**CALCUTTA HIGH COURT**

L.O. Clarke

Vs

Brojendra Kishore Roy Chowdhry

(Francis W Harington, C.J. Brett, J.)

12.01.1909

**JUDGMENT**

**Francis W. Maclean, C.J.**

1. The plaintiff is a zemindar residing in the District of Mymensingh. The defendant is a member of the Indian Civil Service, and, at the date of the transaction in question, was District Magistrate of Mymensingh. The plaintiff seeks to recover damages for a trespass alleged to have been committed by the defendant in searching the plaintiff's cutchchery at Jamalpur on the 28th of April 1907. The defendant, in substance, pleads not guilty by Statute and relies upon th6 Statutes to which reference will be made later on.

2. The facts appear to be these: For sometime previous to the 28th of April 1907 the state of feeling between the Hindus and Mahomedans at Jamalpur ran very high and there can be no doubt but that for some days the town had been in a condition of very great excitement. On the 28th of April 1907, the date of the search which undoubtedly took place on the afternoon of thatday the defendant was at Mymensingh; and in consequence of a telegram, which he received from Mr. Barniville, the Sub-divisional Officer, and Mr. Luff man, the Head of the Police at Jamalpur, he left for Jamalpur and arrived there at about 10. o'clock in the morning. He was then informed by Mr. Luffman that on the previous evening a man named Genda Sheikh had been wounded by a revolver shot; and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries of the zemindars. In consequence of this information the defendant determined to search, amongst others, the plaintiff's cutchery; and in the presence of certain gentlemen as witnesses of the search and accompanied by Mr. Barniville, Mr. Luffman and several police, he searched the plaintiff's cutchery in the afternoon. This is the trespass complained of. It is unnecessary to go more in detail into the facts of this part of the case, because there is no dispute as to the facts stated above. The fact of the search and that it was conducted by the order and under the directions of the defendant is not denied. It seems,

therefore, unnecessary to discuss what took place on the evening of the 27th of April or to go more minutely into the question of the excitement or the cause of the excitement and the state of feeling between the Hindus and Mahomedans at that time. Unless the search were warranted by some Statute, the defendant had no right to make it; and the question we have to decide is whether the defendant is protected, in other words, was he acting and did he act under any, and if so, what power conferred upon him by law. The plaintiff has charged the defendant with having acted maliciously and without reasonable and probable cause in making the search. I have no hesitation in saying that there is no ground whatever for charging the defendant with malice, nor any hesitation in saying that the defendant acted in perfect good faith in making the search that he did.

3. It will, perhaps, be convenient, in the first place, to deal with Section 25 of the Indian Arms Act, 1878, upon which the defendant relies. That section runs as follows: "Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate, having first recorded the grounds of his belief, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are, or is, to be found, and may seize and detain the same, although covered by a license in safe custody, for such time as he thinks necessary. The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name, or in virtue of his office, by the Local Government." The search was undoubtedly a general search for arms, not, as is now suggested at the Bar, for the revolver, with which Genda Sheikh had been wounded. It is conceded that the defendant before making the search did not record the groundof his belief. The question then is whether, not having complied with the terms of the Statute, the defendant can justify the search under that section. It is contended for him that the words "having first recorded the grounds of his belief," are merely directory and not imperative or mandatory. It is difficult to accept this view. A special and drastic power is by this section granted to the Magistrate. Without it, he could not have made the search, unless, as it is suggested, certain provisions of the Criminal Procedure Code apply to a case such as the present. These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to insure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is mandatory and what is merely directory in the language of any particular Statute. The present case appears to fall within that-class of cases in which, when a Statute creates a special right, but certain formalities have to be complied with antecedent to the

exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant, in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action.

4. Then it is said that the search was warranted by Section 105 of the Criminal Procedure Code. That section runs as follows: "Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant." The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to Section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a 'Court,' and, all that Section 105 enacts is, that instead of the Court issuing a search-warrant, the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate: but the section does not assist the present defendant.

