

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF CHUNDER NATH SEN AND
ANOTHER.*

1876
Dec. 11.
1877
Feb. 20.

Superintendence of High Court — 24 and 25 Vict., c. 104, s. 15 — Order under Criminal Procedure Code (Act X of 1872), s. 518.

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

THE petitioners were the proprietors of an old established hât. A new hât was opened by one Hurrenath Dass in close proximity to the petitioner's hât, and was held on the same days. The Assistant Magistrate, having regard to the circumstances of the case as they appeared from the evidence of witnesses taken before him, and from police reports, made an order under s. 518 of the Criminal Procedure Code, whereby the petitioners were prohibited from holding their hât on the days in question. The petitioners, thereupon, applied to the High Court to have the Assistant Magistrate's order quashed, and the case came on for hearing before Markby and Mitter, JJ. The question of the High Court's jurisdiction to entertain such an application, having regard to the provisions of s. 520 of the Code, had been referred to a Full Bench by Garth, C. J., and Birch, J., in a case which came before them; but, as upon further enquiry it was ascertained that the question then referred did not arise, it was not decided. In consequence, however, of the opinion expressed by those learned Judges that the question ought to be referred to a Full Bench, Markby and Birch, JJ. adopted that course in the present case.

Baboo *Kali Mohan Doss* and *Grija Sunker Mozoomdar* for the petitioners.

* Criminal Motion, No. 29 of 1875, against an order of Baboo K. G. Gupta, Assistant Magistrate of Backergunge, dated the 26th November, 1875.

1877

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PETITION OF
CHUNDER
NATH SEN.

Baboos *Mohini Mohun Roy* and *Doorga Mohun Doss* for
Hurrnath Doss.

Baboo *Kali Mohun Doss*.—Although orders under s. 518 are non-judicial, and it has been decided that this Court cannot interfere with them under s. 297, and that they are not appealable, it is submitted that this Court can set them aside under s. 15 of the Charter Act. This Court has interfered in cases in which the Magistrate has not taken the initial steps which are directed to be taken under that section, and also when his order ought to have been under s. 521—*Banee Madhub Ghose v. Wooma Nath Roy Chowdry* (1), *Chunder Coomar Roy v. Omesh Chunder Mozoomdar* (2), *Sree Nath Dutt v. Unnoda Churn Dutt* (3). [MARKBY, J.—Those cases only amount to this. All the proceedings of a Magistrate are *primâ facie* judicial; but the Legislature has expressly provided that certain proceedings shall be considered non-judicial. If a proceeding before a Magistrate is to be brought under the latter class, it must be shown that the circumstances exist which bring it within that class. In what respect are the powers of this Court under s. 15 of the Charter Act greater than its powers under Chap. XXII of the Criminal Procedure Code?] In *Arzanoollah v. Nazir Mullick* (4), your Lordship, while holding that this Court could not interfere under the Criminal Procedure Code with orders made under s. 518, intimated that you might interfere with them upon an application under s. 15 of the Charter Act. [MARKBY, J.—I expressed no such opinion in that case, nor is there even the slightest indication of such an opinion.] In *Tej Ram v. Harsukh* (5) the Allahabad High Court held, that it could not interfere under s. 15 with an order of a subordinate Court, on the ground that it proceeded on an error of law or of fact; but this Court has gone further, and has held that it will interfere with illegal proceedings.

Pleaders for the opposing party were not called upon.

(1) 21 W. R., Cr., 26.

(3) 23 W. R., Cr., 34.

(2) 22 W. R., Cr., 78.

(4) 21 W. R., Cr., 22.

(5) I. L. R., 1 All., 101.

The opinion of the Full Bench was delivered by

GARTH, C. J.—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vict., cap. 104; nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

Petition dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Mitter.

KALLY PROSONNO GHOSE *v.* GOCOOOL CHUNDER MITTER AND ANOTHER.

1877
*Feby. 13 &
March 9.*

Hindu Law—Adoption—Hindu Widow with permission to adopt, Position of—Divesting of Property.

A Hindu testator died, leaving all his property to *P* and *B*, his two sons, absolutely, in equal shares. *B* died in 1845, leaving a minor son, *K*. *P* died in 1851 without male issue, leaving a widow *BD*, and a daughter. *P* also left a will, by which he gave, subject to certain trusts for the worship of the family idols, all his property to his widow *B D*, for her life, and on her death to his daughter's son (if any): the daughter died without issue before her mother. *BD* died in October 1864 leaving a will, of which she appointed her brother *G* executor, and *G*, in accordance with the directions in her will, took possession of the property, which *B D* took as widow and under the will of *P*. *K* died in 1855, when still a minor, leaving a minor widow, and having made a will, by which he gave permission to his widow to adopt a son. The widow of *K* adopted a son in August, 1876. In a suit brought by the plaintiff as adopted son of *K* and heir of *P*, to recover the property left by *P*, the issue was raised whether, assuming the plaintiff to be the legally adopted son of *K*, he was the heir of *P*. HELD, that his adoption not having taken place when