

1872.

In re
JAMES
HASTINGS.

name as the signing Magistrate. I think, therefore, that Section 84 shows that the place where the Magistrate signs should appear on the warrant. This view is borne out by the form given in the Act which leaves a space for the designation of the person before whom the prisoner is to be brought.

As to the objection taken to the offence not being described with sufficient particularity, I think it is not well-founded. The technical description of the offence is given and the form seems to contemplate that being sufficient.

For the reasons I have stated, I think it is my duty to hold that this is not a valid warrant. No good grounds have been shown for detaining the prisoner in custody. He must, therefore, be discharged.

[APPELLATE CRIMINAL JURISDICTION.]

February 7.

Miscellaneous Petition.

GANPRASA'D bin SOBHA'RA'M*Petitioner.*

Crim. Proc. Code Sections 308, 404—Judicial proceeding—Review.

An order under Section 308 of the Code of Criminal Procedure is a judicial proceeding within the meaning of Section 404 of that Code and is, therefore, open to review by the High Court under its extraordinary jurisdiction, when an error in law is committed.

Ashburner v. Keshav (a) on this point overruled, and *The Collector of Hoogly v. Tarak Nath Mukhopadhyaya (b)* followed.

THE following are the facts of the case:—

About three years ago, the petitioner, Ganprasád erected steps to his house in "Shukravár Peth" in the town of Sholápur, and paid to the Municipality of the place the sum of Rs. 130-8-0 for that and other purposes. On the 30th November 1870, the Municipality sought to remove the steps in consequence of which Ganprasád sued the Municipality and, on the 8th February 1871, obtained a decree enjoining the Municipality from removing the steps.

(a) 4 Bom. H. C. Rep. A.C.J. 150. (b) 7 Beng. Law Rep. 449.

On the 6th October 1871, F. Bosanquet, Magistrate of the District of Sholapur, issued an order directing Ganprasád, within a month from the date thereof, to remove the steps or to show cause why the said order should not be enforced. On the 24th October 1871, Ganprasád appeared to show cause and produced the decree of the 8th February 1871 in support of his claim to retain the steps. The cause shown, however, was disallowed on the 25th October 1871.

1872.
GANPRASA'D
bin
SOBHARA'M.

Ganprasád thereon petitioned the Magistrate on the 30th October 1871, and prayed that as he had instituted a fresh suit to prove his right to retain his steps, the order of the 6th October 1871 should not be enforced till the termination of that suit. The Magistrate, however, rejected that petition on the 30th October 1871.

On the 31st October, Ganprasád obtained from the Court of the Assistant Judge, in which his suit against the Magistrate had been pending, an injunction directed to that officer to stay criminal or any other proceedings against Ganprasád in the matter of the steps.

Notwithstanding this injunction, the Magistrate, on the 1st November 1871, issued an order to Ganprasád, stating that the Civil Court had no power to entertain the suit and that he would enforce the previous order, viz., the order of the 6th October 1871.

Ganprasád thereon presented a petition to the High Court, and prayed that the proceedings of the Magistrate might be sent for, and his illegal and arbitrary action restrained.

On the 9th November 1871, the Court (Melvill and Kemball, JJ.) received the petition and referred it to the Magistrate of Broach, with a direction to him to report in detail on the allegations contained in the petition, and to stay all proceedings in connection with the case. On the receipt of the report, the Court (Gibbs and Melvill, JJ.) referred the case, on the 19th December 1871, to the Full Bench under the following order :—

1872.
 GANPRASAD
 bin
 SOBHA'RAM.

“ We refer to the Full Bench the question whether the proceedings of a Magistrate, made under Section 308 and following Sections of the Code of Criminal Procedure, are a judicial proceeding within the meaning of Section 404 of the Code.

“ This question was decided in the negative in *Ashburner v. Keshav (c)*, but it seems to us desirable that it should be reconsidered. The Calcutta High Court has adopted a different view : *Collector of Hooghly v. Tarak Nath Mukhopadhyaya (d)*.

“ We may state that in the case before us, the Magistrate of a District ordered the removal of an obstruction from a thoroughfare. The person, to whom the order was issued, showed cause against the order, but the cause being disallowed, the Magistrate has proceeded to carry his order into execution, and has directed criminal proceedings to be instituted against the person aforesaid. If the question referred to the Full Bench be decided in the affirmative, it is our intention to call for the proceedings of the Magistrate, in order to determine whether the cause shown was such that the Magistrate committed an error in law in disallowing it.”