5. Then, reliance is placed upon Section 165 of the same Code, and the argument is that, inasmuch as Mr. Luffman might have made a search under that section, the search must be treated as having been made under that section, and the defendant can so shelter himself. The answer to this contention seems to be that the search was not, and was never, intended to be a search under this section, and the search was not by Mr. Luffman or by any police officer making an investigation: it was a search conducted by, and under the directions of, the Magistrate. Mr. Clarke says so himself. He says "I thought I was justified in making the search myself "and" I did want to make the search myself." It must, I think, be taken that the search was. by him. Mr. Luffman was not called to prove that this was a search under this section, or that he was exercising the powers conferred upon him by this section. Mr. Luffman did not go into the box. Section 165 does not mention the Magistrate. Where there are special provisions in an Act of the Legislature dealing with the case of a search for Arms, and laying down what are the conditions precedent to making such a search, and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact the search is one made for arms, it ought, in the absence of evidence, to show that the search was made under the general as opposed to the specific legislation, to be taken that the search was made, not under the general provisions authorizing searches, but under the special provisions authorizing a search for arms, and especially so when the search is made by one who, in the circumstances had no power of search under the general provisions as to searches. Nothing is specifically said about arms under Section 165, and that section does not appear to protect the defendant.

6. The scheme as regards searches under the Code of Criminal Procedure is reasonably clear. The Court can issue a search warrant under Section 96, or in, lieu of that the Magistrate may himself

search under Section 105; Section 165 deals with searches by a police officer, and not by a Magistrate.

7. The only other Act relied upon is Act XVIII of 1850. The preamble of that Act is "for the greater protection of Magistrates and others acting judicially" and there is only one section which runs as follows;-" No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound, to execute, if within the jurisdiction of the person issuing the same." Can it be said that in conducting this search, the Magistrate was acting judically ? Was this act done in the discharge of his judicial duty ? The Act itself draws a distinction between an executive as opposed to a judicial act: for it protects not only the person who acts judicially, but also the person who executes the order of the person so acting judicially. The duties of a Magistrate in this country are at once judicial and executive. But here the search must be taken to have been conducted by the Magistrate in his executive, and not in his judicial, capacity. There is; therefore, no Statute which protects the Magistrate in his prima facie wrongful act in trespassing upon the plaintiff's cutchery.

8. I should have been glad if I could have seen my way to have protected the Magistrate, for he was placed in a difficult position and in one of emergency. That he acted with the utmost bond fides throughout, I entertain no doubt whatever, and the charge of malice against him is as unfounded as it is improper. The only mistake he made was in not complying with the provisions of the Arms Act before he made the search. We are told that if the decision of the first Court be upheld, it will paralyze the action of Magistrates, in moments of emergency, in this country, and that they will be timid about acting under their statutory powers. I am afraid we cannot go into the consequences of our decision; our only duty is to decide, as best we may, according to what we believe to be the Law. At the same time it may be pointed out that it is of the highest importance, in the interests of the public, that when Executive Officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising those powers, in satisfying themselves that they have strictly complied with the provisions of the Act which created them.

9. It is said that we must decide this case, not according to the Law of Trespass prevailing in England, but upon the principles of equity, justice and good conscience. But how can those

principles justify an Executive Officer of the Government in forcibly entering another man's house and ransacking its contents without any warrant in law to do so ? In the view taken it becomes unnecessary to go into the question of whether the search was properly conducted or whether too much violence was or was not displayed, for, at the outset Mr. Dunne said that he did not propose to go into question of the quantum of damages.

10. There is a cross-objection in which the plaintiff re-iterated his charge against the defendant of malice and want of bond fides. This cross-objection has not been pressed.

11. The result then is that the appeal is dismissed; but having regard to the re-iteration of the unfounded charges against the defendant, it will be dismissed, without costs, and the cross-objection will also be dismissed without costs.

12. This judgment will govern the next appeal No. 37 of 1908 and the same order will be made in that case.

Harington J.

13. In this case the defendant appeals against a judgment of this Court in its original jurisdiction awarding to the plaintiff Rs. 500 damages for trespass.

14. The defendant was in April 1907 District Magistrate of Mymensingh: on the 27th of that month-there being very considerable ill-feeling between the Mahomedans and Hindus-a Mahomedan was shot at Jamalpur. On the 28th the defendant arrived at Jamalpur and was informed of the shooting of the Mahomedan and that fire-arms had also been used by some Hindus in the temple of one Doya Moyee. He was told that the person, who had shot the Mahomedan, had fled towards the plaintiff's cutcheries and he was told that the zemindars were storing arms in their cutcheries.

15. Under these circumstances, on the 28th the defendant went to the plaintiff's cutchery accompanied by the District Superintendent of Police and other persons, who conducted a search under the authority of the defendant.

