from the plaintiff, but that he ought not to be ordered to pay any costs; and we shall alter the decree which has been made accordingly. But as regards the Government our decree for costs will remain unaltered: and the Government must, moreover, pay the plaintiff his costs of this application for review. It is impossible to apportion the costs in this case so as to charge the Government only with such a share of costs as would represent the

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plaintiff's claim for a declaration of right, as apart from his claim against the original defendant personally for damages. His suit was substantily a suit for damages, and was valued as such only. The Government came in, and, contesting the plaintiff's right on its own account, in fact altered the whole nature of the suit. The sum at which the plaintiff values his suit, although based solely on the amount of damages claimed, is not in excess of the value which might have been put upon the suit, had it been one instituted originally merely for the purpose of establishing the plaintiff's right as against Government; and under all the circumstances we are clearly of opinion that it is only fair to the plaintiff that he should receive full costs from the Government.

The manner in which this suit has been conducted on behalf of Government is most extraordinary. The line adopted throughout has been such as to put the Government to the greatest possible expense with the least possible chance of benefit. The suit was instituted against an individual for damages for an act done by him illegally in excess of his jurisdiction as Deputy Magistrate. The Government had nothing to do with the suit, and would neither directly nor indirectly have been affected by its result. If the Government was of opinion that the Deputy Magistrate acted rightly, it would have been perfectly fair and reasonable that the Government should (under section 70 of the Civil Procedure Code) have undertaken the defence of the suit. Or if it was not thought desirable to proceed under section 70, the advisers of Government might have been instructed to conduct the defence for the Deputy Magistrate, and the Government might have indemnified him against any damages or costs he might be ordered to pay. Had this latter course been followed, the Government would have done all that could possibly be done for the Deputy Magistrate, while it would have itself remained clear of, and unaffected by, the suit. The Government advisers, however, for reasons best known to themselves, chose (instead of merely undertaking the defence of the Deputy Magistrate) to insist upon Government being formally placed upon the record as a defendant,—a step from which no good could possibly accrue to Government or to the Deputy Magis-

trate, and from which much harm could accrue, and has in fact accrued, to Government. Having become a defendant, the Government puts in a written statement which is vague and weak in the extreme. The case goes to trial, and is not properly put before either of the lower Courts, or even before us at the hearing of the special appeal; the best, if not the only real defence which the Deputy Magistrate had, not being relied on, or we may say, thought of, till it is brought up before us on an application for a review of our judgment. Finally, this defence is urged before us, and a review is prayed for, by the Government, and not by the Deputy Magistrate who alone could properly urge the plea now relied on.

It appears to us to be a very serious matter that litigation on behalf of Government should be conducted after such a fashion.

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## [ORIGINAL CIVIL.]

*Before Mr. Justic Norman, Offg. Chief Justice, and Mr, Justice Phear*

BRAMMAMAYIDASI v. ABHAI CHARAN CHOWDHRY.

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*July* 19
See also 14 B. L. R. 40

*Limitation—Act XIV of* 1859, *s*, 1, *cl*, 9— *Deposit—Cause of Action.*

The plaintiff, a Hindu widow, on 26th March 1866, sold to the defendant certain land for Rs. 800. The price was paid to the plaintiff, who on the same day lent it to the defendant under an agreements that she should receive Rs. 6 monthly by way of interest, and that the principal sum should be repayable on demand. interest was paid up to April 1869, but afterwards discontinued. The plaintiff thereupon demanded payment of the principal sum of Rs. 800, but payment was refused by the defendant. On July 4th, 1870, the plaintiff sued for the recovery of the prinicpal sum lent, with interest from the date when it was withheld up to the date of suit. *Held*, that the obligations to pay Rs. 6 a month by way of interest, and to repay the principal on demand, must be construed to be alternative obligations. In this view of the contract, a demand was necessary to complete the cause of action, and the cause of action arose at the date of the demand; the suit therefore waa not barred by Act XIV of 1859, section 1, clause 9.

*Per* NORMAN, J.— By Hindu law a demand would be necessary.