

In Re: Petition of Chundernath Sen

In Re: Petition of Chundernath Sen

SooperKanoon Citation : sooperkanoon.com/888065

Court : Kolkata

Decided On : May-28-1880

Reported in : (1880)ILR5Cal875

Judge : Morris and ;Prinsep, JJ.

Appellant : In Re: Petition of Chundernath Sen

Judgement :

Morris, J.

1. This matter has arisen from a complaint made on 15th February 1879, regarding an obstruction to a public thoroughfare.
2. It appears that, a few months before this complaint was made, proceedings had been taken under Section 521 of the Code of Criminal Procedure, regarding an obstruction to another portion of the same road, and the matter had been referred to a jury under Section 523. The report of the jury was not unanimous, but the Magistrate, on 6th February 1879, accepted the opinion of the majority, declaring that the road was private, and not public.
3. The Magistrate, apparently without the consent of either side, directed the same jury to report on the second matter. Shortly after, one of the contending parties objected to one of the jurymen, who had been appointed by the Magistrate, on the ground that he had decided the matter against him in the first case. Without giving

notice to the other party, the Magistrate allowed this objection, and appointed another jurymen in the place of his first nominee. The effect of this was to turn the majority to the other side, and to cause the report to be made in favour of the objector, that the road was public and not private.

4. We are of opinion that the Magistrate should not, at the instance of one party, and behind the back of the other party, have cancelled the appointment of one of the jurors, even though such juror was his own nominee. If the objection taken was good, it was equally applicable to all the jurymen who had previously committed themselves to an opinion in the first case.

5. It is unnecessary, however, to notice this further, because it is clear to us that the entire proceedings have been taken under a mistaken view of the law regarding the respective functions of a Magistrate and a jury under chap. xxxix of the Code of Criminal Procedure.

6. In order to give a Magistrate jurisdiction to direct the immoveable of an unlawful obstruction from a thoroughfare or public place, it must be first found that the place so obstructed is a thoroughfare or public place. If this be disputed by the party on whom the notice to remove the obstruction has been served, the Magistrate should not refer the decision of this matter under Section 523 to a jury. The duty of a jury is declared by that section to be to try whether the Magistrate's order to remove the obstruction is reasonable and proper, not whether the way or place obstructed is public or private property. Until this matter has been decided by the Magistrate under Section 532 of the Code of Criminal Procedure or by a Civil Court, the order under Section 521 should not be carried out or referred to a jury, but should be stayed.

7. If, however, a Magistrate under a mistaken view of the law, and in spite of the objection raising the question of the right of way, should appoint a jury, then, as pointed out by Mr. Justice Phear in the case of Roy Omesh Chunder Sen (21 W.R., Cr., 64), the order of the Magistrate to remove the obstruction complained of could not be decided by such jury to be reasonable and proper, because at the outset of their enquiry they would be met by the bonafide objection that the road was private and not public property. In such a case they could only submit a report

to this effect to the Magistrate, it being no part of their duty to determine the rights of parties in property. The Magistrate ought then either to refer the party complaining to the Civil Court, or in the exercise of his discretion inquire into the matter as provided by Section 532.

8. We may refer, in support of this view of the law, to the following cases: In re Becharam Buttacharjee (15 W.R., Cr., 67) decided by Loch and Mookerjee, JJ.; Roy Omesh Chunder Sen v. Ichanach Mozumdar (21 W.R., Cr., 64); Petamber Jugi v. Nasaruddy (25 W.R., Cr., 4) decided by Glover and R.C. Mitter, JJ.; and to some proceedings of the Madras High Court, pp. 304 and 305, published by Mr. Weis, in his collection of the orders of that Court.

9. We, therefore, set aside the order of the 12th April, and direct that if the Magistrate finds it necessary to take further action, he do proceed in the manner now indicated.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com