16. In respect of this search the plaintiff claimed damages to the extent of Rs. 10,500.

17. There was some evidence of actual damage done by the persons, who carried out the search apart from the mere trespass. This evidence the persons who made the search were not called to contradict. The Judge, therefore, after acquitting the defendant of any want of bond fides in the matter awarded the plaintiff Rs. 500 to cover the trespass and the actual damage done.

18. The learned Counsel for the appellant does not concern himself with the amount of damages, but argues that the defendant is justified under the statutory enactments on which he relies.

19. The Acts which the defendant considered himself entitled to rely on were the Arms Act and the Criminal Procedure Code. In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under.

20. That to my mind is of very little importance. The defendant is entitled to call in aid any Statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search.

21. Under Section 25 of the Arms Act a Magistrate is authorized, if he thinks a person has arms for an unlawful purpose, to make a search, having first recorded the grounds of his belief.

22. It is admitted that the defendant did not record the grounds of his belief in this case, but it is argued that the provision that he should do so is merely directory, and that his entry on the premises is justified as he had good grounds for his belief that arms were stored in the cutchery notwithstanding his failure to record these grounds.

23. I do not agree with this, and I think that where a Statute authorizes the doing of an act, which is prima facie a wrong to an individual, the doer must comply strictly with the conditions imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual, who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection.

24. Here the section imposes on the Magistrate in the most express terms the duty of first recording the grounds of his belief that arms are in the possession of the person, whose house is to be searched. It makes it in the most express terms a condition precedent and to justify his entry the condition must be strictly complied with. As there was a failure to comply with this condition the Arms Act will not avail the defendant.

25. The next section, under which it is sought to justify the appellant, is Section 165 of the Criminal Procedure Code. That section provides that "whenever a police officer making an investigation considers that the production of anything is necessary for the conduct of an investigation of any offence, which he is authorized to investigate, and when such thing is not known to be in the possession of any person, such officer may search or cause the search to be made for the same within the limits of the station, of which he is in charge or to which he was attached."

26. I quite agree with the argument that (apart from any question of the user of undue violence), if the search by the police officer can be justified under this section, then the defendant must succeed, for, if the police officer committed no trespass in entering and searching, then the defendant committed no wrong in authorizing the police officer to do that which the law gave him a right to do.

27. But this case was not set up in the Court of first instance nor was any evidence given to support it. To succeed the defendant would have to prove that the police officer, who made the search, considered that the production of something was necessary for the conduct of his investigation into an offence, which he was authorized to investigate, and this could not be proved without calling the police officer.

28. Now the police officer was not called, the facts entitling the police officer to enter and search were not proved. As the case stands there is nothing to show that the police officer considered that it was necessary to any investigation to produce anything. For all that appears he may have searched, just because the defendant told him to.

29. The next section relied on is Section 105 read with the other section dealing with the issue of a search-warrant.

30. The defendant considered he was able to issue a search-warrant and therefore under Section 105 competent to conduct a search in person.

31. Now the law relating to the issue of search-warrants is to be found in Section 96 and the following sections of the Criminal Procedure Code.

32. By Section 96, when the Court considers that the purposes of any enquiry, trial or other proceeding under this Code will be served by a general search, it may issue a search-warrant and by Section 105 a Magistrate can direct a search to be made in his presence of any place, for which he is competent to issue a search-warrant.

33. Could he in the present case issue a search-warrant ?

34. In my opinion Section 96 only authorizes the Magistrate to issue a search-warrant when sitting as a "Court," i.e., when some proceeding under the Code has been initiated before him and this view is strengthened by the form of the search-warrant given in schedule V, Form 8, which recites that information has been laid or complaint has been made. In this case there is no evidence of the initiation of any proceeding before the Magistrate under the Criminal Procedure Code nor of any "information" or a "complaint "being laid before the Magistrate under the Code.

Moreover the Magistrate appears to have been searching for arms generally, not for some particular weapon.

35. As I read the provisions of the Code it appears to provide for search by a police officer, which may be made under Section 165 before any proceeding has been initiated before any Court and searches under the authority of a Court under Section 96, which must be made after the initiation of some proceeding. The only section's that I can find in the Code authorizing a Magistrate to search without any proceeding having been initiated before him, are Sections 98 and 100. The former confers on a District Magistrate, Sub-divisional Officer, Presidency Magistrate or Magistrate of the 1st class the power of issuing a warrant or to Search houses suspected of containing stolen property, forged documents, counterfeit coins and such like articles, but this power can only be exercised upon information and after such enquiry as the Magistrate thinks, necessary. The latter enables a Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate, if he has reason to believe that a person is confined under such circumstances that the confinement amounts to an offence, to issue a warrant for the search for the person so confined. It is significant that Section 96 which authorizes the issue of a search-warrant for the purposes of an enquiry, trial or other proceeding under the Code confers the powers of issuing the warrant on "the Court," while Sections 98 and 100 confer the power of issuing a warrant to search only on the Magistrate specified in the section.

