

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

EMPRESS ON THE PROSECUTION OF JODOONATH GHOSE v. BROJONATH DEY.*

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June 21.

Beng. Act III of 1864, ss. 2, 10, 11, 13, 15, 16, 57, and 58—Public Highways—Municipal Commissioners, power of, to close or divert a public highway—Calcutta Municipal Act (Beng. Act VI of 1863), ss. 109, 110.

Beng. Act III of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not by so vesting them give power to the Municipal Commissioners, nor *a fortiori* to the Vice-Chairman alone, to stop up or divert such public highways.

THE facts of this case were as follows:— Within the jurisdiction of the Municipal Commissioners of the town of Serampore there was formerly a lane, called the Shudgoppara Lane, leading to the River Hooghly. This lane ran through the garden of one Brojonath Dey, the defendant in this proceeding. In the year 1869 this lane was stopped by persons acting on behalf of the defendant; these persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were subsequently taken by the defendant in the Civil Courts, with a view of establishing that the road was not a public highway, but these proceedings were unsuccessful; and in the present case it was admitted that the lane in question was a public highway. The litigation in the Civil Courts ended in 1871. In August, 1874, the present defendant presented a petition to the Municipal Commissioners of Serampore, which again sought to open the question whether the lane was a public highway, and also prayed for permission to close it under such conditions as the Municipal Commissioners might consider reasonable. On the back of the petition was written the following order, dated the 31st of December, 1874:—

“ Application granted on condition that the applicant make at his own expense a road ten feet wide, round the south and

* Revisional Proceedings from an order of H. Haggard, Esq., Magistrate of Serampore, under s. 521 of the Code of Criminal Procedure.

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west side of his garden, so as to form a thorough communication between Distillery and Napitpara Lane."

This order was signed J. E. B. Jeffery. It was admitted that Mr. Jeffery was at that time Vice-Chairman of the Municipality, and it was not contended that this order was not made by him in that capacity. Prior to January, 1876, the said road was completely stopped up, and another road to the south and west of the defendant's garden was made. There was some doubt, however, whether this new road was really a new road, or whether it existed before, and was only widened. Applications, respectively made to the Municipal Commissioners and to the Chairman of the Municipality, who was also the Magistrate of the district, against the order of Mr. Jeffery, the Vice-Chairman, were refused on the ground that neither the Chairman nor the Municipal Commissioners had any power to interfere with the order of the Vice-Chairman. The matter was then, under s. 521 of the Code of Criminal Procedure, taken before the Joint Magistrate of Serampore, who, in October, 1876, called upon the defendant to show cause why the obstruction to the Shudgoppara Lane should not be removed. The Joint Magistrate ultimately held that the order of Mr. Jeffery was not illegal, and he refused to interfere further. The case then came before the High Court under s. 297 of the Code of Criminal Procedure, the question of law raised being whether the Joint Magistrate was right in holding the order of Mr. Jeffery to be legal.

The Municipal Commissioners were unrepresented.

Baboo *Troilokynath Mittra* for the complainant.—Under Beng. Act III of 1864 the Vice-Chairman of the Municipality had no authority to sell, divert, or close a public road. S. 13 only gave power to the Commissioners to sell land required for the purposes of the Act, and, therefore, did not apply to this case. Although the Commissioners had powers reserved to them under s. 58 of the Act to make alterations in fences, pavements, or posts of a highway, they could not obstruct or sanction an obstruction of the public roadway. The 10th section of the Dis-

district Municipal Act (Beng. Act III of 1864), vesting the streets in the Commissioners, is in words precisely similar to s. 109 of the Calcutta Municipal Act (VI of 1863). S. 110 of the Calcutta Act, however, gives the Commissioners express power to divert and close up streets; it may, therefore, be assumed that the Legislature considered that, without such express permission, the Commissioners had no such power conferred on them by the words of s. 109. The District Municipal Act of 1864 does not contain such express permission as is found in s. 110 of the Calcutta Act of 1863. This omission was, no doubt, designedly made, and shows an intention to withhold such powers from District Municipal Commissioners. The same distinction is preserved in the Calcutta Municipal Consolidation Act (Beng. Act IV of 1876) and the Bengal Municipal Act (Beng. Act V of 1876). The Commissioners could not, therefore, be supposed to have the power to close a road altogether without such express permission. Ss. 12 and 15 of Beng. Act III of 1864 give no power to the Commissioners to substitute one public road for another. Under s. 213 of the Bengal Municipal Act of 1876, the Commissioners have power to close a road temporarily for certain purposes. The following cases were cited in the course of the argument: *Rex v. Justices of Worcestershire* (1), *Rex v. Justices of Surrey* (2), *Rex v. Horner* (3), *Reg. v. United Kingdom Electric Telegraph Co.* (4), *Reg. v. Train* (5), *Rex v. Winter* (6), *Reg. v. Justices of Calcutta* (7), and *Fowler v. Sanders* (8).

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Baboo *Taraknath Dutt* for the defendant Brojo Nath Dey.—S. 10 of Beng. Act III of 1864 vested public roads in the Commissioners, and, therefore, gave them a right to close or divert such roads.

Baboo *Troilokynath Mittra* in reply.

(1) 2 B. & Ald., 228.

(2) 7 D. & Row., 857.

(3) 2 B. & Ad., 150.

(4) 9 Cox, Cr. Ca., 137.

(5) 9 Cox, Cr. Ca., 180.

(6) 8 B. & C., 785.

(7) 2 Ind. Jur., N. S., 182.

(8) Cro. Jac., 446.

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MARKBY, J. (after stating the facts of the case):—The question turns on the construction of Beng. Act III of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in ss. 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act; but public highways not being the property of Government or private property are, by s. 10, vested in the Municipal Commissioners. By s. 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold properties, moveable and immoveable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By s. 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is, that Shudgoppara Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes, it is further said, are defined in the preamble, namely, the “conservancy, improvement and watching” the district where they have jurisdiction. The Commissioners, therefore, it is argued, had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole judges. I am of opinion, however, that it was not the intention of the Legislature to give by implication these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of ss. 9, 10, and 12 are controlled by the specific provisions of ss. 13, 14, 15, and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair, and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (s. 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (s. 16), and even with the consent of the Lieutenant-Governor there is no power to

stop up a road. It seems to me that if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By s. 20, the Chairman or Vice-Chairman may make any order authorized by the Act unless it be expressly required to be made at a public meeting, and, therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Beng. Act III of 1864 is further confirmed by a comparison of its provisions with those of Beng. Act VI of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; s. 109 of Act VI of 1863 vests the streets of Calcutta in the Justices almost in the same words as s. 10 of Act III of 1864 vests public highways in the Municipal Commissioners. But by s. 110 of the former Act express power is given to the Justices, with the sanction of the Bengal Government, "to turn, direct, discontinue or stop up any public street." This, I think, shows that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstances that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

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I, therefore, consider that this order of Mr. Jeffery permitting Baboo Brojonath Dey, upon certain conditions, to stop up this lane, was an order which neither he as Vice-Chairman, nor the Municipal Commissioners, had power to make; and that the order of the Joint-Magistrate of 21st December, 1876, holding Mr. Jeffery's order to be legal, was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under s. 521, will be returned to the Joint-Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of those proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint-Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

PRINSEP, J.—I concur in holding that Mr. Jeffery, as Vice-Chairman of the Serampore Municipality, was not competent under Beng. Act III of 1864 to close the Shudgoppara Lane; that his order must be considered to be a nullity; and that the proceedings taken under s. 521 of the Code of Criminal Procedure, by the present Joint-Magistrate of Serampore, should proceed.

Order set aside.