

[IN REVISION.]

1926.

*Present:* Dalton J.

RAJAPAKSE *v.* WARUSA *et al.*

*P. C. Avissawella, 11,184.*

*Obstruction to a commissioner appointed under section 5 of Partition Ordinance—Statutory public servant—Penal Code, s. 183.*

A Commissioner appointed under the Partition Ordinance is a public servant within the meaning of section 183 of the Penal Code.

**A**PPPLICATION to revise an order made by the Police Magistrate of Avissawella, discharging the accused.

*B. F. de Silva*, for appellant.

*E. G. P. Jayatilleke*, for respondent.

July 9, 1926. DALTON J.—

This is an application by the complainant, a licensed surveyor, to revise an order of the Police Magistrate discharging the accused in the case. The complaint made was that the two accused had voluntarily obstructed the surveyor in the discharge of his duties on a commission issued to him, the surveyor, on February 9, 1926. in D. C. Colombo, case No. 9,371, thereby committing an offence under section 183 of the Penal Code. That section deals with the obstruction of a public servant in the discharge of his public functions.

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Without taking evidence, purporting to follow the decision in *Silva v. Wijesinghe*,<sup>1</sup> the Magistrate held that section 183 did not apply to any order made in a civil suit between party and party, and accordingly on May 11, 1926, discharged the accused. On May 21 complainant filed a petition to revise that order. The order made was clearly an order of discharge under section 191 of the Criminal Procedure Code, and not an acquittal. In *Suppiah v. Loku Banda*<sup>2</sup> De Sampayo J. held that a complainant has a right of appeal against an order of discharge. It is urged for the respondents, however, that whichever it be, the complainant had a right of appeal, which he has not exercised. The right of appeal against an acquittal is of course subject to the obtaining of leave under section 336. Here, however, no such leave is required. The petition in revision is also filed within the time limited for lodging an appeal, and hence, even if complainant should have appealed and not have brought the matter up in revision, I think this Court is, under the circumstances, quite justified in dealing with the matter under its powers of revision.

For the complainant it is urged first of all that, inasmuch as he was appointed a Commissioner in D. C. 9,371 under the Partition Ordinance, he was in fact himself a public servant within the meaning of section 183 of the Penal Code. If that is not so, at any rate it is urged he comes within the second class of persons mentioned in the section, "persons acting under the lawful orders of a public servant," inasmuch as he was acting under the lawful orders of the District Judge, who is a public servant. In this latter connection I am referred to the decision in *Bowes v. Meera Tamby*.<sup>3</sup> It is enacted, however, by section 147 (1) (a) of the Criminal Procedure Code that no Court shall take cognizance of any offence punishable under section 183, amongst others, except with the previous sanction of the Attorney-General, or on the complaint of the public servant concerned, or of some public servant to whom he is subordinate. Here the complainant is the surveyor or commissioner himself. It is clear from the record that there is no previous sanction of the Attorney-General, and inasmuch as there is no complaint by the District Judge or of any public servant to whom he is subordinate, it is not necessary to consider the question whether the complainant was a person acting under the lawful orders of a public servant. It only remains to be considered whether he was in fact a public servant himself in his capacity as a commissioner of the Court.

The decision of the Court in *Bowes v. Meera Tamby* (*supra*) does not help on this point. The facts there show that the Court dealt with the person obstructed, not as being a public servant himself, but as acting in pursuance of the lawful order of the District Judge.

<sup>1</sup>(1886) 7 S. C. C. 203.

<sup>2</sup>3. C. W. R. 127.

<sup>3</sup>(1905) 8 N. L. R. 311.

Hence, although the point is not referred to, it must be presumed that the provisions of section 147 (1) (a), to which I have referred, were duly complied with.

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In *Brodhurst v. Hendrick Sinno*<sup>1</sup> Bonser C.J. held that a surveyor appointed by the Fiscal to survey a land sold in execution is not a public servant. He further went on to hold also that he was not a person acting under lawful orders of a public servant within the meaning of section 183. This further finding was dissented from in *Bowes v. Meera Tamby* (*supra*) on the ground that the construction placed upon the section by Bonser C.J. made the words "or any person acting under the lawful orders of such public servant" inoperative. The Court, however, did not question his conclusion that the surveyor so appointed was not himself a public servant.

The complainant is a commissioner appointed by the Court under section 5 of the Partition Ordinance. He may be actually selected by the parties to the action, and he is paid by them; he is appointed for that case only, and he surveys and partitions the land for the parties in terms of the decree of partition. Whilst he may well be acting under the orders of a public servant or functionary, it is difficult to see how by virtue of that commission he himself becomes a public servant within the ordinarily accepted meaning of that term. But the term is defined in section 19 of the Penal Code. Is he a statutory public servant? Of the various classes of persons set out there, for the purposes of this case it is only necessary to consider the seventh class, viz., "every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of justice or by any other competent public authority." The commissioner is clearly not an arbitrator, although he is a person to whom a matter has been referred for report by a Court of justice. Is he one of the "other persons" falling within this second class? His duties, as set out in section 5 of the Partition Ordinance, are after giving thirty days' notice, both by writing and by beating of "tom-tom" in the village and on the land of the proposed partition, thereafter in the presence of all the parties concerned, if they wish to be present, to make the partition, having regard to the ascertained proportions of the several owners; in addition he takes into account the value of any improvements made on the land, and the party by whom they may have been made, and doubtless after holding an inquiry on the spot and collecting information from those present to enable him to perform his various duties, he thereupon draws up a schedule setting out the general mode of his proposed partition which he returns to the Court, with his survey. The Court may thereafter confirm or modify the proposal of the commissioner in entering final judgment. It will be seen, therefore, that the commissioner has to go far beyond merely making a survey; he has *inter*

<sup>1</sup> (1899) 4 N. L. R. 213.

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*alia* to consider the question of value generally, as well as with regard to improvements. As pointed out in the *Law of Partition* (Jayewardene), the Courts expect from commissioners the same high standard of impartiality and integrity as the public expect from the Courts.

Section 19, class 7, of the Ceylon Penal Code is the same as section 21, class 6, of the Indian Penal Code. In his notes on this section in the *Commentary on the Penal Law of India*, Gour adds the word "commissioners" to the word "arbitrator" and states that "arbitrators and commissioners and other assistants of Court are public servants" (Vol. 1, p. 228). He adds that the persons typified in this sixth class are really persons who take more or less a judicial character, and for the limited purpose for which they are appointed they become as it were the *alter ego* of the person appointing them.

It seems to me that the case of *Brodhurst v. Hendrick Sinno* (*supra*) cannot be brought within section 19, class 7, of the Ceylon Penal Code, and therefore it affords no assistance here. Having regard to the duties of the commissioner, to which I have referred, and also to the opinion expressed by Gour, I have come to the conclusion that a commissioner appointed under the Partition Ordinance comes within the seventh class of persons mentioned in section 19 of the Penal Code, and as such is a statutory public servant. I have considered the case of *Bajoo Singh v. Queen Empress*,<sup>1</sup> cited in the course of the argument, but that appears to me to be a case which deals with an officer, a surveyor, who comes within the tenth class of persons dealt with in section 19, inasmuch as he was surveying what was held to be Government property. That case, therefore, has no application here.

For the reasons I have given I would set aside the order of the Magistrate discharging the accused and refer the matter back to him to hear evidence on the complaint filed and to proceed to a final determination thereon.

*Set aside.*

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<sup>1</sup> 26 Cal. 159.