36. Lastly, it is said, that the defendant was acting as a judicial officer and so is protected by the Act of 1850.

37. That Act in my opinion does not apply because there is nothing to show that the Magistrate was acting judicially, when he directed the search.

38. No doubt there is authority for saying that the issue of a search-warrant by a Magistrate is a judicial act. Under the Code (except in the cases specified! under Sections 98 and 100) the issue of a search-warrant presupposes the existence of an enquiry trial or other proceeding in the course of which the Court may be called on to determine judicially whether a warrant ought or ought not to be issued. But even if it be assumed that a search by the Magistrate under Section 105 is as much a judicial act as the issue of a warrant to search (a proposition to which I am not at present prepared to assent) even then it has not been shown that the search was directed for the purpose of any proceeding under the Code, as it must be to justify the issue of a warrant. And further, if the Magistrate were acting as a judicial officer, I should have expected some sort of record of some proceeding before him in the course of which it would appear that the search was directed. On the contrary, it appears that there was nothing before the Magistrate to enable him as a Court to issue a warrant.

39. He cannot therefore be said to have been acting judicially in directing 'a search to be made without any proceeding having been instituted before him, which he could be called on to determine judicially.

40. In conclusion, if there had been no evidence of excess of violence in the conduct of the search, I should have considered that a very small sum indeed would have represented the damage, which the plaintiff would be entitled to recover for the wrong, which the defendant has done him in making a search, which he had ample reasons for making without recording those reasons. But there was evidence of undue violence in the conduct of the search-not perhaps very strong or very convincing evidence, but it was believed by the learned Judge who had the witnesses before him and I cannot say there was no case to answer on this head. But the defendant did not answer it by calling the actual searchers the persons who were alleged to have done the damage and that being so the damages were bound to be more than nominal.

41. For these reasons, I agree that the appeal should be dismissed and that the respondent should be allowed no costs, inasmuch as he has made grossly improper and unfounded attacks on Mr. Clarke, who when called upon to act under circumstances of unusual difficulty, undoubtedly acted with perfect good faith."

Brett J.

42. I regret that, after the best consideration which I have been able to give to the facts and law of this case, I am unable to agree with the view which has been taken in their judgment by the learned Chief Justice and my learned brother Mr. Justice Harington.

43. The present appeal arises out of a suit brought by the plaintiff, Babu Brojendra Kishore Roy Chowdhry, a zemindar in the District of Mymensingh, who has his zemindari cutchery at Jamalpur in that District, against Mr. L.O. Clarke, who on the 28th April 1907, was District Magistrate of the Mymensingh District. The suit was brought to recover damages to the amount of Rs. 10,500 for wrongful trespass in the cutchery of the plaintiff by the defendant on the 28th April 1907. The plaint alleged that on the 28th April the defendant with the Sub-divisional Officer of Jamalpur, Mr. Luffman, District Superintendent of Police, a Sub-Inspector of Police and the Sub-Registrar followed by a large number of armed police men and a large number of Mahomedan rowdies carrying lathis and other dangerous weapons wrongfully invaded and trespassed in the plaintiff's cutchery, and there, under orders of the defendant, those who accompanied him forcibly, wantonly and wrongfully broke open and smashed boxes in the cutchery, scattering, destroying and mutilating various valuable zemindari papers and documents. It went on to say in paragraph 6 that "the defendant acted in a whole illegal, wanton and arbitrary

manner and he had no lawful or reasonable excuse or justification or authority in or for his wanton and high-handed conduct aforesaid, and the plaintiff further charges that the defendant acted wrongfully and maliciously and without reasonable cause in the matter of the conduct aforesaid." Damages were claimed (see paragraph 7 and the schedule) (1) for insult, injury and humiliation at Rs. 8,000, (2) for damages done to the houses at Rs. 200, (3) damages to moveables at Rs. 300 and (4) damaged or lost papers and documents at Rs. 2,000. Under the 1st item appears to have been included a claim for rents, which in consequence of the search the plaintiff said he had been unable to realise from his tenants.