On the 20th December 1871, the petition was argued before Westropp, C.J., Lloyd, Melvill, and Kembal, JJ.

Shántarám Náráyan, for the petitioner :—Long before the date of the decision in *Ashburner v. Keshav* (28th March 1867) this Court had held in several cases that a Magistrate's order under Section 308 of Act XXV. of 1861 was a judicial proceeding within the meaning of Section 404 of that Act. *In Re Bápu Chintáman*, the High Court (Couch and Tucker, JJ.) sent for the proceedings of the Magistrate of Ratnagiri, under Section 404 of the Criminal Procedure Code, and reversed his order made under Section 308 (6th April 1864). *In Re Karsandás Bechar and another*, the High Court (Westropp and Tucker, JJ.) entertained an application, under the extraordinary jurisdiction, against an order of the Ma-

(c) 4 Bom. H. C. Rep. A. C. J. 150.

(d) 7 Beng. Law Rep. 449, see p. 482.

gistrate of Broach prohibiting the burning and burying of dead bodies at a certain place and directing their disposal at another place four miles off. The application, however, was rejected on the merits. Moreover, what the late Chief Justice said in *Ashburner v. Keshav*, that an order under Section 308 was not a judicial proceeding, was merely an *obiter dictum*, and not a deliberate decision of the Court. The question came before the Court only incidently and did not and could not have received full consideration. [Westropp, C.J., referred to *Kemp v. Neville (e)*].

WESTROPP, C.J. :—We are of opinion that the view taken by the Calcutta Bench in the case referred to in the order of reference is correct, and that so much of the decision in *Ashburner v. Keshav* as declares that a Magistrate's order made under Chapter 20 of the Code of Criminal Procedure is not a judicial proceeding, cannot be sustained.

Proceedings under Chapter 20 were treated as judicial proceedings in several cases previous to that of *Ashburner v. Keshav*, and were reviewed by this Court under Section 404. The provision in Section 308, which requires the Magistrate to issue a notice to the person concerned to show cause why the order should not be enforced, is in itself sufficient to show that the order is to be regarded as a judicial proceeding.

The question referred by the Division Bench must be answered in the affirmative. It will be for the Division Bench to call for the record and proceedings in the case, and the Magistrate will have an opportunity, if he pleases, of instructing counsel to appear in support of the legality of his proceedings.

The Division Bench, on receipt of the Magistrate's proceedings in the case, heard the petition on the 1st February 1872, when

Shantaram Nardyan, appeared for the petitioner.

There was no appearance in support of the Magistrate's order.

1872. The Court (MELVILL and KEMBALL, JJ.) took time to consider its judgment and, on the 7th of February, reversed the order of the District Magistrate, which it considered to be arbitrary and unjust, and referred to the remarks of the Court in the case of *Reg v. Dalsukráñ Haribháí (f)*.

Order reviewed.

[APPELLATE CRIMINAL JURISDICTION.]

Feb. 8.

REG. v. VAKTA' valad LAKHU.

Pound-keeper—Act I. of 1871, Sections 6 and 27.

Where a Magistrate convicted, under Section 27 of Act I. of 1871, a person who was not himself a pound-keeper, but was merely entertained by the Police Pátíl, who was *ex-officio* pound-keeper under Section 6 of the Act.

The High Court annulled the conviction and sentence passed upon the accused.

THIS case was referred for the orders of the High Court by A. A. Borradaile, Magistrate of the District of Ahmadabad, who made the following observations:—

“Under the provisions of Section 434 of the Code of Criminal Procedure, I have the honor to forward, for the orders of the Honorable Judges, the papers and proceedings of the Second Class Subordinate Magistrate of Veerangáon, Azam Prágji Anandrám, in the case of *Reg. v. Vaktá Lakhu*, convicted and sentenced, under Section 27 of Act I. of 1871, to pay a fine of one Rupee.

“The word ‘Pound-keeper’, as used in Section 27, under which the accused is convicted, is defined in Section 6 which contains special provision in regard to Pound-keepers in the Bombay Presidency.

“The accused in this case is not a Police Pátíl, but a person merely entertained by the Police Pátíl of Veerungáom, who is *ex-officio* the Pound-keeper, to look after the impounded cattle and to water and feed them.