

1867.  
March 28.

*Miscellaneous Petition.*

L. R. ASHBURNER, District Magistrate of

Khándesh ..... *Petitioner.*

KESHAV valad TUKU' PA'TI'L *et al* ..... *Opponents.*

*Judicial Proceeding—Magistrate—Illegal Order—Act XXV. of 1861, Secs. 308—310 and 404—Reg. XII. of 1827, Sec. 19, Cl. 7.*

An order made by a Magistrate under Sec. 308 of Act XXV. of 1861 (Criminal Procedure Code) is not a judicial proceeding within the meaning of Sec. 404 of that Act.

A Magistrate who makes an illegal order, which purports to be made under Sec. 308 of Act XXV. of 1861, but is not made in accordance with the provisions of that section, is liable to be sued in the Civil Court in respect of such order, and to be restrained by injunction from carrying it into effect.

L. R. ASHBURNER, Magistrate of the District of Khándesh, on the 10th of July 1866, issued an order to Keshav valad Tukú Pátíl, Bhiká valad Bhulá Pátíl, and Dayál valad Tápi Pátíl, of which the following is a translation :—“ Know that there is a certain site situated at the aforesaid town, which is part of a public thoroughfare, and which you usurped possession of without authority ; and you have enclosed the site (by building walls around it) for the purpose of collecting manure (*ukirdlá*) there. You are hereby directed to remove the walls and to clear the site within two days from the date of this notice, which is given to you under Sec. 308 of the Code of Criminal Procedure. Disobedience of this order will be punished as provided in Sec. 188 of the said Code.”

On the 21st of August 1866, Keshav and Bhiká filed a suit against the Magistrate, and presented a plaint for registration to the Honorable G. A. Hobart, District Judge of Khándesh : and, after stating that the abovementioned order reached them on or about the 14th of August, and that the site in question was their own ancestral property, applied for an injunction to prevent the Magistrate from removing the walls of the building standing thereon.

The District Judge having granted the injunction, the defendant applied to him to have it set aside, on the ground that his order to the plaintiffs for the removal of the building was an order to remove a nuisance, and that the injunction was in contravention of the defendant's power as Magistrate. An order was thereupon passed by the District Judge, of which the following is a translation :—

“ There is now an objection to admit such an application : as a notice had been issued by this court to stay the execution of the order (issued by the Magistrate). No order, therefore, can be issued upon such an application. You are at liberty to proceed according to law.”

The Magistrate then petitioned the High Court to have the order of the District Judge set aside, by the exercise of its extraordinary powers, on the grounds (1) that the District Judge had not jurisdiction to issue the order for an injunction ; (2) that the Judge was wrong in supposing that there was any objection to his setting aside that order, inasmuch as Act VIII. of 1859, Sec. 93, distinctly provides for such a procedure ; and (3) that the District Judge's order was illegal, as well as inequitable, since the Magistrate had issued the order complained of for the removal of a nuisance in pursuance of Sec. 308 of Act XXV. of 1861 (Code of Criminal Procedure), which order was final, inasmuch as the plaintiff did not take any steps as required by Chap. xx. of that Act.

*Dhirajlál Mathurádús* (Government Pleader) for the petitioner.

PER CURIAM :—The Judge to report on the course he adopted, especially with reference to the proviso at the end of Sec. 93 of Act VIII. of 1859. Notice to be given to the opposite party.

The District Judge, in his report, stated that he registered the plaint, because it was specially provided in Reg. XII. of 1827, Sec. 19, Cl. 7, that “ any individual deeming himself possessed of a private right, which cannot equitably be interfered with,” may “ file a suit in the Civil Court against

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the Magistrate to support his claim ; and that the reason of his refusing to interfere with the order of injunction was, that the grounds of expediency on which the injunction was granted continued to exist ; and he further observed that the Magistrate's order, though stated to be given under Sec. 308 of Act XXV. of 1861, was a peremptory one, and so not in terms such as Sec. 308 of the Act requires.

Coram COUCH, C.J., and WARDEN, J.

*Dhirajlál Mathurádás* (Government Pleader), for the petitioner, argued that he came to this court in appeal under the provisions of Act VIII. of 1859, Sec. 94. The order of the Magistrate was in accordance with the provisions of Sec. 308 of the Criminal Procedure Code ; and the plaintiffs ought to have availed themselves of the remedy prescribed in Sec. 310 of the same, and ought not to have gone to the Civil Court.

*Vishvanáth Naráyán Mandlik*, for the opponents, cited 7 Calc. W. Rep. Civ. R. 95, and contended that the order of the Magistrate was not an order under Sec. 308, nor was it in accordance with any law ; and that the court, exercising its powers of extraordinary jurisdiction, might quash the order.

*Cur. adv. vult.*

28th March 1867. COUCH, C.J. :—The Magistrate's order in this case is not a judicial proceeding, and we cannot send for it and cancel it at this stage. If the Magistrate finds he has made an illegal order, he can set himself right by not following it up. Besides, having made one illegal order, he need not go on and make another. It was in the discretion of the Judge to grant an order of injunction, as he has done ; and no cause has been shown for our interfering with that order. If a Magistrate makes an illegal order he is liable to be sued for it.

PER CURIAM :—The petition rejected with costs.