44. The suit was instituted on the 25th July 1907 in the Court of the Subordinate Judge (3rd Court) of Mymensingh. On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from the Court of the Subordinate Judge to that of the District Judge. After receipt of notice of the application the plaintiff, on the 3rd January 1908, applied to the High Court in its extraordinary-civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial and on the same day a rule nisi was issued by the High Court on the defendant to show cause why the suit should not be transferred to the High Court for trial. On the 29th January 1908, an order was passed by Mr. Justice Fletcher transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original jurisdiction. The suit afterwards came on for hearing before Mr. Justice Fletcher on the 25th May 1908.

45. The following sequence of events is important:

46. On the 21st April 1907, there was a large fair or mela held at Jamalpur. Certain Hindus at the instigation, it is stated, of the Hindu servants of the plaintiff and other zemindars, his co-sharers in the village, tried to prevent the sale of bideshi or foreign goods at this fair. The Mahomedans resented this and there was a serious disturbance and the feelings of the Mahomedans towards the Hindus were considerably embittered. In the evening of the 27th April some Hindus dressed, it is stated, in Mahomedan clothes, were seen wandering about and were followed by some Mahomedans. The Hindus turned on the men following them and fired 3 or 4 revolver shots at them, one of which wounded Genda, a Mahomedan. An uproar followed, Mr. Barniville, Sub-divisional Magistrate of Jamalpur, and Mr. Luff man, District Superintendent of Police, who were then in the D k Bungalow at Jamalpur, went to the scene of disturbance and met some Mahomedans carrying away the Mahomedan Genda, who had a wound from a revolver bullet in his leg. Information was given to them that Genda had been wounded by one Prakash Chander Dutta, a leader of a body of Hindus called Volunteers and that Prakash Chander Dutta and those with him had fled in the direction of the cutcheries. The cutcheries of the plaintiff and his co-sharer landlords appear from the map filed in the suit to be all close together on an open piece of

ground. Close by is the temple of Thakurani Doya Moyee. An excited crowd of Mahomedans armed with lathis were collecting evidently bent on attacking the cutcheries. The two officers collected as many police as they could, but went towards the cutcheries with apparently the double intention of arresting the man or men, who had fired on the Mahomedans and wounded Genda and also of keeping the Mahomedan mob under control. On arrival at the cutchery they found four Hindu strangers there, whom they arrested on suspicion. They also found Satish Chandra Banerjee with forty or fifty men armed with lathis in the cutchery. These they disarmed. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee and went there. They found the door locked and were refused admission. The Sub-divisional Magistrate ordered the persons inside to open the door, promising that no harm should be done to the persons inside. There was then a large angry crowd of Mahomedans close by, but they seem to have been under control. The door was not opened, but two shots from a revolver and two from a shot gun were fired from inside the temple and a Mahomedan received a shot wound. The two officers then drew off the Mahomedan crowd and managed to disperse them.

47. The Sub-divisional Officer, Mr. Barniville, then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police, Mr. Luffman, sent a telegram to Mymensingh to the defendant as District Magistrate to the following effect "serious riot just averted-come at once."

48. The defendant received this telegram at 2 A.M. on the morning of the 28th April. He afterwards started for Jamlpur and arrived there at 10 A.M.

49. On his arrival the defendant received from Mr. Barniville, the Sub-divisional Magistrate, and from Mr. Luffman, Superintendent of Police, reports of the two occurrences of the 27th April.

50. At 1-30p.m. the defendant with Mr. Luffman, the District Superintendent of Police, proceeded to search the cutcheries of the plaintiff and of the other zemindars. The temple of Doya Moyee and the cutchery and Naib's house of the Ram Gopalpur zemindar were first searched. Afterwards the cutchery of the plaintiff was searched. The case for the defendant was that he searched the plaintiff's cutchery in consequence (1) of the reports received by Mm from Mr. Barniville, and Mr. Luffman of what had occurred on the 27th April, and (2) of the reports previously reserved that the Gouripore zemindars (i,e., the plaintiff and his co-sharers) had been collecting arms and men in their cutcheries.

