

(1869) 07 CAL CK 0027

In the Calcutta High Court

Case No : Application for Review No. 174 of 1869

Pyarilal and Co.

APPELLANT

Vs

E.G. Rooke

RESPONDENT

Date of Decision : 23-07-1869

Acts Referred:

Citation : (1869) 07 CAL CK 0027

Judgement

L.S. Jackson, J.—It appears to me that we ought not to alter the judgment complained of in this case. It is now pointed out to us by the learned counsel who appeared for the petitioner that the order of the Magistrate was not passed u/s 308, but section 320 of the Code of Criminal Procedure. That section is in these words, "if a dispute arising concerning the right of use of any land or water, the Magistrate within whose jurisdiction the dispute lies, may enquire into the matter, and if it shall appear to him that the subject of dispute is open to the use of the public, or of any person, or of any class of persons, the Magistrate may order that possession thereof shall not be taken or retained by any party to the exclusion of the public, or of such person, or of such class of persons, as the case may be, until the party claiming such possession shall obtain the decision of a competent Court adjudging him to be entitled to such exclusive possession." Now if we accept the argument of the learned counsel, that the effect of a decision by the Magistrate u/s 320, is to alter the position of the parties in respect of their remedies in the Civil Court, or in respect of their right to bring an action, and if we take the finding, as we must take the finding of the Court below, in respect of the facts, then we find that this was a piece of land of which the plaintiff claimed to be entitled to the exclusive use. He denied that the public or any persons had any right whatever in any way to make use of the land in dispute. The Magistrate found, and the Civil Court has also found, that he was not entitled to such exclusive use, and that the public were entitled to walk over that road, and to use it as a foot-path. That being the case, I think the Magistrate's order was perfectly right; namely, that he was quite right in ordering that the possession should not be taken or maintained by this plaintiff to the exclusion of the public

until the party claiming such possession shall obtain a decision adjudging him to be entitled to such possession.

2. Then what is the decision which the plaintiff would have to obtain for the purpose of getting rid of the effect of that order? The section shows that it was a decision adjudging him to be entitled to such exclusive possession. It is quite clear that the Court could not adjudge him to be entitled to such possession. The Court could indeed say that the suit was groundless; that the public was entitled to the right of way, a right to walk over that land; and that the Court could not deprive the public of that privilege. But if any person should go beyond the right which was found, that is, the right which the public had to walk over that land, and should take his carts over the land in dispute, and the plaintiff should be undamaged thereby, the plaintiff would have a right of action against such person for the trespass. I still think that the Civil Court in trying this suit went beyond its jurisdiction, and made an improper order.

3. I also think that we could not take the course suggested by the learned counsel, namely of correcting the error in point of form committed by the lower appellate Court, and confirming merely its finding upon the issues, because neither of the issues was the issue contemplated by section 320, nor do I think was the lower Court competent to try the issue whether the road in the first was or was not a public road.

4. For these reasons I think our decision was right, and we ought not to interfere with it. This application must therefore be refused with costs.

Markby, J.

5. I am of the same opinion. My judgment in the former case in no way proceeded upon any distinction between section 308 and sections 318 and 320 of the Criminal Procedure Code. It proceeded entirely upon this ground, to which I still adhere, that the Civil Court has no jurisdiction to enquire into a public right per se. As ancillary to an enquiry whether a person has been injured in private capacity, it may enter upon such an enquiry; but abstractly and otherwise than as collaterally to a suit arising out of a private injury, a Civil Court has no jurisdiction to enquire into a public right: and on this ground, and this ground alone, I would refuse this application. Nor can I imagine by any possibility how such a suit as this can be looked upon as a proceeding to set aside the order of the Magistrate, and in some way or other to question the rightness or vagueness of the Magistrate's order. I must own that I do not understand such a suit, nor do I think that any such suit is contemplated or created by the sections of the Code of Criminal Procedure which have been referred to.