

(1868) 11 CAL CK 0009
In the Calcutta High Court
Case No : Reference No. 155 of 1868

**In Re: Harimohan Malu
 The Queen**

Date of Decision : 20-11-1868

Acts Referred:

Citation : (1868) 11 CAL CK 0009

Judgement

Phear, J.—In these two cases we have had to consider the effect of Sections 62 and 308 of the Code of Criminal Procedure, as operating to give authority to the Magistrate under certain circumstances to issue injunctions against individuals, controlling them in the exercise of their proprietary rights. On the whole, we have come to the conclusion that these two sections are not in conflict with one another, and also that they are not, properly speaking, alternatives. The essential difference between them is that Section 308 expressly directs that the injunctional order of the Magistrate should, in cases to which that section applies, be an order nisi so to speak, that is an order accompanied by a condition that it is not to operate, if the party show cause, within a specified time, why the order should not be obeyed; while, on the other hand, Section 62 speaks only of an order absolute, without saying that the party is to be afforded an opportunity for showing cause against the order. In cases falling under either the one section or the other, the order must clearly be in writing. This is expressed in so many words by the provisions of Section 62, and it is also implied by the terms of Section 308, followed as it is by the provisions which appear in Section 309. Now it appears to us that, in these two cases, it is not necessary that we should determine exactly what is the meaning or scope of Section 62. It is enough for us to say that, in our judgment, if any part of the ground covered by that section also falls within the scope of Section 308, then the Magistrate must conform to the more particular directions of the latter section, and it is not sufficient that he should comply merely with the general words of the former; that is, he cannot choose whether he will issue an order without a condition, or whether he will issue an order with a condition, but is bound, in all cases which fall within the operation of Section 308, to comply with the provisions of that section. Now it appears to us that, in both the cases which are before the Court, the subject or

the occasion of the order fell directly within the meaning of Section 308. In each case, according to the view of the facts which the Magistrate apparently took, the obstruction or nuisance, which it was the object of the order to remove or abate, occurred in a public place or a public highway. Consequently, Section 308 applied; and from what I have already said, it follows that the Magistrate had not any authority in either of these cases to issue an order absolute, but was bound to give in his order an opportunity to the person to whom it was directed, to show cause against it; and I need hardly say that, in neither of the orders complained of was this opportunity given. The Jessore case was brought before us by petition of parties aggrieved. The Magistrate had directed in his order that certain Kumars should be removed from a piece of water, and it appeared that his reason for directing this was twofold: namely, that they constituted an obstruction to persons lawfully using this piece of water as an highway, and also that this produced a nuisance by causing the accumulation of decaying vegetation in a public place. We think that the complainants have made out that this order was an improper one. It was absolute in its terms, and did not comply with the provisions of Section 308. We are, therefore, of opinion, that it should be quashed.

2. The Hooghly case has come before us in the shape of a reference from the Judge, who recommends that the order of the Magistrate be quashed on the ground of its illegality. There the Magistrate had issued an absolute order for the removal of a fence which he thought was an obstruction to a certain public path or highway. For the reasons which I have already mentioned, this order -also is bad, because it did not give the persons affected by it the opportunity to show cause against it. Accordingly, we think that the Judge is right in considering that the order is illegal and ought to be quashed. I think it right to add that it seems to me that, in all cases, whether cases falling exclusively u/s 62 or cases coming under the provisions of Section 308, the order ought to contain a clear statement of the facts which the Magistrate, in the exercise of his judicial discretion, considers to constitute the material facts of the case, and upon the footing of which he has made the order. It is only fair, I think, to the party against whom the order is made that he should be made to know distinctly the grounds upon which the Magistrate has acted, in order that he may be better guided to a conclusion as to whether the order is one which he is bound to obey, or whether he can safely resist it either under the Penal Procedure which is laid down by Section 188 of the Penal Code, or by showing cause under the provisions of Section 308 and the following section. But whether an order would be bad or not when it did not contain a statement of the material facts in the way I have indicated, I still think that at least the record which is sent up to this Court when the validity of the Magistrate's order is put in question, should disclose all the facts upon which the Magistrate acted, and upon which he relied for justification of his order. I may say that in neither of the cases before us, is this so. We can perhaps just gather from some rather informal orders endorsed upon the back of successive petitions in each case, what view the Magistrate took of the general

facts. But there is no formal adjudication, no formal statement of those facts either in the order itself, for the information and benefit of the parties, or in the record for the purpose of enabling this Court to come to a judgment upon the validity of the order; and I am inclined to the opinion that this alone would justify us in quashing the order, because I think we ought not to maintain orders of this kind in force, unless we see that the facts of the case as exhibited in the record justify them in law.

1[Sec. 62 : --It shall be lawful for any Magistrate, by a written order, to direct any person to abstain from a certain act, or to take certain order with certain property in his possession, or under his management, whenever such Magistrate shall consider that such direction is likely to prevent, or tends to prevent, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or is likely to prevent, or tends to prevent, danger to human life, health, or safety, or is likely to prevent, or tends to prevent a riot or an affray. (Extended to Calcutta by Act XXI, 1864).]

Magistrate may issue orders to prevent obstruction, etc.

2[Sec. 308:--Whenever the Magistrate of a District or of a division of a District may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed or should be removed to a different place, or that the construction of any building, or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented, or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary, or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public, he may issue an order to the person causing such obstruction or nuisance or carrying on such trade or occupation or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on such person within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove such building, or to alter the disposal of such substance, or to fence such tank or well (as the case may be), or to appear before such Magistrate within the time mentioned in the order, and show cause why such order should not be enforced. (Extended to Calcutta by Act XXI, 1864).]

3[Sec. 63:--Any Magistrate may enjoin any person not to repeat or continue a public nuisance. (Extended to Calcutta by Act XXI 1864).]

Magistrate may order removal of nuisances.

4[Sec. 310:--The person to whom such order is issued shall be bound, within the time specified in the order, to obey the same or to appear before the Magistrate to show cause as aforesaid, or he may apply to the Magistrate by petition for an

order for a Jury to be appointed to try whether the order is reasonable and proper. On receiving such petition, the Magistrate shall forthwith appoint a Jury which shall consist of not less than five persons, whereof the President and one-half of the members shall be nominated by such Magistrate, and the remaining members by the party petitioning. The Magistrate shall suspend the execution of the order pending such enquiry, and be guided by the decision of the Jury, which shall be according to the opinion of the majority. If the petitioner shall, by neglect or in any other way, prevent the appointment of a Jury, or if from any cause the Jury so appointed shall not decide and report within a reasonable time to be fixed in the order for the appointment, their functions shall cease from the date of the expiration of such period unless they be continued by special order of the Magistrate, and if from any of the above causes no decision be made by the Jury, the order of the Magistrate shall be carried into effect as hereinafter provided. (Extended to Calcutta by Act XXI, 1864).]

Person ordered shall obey the order, or may claim a Jury.

Constitution of Jury. Proceeding incase of neglect by Jury.

Magistrate may prohibit the repetition or continuance of public nuisance.