51. At that time none of the amlahs or peadahs of the plaintiff were to be found and it seems that the Jemadar in charge of the plaintiff's cutchery building had locked it up and left at 1 P.M. The padlocks closing the doors of the building were forced open and the boxes in the cutchery were

also forced open and their contents-zemindari papers-taken out in pursuit of the search for arms. The search of all the buildings occupied from 1-30 P.M. to 3-30 P.M.

52. The main points raised for determination in the suit were (I) was the search made under the provisions of the Code of Criminal Procedure and was the defendant protected from the suit on that account, (2) was the search made under the provisions of the Arms Act and was the defendant protected from suit by that Act, or (3) was the defendant in directing the search acting judicially and were he and those acting under his orders in consequence protected by the provisions of Act XVIII of 1850 ?

53. In his defence the defendant pleaded (see his written statement, paragraphs 13, 14 and 15 and the preceding explanatory paragraphs 6 to 12) (1) that at the time of the alleged trespass he was District Magistrate of Mymensingh, and as such Magistrate he was acting and did act under and by virtue and in pursuance of the powers conferred on him by law and particularly by all or some one or more of Sections 94, 96, 105 and 165 of the Criminal Procedure Code or (2) in the alternative that he was acting tinder the powers conferred upon him by Section 25 of the Indian Arms Act, or (3) in the alternative that he was acting in discharge of a judicial duty and within the limits of his jurisdiction and that he at the time believed himself to have (as he submits he had in fact) jurisdiction to do or order the acts done or ordered by him and therefore that he was protected by Act XVIII of 1850, being the Act for the Protection of Judicial Officers. Further, he alleged that the damages claimed were excessive. The written statement, it is to be observed, was filed in the Court of the Subordinate Judge of Mymensingh on the 9th November 1907.

54. Evidence was gone into by both parties and judgment was delivered by Mr. Justice Fletcher on the 19th June 1908. The learned Judge held that the defendant in determining to make the search on the day in question in the plaintiff's cutchery was acting bona fide and was not actuated by malice or other improper motives against any particular individual or section of the community. On the other hand, he held that the search of the plaintiff's premises by the defendant was not warranted by law and so constituted an actionable trespass. In arriving at this conclusion the learned Judge applied the principle of the Common Law in England, which he regarded as applicable to the case, that a Magistrate is liable in an action for trespass for acts done by him to the person or property of others, unless he can justify the act as having been done under the authority of law, and that if a Magistrate pleads a Statute or Statutes as justifying his acts, he must bring himself within the words of the Statutes strictly.

55. Applying that principle he held that the defendant had failed to justify his act under the Arms Act of 1878, as the provisions of Section 25 of that Act require that before causing a search to be made under the Act, the Magistrate should first record the grounds of his belief that the person,

whose premises he was about to search, had in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace and the defendant had failed to record the grounds for his belief to that effect before he directed the search.

56. Dealing next with the plea based on the provisions of Sections 105 and 106, Criminal Procedure Code, the learned Judge dismisses it very summarily with the observation that it is obvious that the defendant was not competent to issue a search warrant under the provisions of the Code of Criminal Procedure; as he was not acting as a Court within the meaning" of Section 94 of the Criminal Procedure Code, as there was no proceeding pending before him.

57. He then takes the plea based on the provisions of Section 165 of the Code of Criminal Procedure that the search was in fact one made by Mr. Luffman, the District Superintendent of Police, who at the time was making an investigation into the offence committed by the person, who shot at and wounded Genda on the 27th April 1907 and that as Mr. Luffman as a police officer had authority under Section 165 of the Code of Criminal Procedure to make the search in the course of that investigation, the defendant, having taken Mr. Luffman to make the search, was protected by the law in the same way as Mr. Luffman. As to this the learned Judge says that he was satisfied on the evidence that the search was not intended to be made under the provisions of that section, but was a search for arms generally, which Section 165 does not authorise and therefore he held that Section 165 of the Criminal Procedure Code did not justify the action of the defendant. It is unfortunate that the learned Judge does not specify the evidence, on which he relied in support of this conclusion.

58. Further, he held that the provisions of Act XVIII of 1850 could not be invoked to protect the defendant, because he was? of opinion that in directing and conducting the search the defendant was performing no judicial duties at all. It is to be noticed that the judgment gives no distinct reasons for the opinion that the act was not a judicial act, but that it was "one of the important executive acts, which as District Magistrate the defendant had to perform,"

59. On these findings the learned Judge arrives at the conclusion that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law and therefore amounted to a trespass.

