

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice.

1908.
December 9.

HENDRICK MENDIS *v.* SRI CHANDRASEKERA
MUDALIYAR.

P. C., Panadure, 28,009.

Obstruction to a road—Order Nisi—Claim of right—Reference to Civil Court—Criminal Procedure Code, s. 105.

Where a person against whom proceedings are taken under section 105 of the Criminal Procedure Code asserts a *bona fide* claim to the property in respect of which the proceedings are taken, it is the duty of the Magistrate to stay criminal proceedings, and allow such person an opportunity of proving his title in a Civil Court.

A PPEAL against an order of the Police Magistrate (T. W. Roberts, Esq.).

H. J. C. Pereira (with him *E. W. Jayewardene*), for the appellant.
Van Langenberg, for the respondent.

Cur. adv. vult.

December 9, 1908. HUTCHINSON C.J.—

This is an appeal against an order made on July 29 last making absolute an order *nisi* which had been made on June 9, for the removal by the appellant of an obstruction to a road. The order seems to have been intended to be made under section 105 of the Criminal Procedure Code, although no mention is made either in the order *nisi*, or in the summons to the appellant of that section, or of any allegation that the road is public, or of any other allegation which would give the Court jurisdiction. The appellant's objections are that he made a reasonable claim in good faith that the road is his private property, over which the public have no rights, and therefore the Magistrate ought to have given him an opportunity of proving that claim by a civil action; and also that the road is one which is or may be lawfully used by the public. The proceedings began with a petition from B. H. Mendis, which states that the appellant has blocked up the road leading to the petitioner's house; and the petitioner on the same day gave evidence that the road is a public cart road. Upon that an order was made, dated June 9, directing the appellant to appear before the Court on the 18th to show cause why the obstruction should not be removed. On the 18th the appellant appeared and said that the gate of which Mendis complained could be opened; and the Magistrate directed a Station House Officer to inquire whether the gate was left open or not.

1908. Then on July 25 and 29 the Magistrate took evidence, which was chiefly directly to the question whether the road was a public road
 December 9. or not. He found that the road is a public road, and ordered the
 HUTCHINSON appellant to remove the obstruction within ten days.
 C.J.

I entirely agree with the observation of the Judges in *Chellappa v. Munkesar and others*¹ If the appellant's claim was *prima facie* reasonable and made in good faith, the Court ought of its own motion to have allowed him time to bring an action, if he was willing to do so, to establish his claim. A Police Court is not a suitable tribunal to adjudicate a claim of this kind, which may involve questions of title to land of great value, and which generally raises questions of great difficulty, both of fact and of law. Moreover, in the present case it does not seem to me that the evidence is very strong to support the finding that the road is a public way. The evidence rather points to the conclusion that, although there may be a private right of way for the owners or occupiers of certain houses and lands—which, however, was not claimed, nor would the claim, if proved, have given the Court jurisdiction to make this order—there is no public right of way. There is not much evidence of any dedication to the public, or of use to the public, or of any probability that the public would ever want to use this road. I think this is eminently a case in which the appellant should have been given an opportunity of bringing an action against the man who is asserting his right to use the road; in that action the question can be tried whether the defendant has a private right, or whether he has a right as a member of the public, or whether he has any right at all.

I set aside the order under appeal, and direct that the proceedings on the application to have the order made absolute be adjourned for a month from the date of the receipt of this order in the Magistrate's Court, to enable the appellant to bring such action as he may be advised. If he does not commence the action within that time and thereafter prosecute it diligently, the Magistrate can then proceed with the application.

Appeal allowed ; case remitted.

¹ (1894) 3 S. C. R. 109.