

CALCUTTA HIGH COURT

Paryag Rai

Vs

Arju Mian

(W C Petheram, C.J. Beverley ,J.)

18.08.1894

JUDGMENT

W. Comer Petheram, C.J. and Beverley, J.

1. The accused in this case are found to have loosed the complainant's cattle at night and to have driven them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release; and they have been ordered by the Joint Magistrate to pay compensation under Section 22 of Act I of 1871 (Cattle Trespass Act), and in default to suffer one month's rigorous imprisonment.
2. The District Magistrate refers the case to us on the ground that the penalty inflicted is inadequate, and he asks us to quash the proceedings and direct that the accused be tried for theft.
3. We are of opinion that the proceedings of the Joint Magistrate must be set aside, inasmuch as on the findings this was not a case of illegal seizure and detention of cattle under the Cattle Trespass Act, and therefore Section 22 of that Act is not applicable. We agree with Mr. Phillips that in this case all the elements of theft are present, as that offence is defined in Section 378 of the Penal Code. We accordingly set aside the proceedings of the Joint Magistrate, and direct that the accused be placed on their trial charged with an offence under Section 379, Penal Code.
4. Mr. Phillips also appears to us to be right in the opinion that the sentence of imprisonment awarded in default of payment of the compensation is not warranted by the law. This was held in the case of *In the matter of Ketabdi Mundul* 2 C.L.R. 507, but the other case cited *Shaik Hussain v. Sanjivi* I.L.R. 7 Mad. 345, is not to the point. The law prescribes that the compensation may be levied as a fine, but it does not say that imprisonment may be awarded in default of payment, and we are not aware of any provision of law which provides that fines may be levied by means of imprisonment. The ordinary mode of levying fines is laid down in Section 386 of the Code of Criminal Procedure. This part of the Joint Magistrate's order therefore is clearly illegal (see *Ramjeevan Koormi v. Doorga Charan Sadhu* Ed. note).