60. In dealing with the question of damages the learned Judge holds that the defendant did not himself enter the cutchery to make the search, but relied on the police to conduct it in a proper manner, and that, though this goes to establish the defendant's bond fides it does not release him from the obligation, which the law casts on him as being in supreme control of the search party,

from seeing that the search was conducted in a proper and reasonable manner. He entertains no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, relying apparently in support of this view mainly on the evidence of Mr. Horniman, and holds that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Being of opinion on this finding that though the damages should not be exemplary they should be substantial, he awards that plaintiff Rs. 500 as damages against the defendant.

61. The defendant has appealed.

62. The learned Counsel for the appellant, who has placed the case before us, has laid great stress from the outset on the remarkable contrast which is presented by the case as held by the learned Judge to have been proved against the defendant and that as set out in the plaint, and has argued that the acts of the defendant and those, who carried out his orders", have been grossly distorted and the damage done exaggerated enormously. No attempt was in fact made to prove the alleged loss of rents from the tenants as a damage consequential on the search, after the plaintiffs' agent had been obliged to admit that in the preceding year an attempt had been made by the plaintiff to raise the rents of his tenants, more than 90 per cent, of whom are Mahomedans, which had been resisted and had created general discontent. The plaint averred against the defendant that he had committed a malicious and outrageous abuse of his authority. The learned Judge has found that the defendant acted bond fide and without malice, but that as he had failed to comply strictly with the provisions of Section 25 of the Arms Act he committed a trespass.

63. The first point taken in support of the appeal is that the learned Judge erred in regarding the principles of the Common Law of England as applicable to the present case. The learned Counsel has pointed out that the alleged trespass having been committed in the District of Mymensingh, which is outside the limits of the ordinary civil jurisdiction of the High Court and the suit having been transferred to the High Court for trial in the exercise of its extraordinary civil jurisdiction, the learned Judge was bound under the provisions of Section 20 of the Letters Patent of 1865, with respect to "the law or equity and the rule of good conscience" to be applied to the case, to apply "the law of equity and rule of good conscience," which would have applied to the case in the local Court of 3rd Sub-Judge of Mymensingh. This contention cannot be denied and clearly the principles of English Common Law could not be taken to apply as such. The learned Counsel for the respondent in reply has, however, invited [attention to the decision in the case of Waghela Rajsanji v. Sheikh Masludin (1887) I.L.R. 11 Bom. 551, 561 as practically laying down that the same principles would apply. But the learned Judge in dealing with the point which arose in that case and which was whether a guardian could execute a contract in the name of his ward, so as to impose on the ward a personal liability, remarks that a guardian in India could not have greater

powers over a ward than a guardian in England, and adds that the matter must be decided by equity and good conscience which is generally interpreted to mean the rules of English Law, if found applicable to Indian society and circumstances. This clearly lays down that the principles would only apply, if found applicable to the circumstances of the case under consideration. In the present case the learned Counsel for the appellant has pointed out that the learned Judge has found that the circumstances were such as to justify the defendant as District Magistrate in making the search for arms, and that he acted throughout with perfect bond fides and the learned Counsel contends that the mere omission on the part of the defendant to record his reasons for directing the search, though the reasons in fact existed and were good and sufficient,cannot be held in accordance with the principles of law, justice, equity and the rule of good conscience as governing the district Courts in India, to be in law sufficient to convert what was a right and justifiable act into an actionable wrong.

64. In this case, however, before attempting to apply the principles, on which the learned Counsel relies, it would be convenient first to see whether in the circumstances of the case the defendant has been able to justify his act on his pleas.

65. The facts leading up to the search have been already set out in detail.

66. The learned Judge in the Court below has stated in his judgment that he was satisfied on the evidence that the search was made for arms generally under the provisions of the Arms Act and not under any sections of the Code of Criminal Procedure, and the first question, which arises, is- Does the evidence support that finding ?

67. On this point we have the evidence of the defendant alone and we have his defence as set out in the written statement. The method adopted in cross-examination of the defendant is, to say the least of it, unusual. By means of a long series of questions many of which on the spur of the moment and without reference to authorities, it was manifestly most difficult for him to answer and in reply to which it is admitted that it would be unfair to bind him by his answers, the learned Counsel appears to have attempted to argue out with the defendant points of law, which it was certainly the duty of the Judge trying the case to decide. What, however, does the defendant say ? In his written statement he first claims protection on the ground that he was acting as a Magistrate under the provisions of Sections 94, 96, 105 and 165 of the Code of Criminal Procedure. None of these could possibly apply to a search under the provisions of the Arms Act. It is equally a matter, which admits of no doubt, that if the search was made for arms used in the commission of an offence, and for the purpose of an enquiry or an investigation into that offence, the provisions of the Arms Act could have no possible application. That Act in Section 25 provides for a search for arms and ammunition generally for the preservation of the public peace

and not for weapons used in the commission of a definite offence.

