

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.	411	Press ~~Mis.~~
Dated	13. 3. 1918	67

160-161

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Not to be folded or roughly handled

*Proceedings of the Madras Government, Judicial Department,
13th March 1867.*

No. 160. Read the following letter from the District Magistrate of Tanjore, to the Chief Secretary to Government, Fort Saint George; dated Vallum, 5th March 1867, No. 60.

I have the honor to acknowledge the receipt of the Proceedings of Government, dated the 26th February 1867, No. 311, and before filing the answer, as per draft therewith received, I have the honor to bring to the notice of Government two mistakes of fact inadvertently made in my report.

2. In the first place, the notice under Section 62 of the Code of Criminal Procedure was not issued by the Acting Head Assistant Magistrate, but by the 2nd Class Sub-Magistrate of Mayaveram; and in the second place, the suit in question was not brought in consequence of the notice thus issued (for the suit was filed before it was issued), but in consequence of a simple order given by the Sub-Magistrate under instructions from the Acting Head Assistant Magistrate, calling upon the plaintiffs to remove the aqueduct which they had constructed. It is to be observed, that the Acting Head Assistant Magistrate's order to the 2nd Class Sub-Magistrate did not contain any direction as to issuing a notice under the Section in question.

3. I have also to bring to the notice of Government a further circumstance which has transpired since I submitted my report on this case. The plaintiffs having disobeyed the notice issued by the 2nd Class Sub-Magistrate under Section 62 of the Procedure Code, they were proceeded against and punished by the Acting Head Assistant Magistrate under Section 188 of the Penal Code; but on a reference made by the Session Judge under Section 434 of the Procedure Code, the proceedings thus held by the Acting Head Assistant Magistrate have been quashed by the High Court as contrary to law. This order of the High Court is based on the supposition, that the disputed question in this case was, "whether the water was open to the use of the public or to any class of persons," thus bringing it within the provisions of Section 320 of the Procedure Code, which vests the power of adjudication on such a question only in a person having the powers of the Magistrate of the District; that the 2nd Class Sub-Magistrate had no jurisdiction under Section 62; and that, consequently, the order issued by him under that Section, as likewise the proceedings held by the Acting Head Assistant Magistrate for disobedience of that order, were illegal. A copy of the Proceedings of the High Court is herewith enclosed for the information of Government.

4. The fact, however, of the notice in this case having been issued by the 2nd Class Sub-Magistrate, and it, as also the Acting Head Assistant Magistrate's proceedings which followed, having been quashed by the High Court as above, does not, in my opinion, materially alter the line of defence to be taken in the matter of the Civil suit in question. As already stated, it is not the notice issued under Section 62 of the Procedure Code which has been made the ground of the suit, and whatever may have been the form of the proceedings taken by the Magistracy in this case, the line of defence rests solely and entirely on the protection which Act XVIII of 1850 gives to Magisterial Officers acting in good faith and in the belief that they had jurisdiction.

5. Unless, therefore, I receive instructions from Government in the meantime to the contrary, I propose to file, on the date that may be eventually fixed for

*Proceedings of the Madras Government, Judicial Department,
13th March 1867.*

the hearing of the suit, a written statement as per the draft prepared by the Government Pleader, omitting, however, the following words from paragraph 2, viz., "under the provision of the 62nd Section of the Code of Criminal Procedure."

6. As directed by the telegram previously received, I have requested Mr. Crole to move the Civil Court to call up the suit from the Moonsiff's Court, and also, in consideration of the necessity which has arisen for again addressing the Government on the subject, to apply for further time, up to the 1st April, for putting in the answer.

7. Paragraphs 3 and 4 of Mr. Dale's answer are in accordance with existing facts, and will be retained as they are.

Proceedings of the High Court of Judicature at Madras, 18th February 1867.

Read letter, dated the 22nd ultimo, from the Session Judge of Tranquebar, referring for the orders of the High Court, under Section 434 of the Code of Criminal Procedure, the proceedings of the Acting Head Assistant Magistrate in Case No. 90 of 1866, as contrary to law.

(Here enter H. C., No. 533 of 1867).

1. The question before the Court in this case is, whether the Subordinate Magistrate had power, under Section 62 of the Criminal Procedure Code, to order the accused to demolish their sluice. If the order was *extra vires*, it is null, and the Head Assistant's subsequent proceedings against them for disobeying it must be quashed.

2. It appears to the High Court that the case is clearly within the provisions of Section 320 (Chapter XXII) of the Code of Criminal Procedure. There was a dispute whether the water was open to the use of the public or to any class of persons, and the erection of the sluice was a taking or retaining the exclusive possession of that which, to render an order legal, must be found a matter "open to the use of the public." The person to adjudicate upon the question of public right of user was therefore a person having the powers of the Magistrate of the District: the jurisdiction of the Subordinate Magistrate under Section 62 was barred.

3. The proceedings of the Head Assistant Magistrate are accordingly quashed.

(True Extract).

(Signed) P. P. HUTCHINS,

Registrar, Appellate Side.

To the Session Judge of Tranquebar.

(True Copy).

(Signed) R. G. CLARKE,

Session Judge.

To the Magistrate of Tanjore for his information.

(True Copy).

(Signed) G. L. MORRIS,

District Magistrate.

No. 161. ORDER THEREON, 13th March 1867, No. 411.

The foregoing letter and its enclosure will be forwarded to the Government Pleader for his opinion as to whether, under the circumstances represented therein, the draft answer furnished with his letter of the 25th ultimo, No. 35, modified as suggested by the Magistrate of Tanjore, will be sufficient.

(True Extract).

Chief Secretary.

To the Government Pleader.

Exd. J. Tulloch.

PROCEEDINGS of the MADRAS GOVERNMENT.

*Read the following
letter from the Magistrate of Tanjore.*

Dated 5th March 1867 No. 60.

Order thereon 13th March 1867 No. 411.

*The foregoing letter
and its enclosure will
be forwarded to the
Government Pleader
for his opinion as to
whether under the cir-
-cumstances represented
therein, the draft answer
furnished with his letter
of the 25th ultimo No. 35,
modified as suggested
by the Magistrate of
Tanjore, will be sufficient.*

To the Govt. Pleader - disp 15/3.

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160. 161

Liberal 1867. Department.

No. 411.

PROCEEDINGS OF GOVERNMENT.

224-560.

Dated 13 March 1867

List