

1872. distinctly says, in considering s. 71 of Act X, which then applied, and the words of which are precisely the same as those of s. 52 of Act VIII of 1869, that the ryot is entitled to have execution stayed without any order of the Court, if he pays the money into Court within the limited period, but it does not say that execution shall not be stayed under any circumstances, either by the Court itself or by the Appellate Court. We think, therefore, that, under that ruling, the Judge had discretion, and, looking to the circumstances of the case, we think that he was right in his exercise of that discretion.

Rao  
BANERAM  
v.  
RAMNATH  
SHAH.

We dismiss the appeal with costs.

Before Mr. Justice Kemp and Mr. Justice Glover.

1872  
Nov. 29.

IN THE MATTER OF THE PETITION OF ROHOMAN SIRKAR AND ANOTHER.\*

Act V of 1861, s. 17—Order of executive nature.

The High Court, while considering that an order by a Magistrate professing to act under s. 17 of Act V of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature.

Reference to the High Court by the Sessions Judge of Rajshahye.—In February 1872, a traveller passing along a foot-path, opposite the village of Chobari was set upon in open day by two men, who murdered and robbed him. The Assistant Magistrate of Serajgunge obtained sufficient evidence against two of the inhabitants of Chobari on which to commit them for trial before the Sessions Court for the aforesaid murder, but the principal witnesses, on whose evidence he so committed those two persons, retracted before the Sessions Court the statements they had made before the Assistant Magistrate, and the case consequently broke down in the Sessions Court, and the accused persons were discharged on the 22nd of April last. On the 10th of May, the Assistant Magistrate drew up a proceeding, in which, after remarking that there had been a serious murder in Chobari, and that many *bundmashes* lived in that village, he called upon the Police Inspector to report whether it was necessary to appoint special constables for the security of the lives and property of people passing by or through Chobari during the then approaching rainy season, and, if such a measure were necessary, to submit a list of five of the principal residents of that village.

The report of the Inspector being in favor of the appointment of such special constables, the Assistant Magistrate, on the 27th of May, appointed Rohoman Sirkar, Moonshée Akhoond, and three other inhabitants of Chobari, as special constables under the provisions of s. 17, Act V of 1861, directing them to state within ten days any objections they might have to being so

\* Reference to the High Court under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Rajshahye.

appointed. No objections having been made by any of those five persons by the 8th of June, the Assistant Magistrate, on that date declared them duly appointed special constables, and bound to perform the duties of officers of Police under the provisions of ss. 17, 18, and 19 of Act V of 1861. On the 6th of July, Rohoman Sirkar and Moonshee Akhoond petitioned the Assistant Magistrate to withdraw his order with regard to them, complaining at the same time of the hardship and pecuniary loss entailed upon them by the operation of that order, they being mahajuns and traders, and their profits and success in business depending in a great measure on their travelling about the country, and being free to leave Chobari whenever, and for as long as, it was to their interest to do so, a freedom of which they were deprived under the Assistant Magistrate's order. The Assistant Magistrate did not comply with their prayer, and they petitioned this Court under s. 434 of the Code of Criminal Procedure.

I consider the Assistant Magistrate's order is illegal, because the circumstances which could alone render such order legal did not exist, nor was any one of those circumstances reasonably to be apprehended at the time of the passing of that order.

The judgment of the High Court was delivered by

GLOVER, J.—The order of the Assistant Magistrate appears to us to be one of a purely executive nature, and one with which this Court has no power to interfere.

We may say, however, that we agree with the Sessions Judge in thinking the order illegal, inasmuch as s. 17, Act V of 1861, refers to cases of unlawful assembly, riot, or disturbance of the peace only, and not to crimes of the nature referred to in this proceeding.

If the Assistant Magistrate considered the Police force already entertained insufficient to prevent crime in the village of Chobari, he should have applied for sanction to an increase, under s. 15 of the Act.

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*Before Mr. Justice Kemp, and Mr. Justice Glover.*

ESHAN CHUNDER GHOSE AND OTHERS (PLAINIFFS) v. HURRISH CHUNDER BANERJEE (DEFENDANT).\*

1872  
April 26.

*Suit for Khas Possession—Occupation for more than 12 years by execution of a Mudra house—Right of Occupancy—Act X of 1859, s. 6—Denial of Landlords Title.*

THE plaintiffs as talookdars brought a suit against their tenant Muddun Ghose, for recovery of rent at enhanced rates of lands held by him, including in the claim the two cottahs in dispute in the present suit. The tenant denied that

\* Special Appeal, No. 859 of 1871, from a decree of the Subordinate Judge of Hooghly, dated the 24th April 1871, affirming a decree of the Moonsiff of that district, dated the 23rd January 1871.