68. To support the defendant's assertion that he acted under the provisions of the Code of Criminal Procedure, we have the following statements. In examination-in-chief he was asked "why did you make the search," and he gave the following reply:

I had received reports for some time that certain zemindars, in special the Gouripore zemindars, had been collecting arms and men in their cutcheries. The Mahomedans of Jamalpore stated that they feared the Hindus would sally out from their cutcheries and do them injury again as soon as the officials had left. A case had been instituted with regard to the shooting of a Genda Sheikh and it was proposed to institute cases for the shooting on the Sub-divisional Officer and Superintendent of Police. For the purpose of these cases it was all important that the weapons, with which the shooting was done, should be found. It was also very dangerous to leave it unascertained whether there was not a considerable store of arms in those cutcheries." The following answers were elicited from him in his cross-examination (at pages 108 to 114 of the paper-book). "Before this search I did refer to the Criminal Procedure Code: I did not refer to the Arms Act." Further on he says, "I thought I could act under Section 105 and then he was stopped; and later on, in answer to a question relating to his power to act under Section 165 of the same Code, he says "in this way I thought I could act under Section 165. The Sub-Inspector of Police was empowered to make a search and I thought I could be present and direct the proceedings. Then I would be acting as an Executive Officer of the Police. "When questioned as to his power to direct the search under Section 94 and Section 96 of the Criminal Procedure Code, he says that he thought, he could issue a search-warrant under Section 96 of the Criminal Procedure Code though afterwards he says "There was nothing formal in my inquiry." "No, I was not holding any inquiry as a Magistrate." Afterwards in reply to the question "you wanted to search in order to preserve the peace of the district," he says "That was one of the reasons: one of the reasons was to seize arms to prevent their being used. My search for the arms in connection with that case was equally in my mind. The actual investigation of that case was in the hands of the District Superintendent of Police." At page 115, he further says in answer to a question from the Court "I made up my mind to make the search after hearing the police officers' and the other persons' reports.

69. The fact that the defendant before directing the search referred to the Code of Criminal Procedure and not to the Arms Act, seems to be consistent rather with the conclusion at least that in his own mind at the time the defendant thought he was acting under the Code of Criminal Procedure and not under the Arms Act, and to support a conclusion contrary to that, at which the learned Judge has arrived, that the search was only for arms generally. They seem fully to support the conclusion that the search was at the same time for arms used in the commission of

the two offences, which were alleged to have been committed on the 27th April, when fire-arms were certainly used.

70. The learned Judge has not referred to the evidence, on which he relied and, after a careful perusal of the defendant's evidence and of his written statement, filed on the 9th November, immediately after the institution of the suit, I regret, that I am unable to agree that the conclusion of the learned Judge is in fact supported by the evidence.

71. The question then arises for determination, Whether 'the defendant was justified in directing the search by the provisions of the Code of Criminal Procedure.

72. First it is to be considered whether the defendant had power to act under the provisions of Section 105 read with the provision of Sections 94 and 96 of the Code. These sections occur in Chapter VII which falls within Part III of the Act, which is headed "General Provisions." That these provisions apply to proceedings before and after the proceedings in prosecution of an accused is clear from the sections themselves. They do not necessarily apply to proceedings after a case has been instituted against any definite accused person. Section 94 runs: "Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a Police station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, enquiry, trial or other proceeding under this Code by or before such Court or officer, etc." An investigation by a police officer or any inquiry by a Magistrate may be made before any accused person has in fact been named.

73. The learned Judge has held that the defendant was not acting as a "Court" within the meaning of Section 94 of the Criminal Procedure Code, as there was no proceeding pending before him. "Court" is nowhere defined in the Code nor is "a proceeding" From Chapter III of the Code it would, however, appear that the term "Court" and "Magistrate" are in fact synonymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court, even though he may not at the time be sitting within the four walls of his ordinary;Court building or in fact any building. The powers of the (Court depend on the power with which the Magistrate presiding in it is vested. "Proceeding" appears to mean anything done or order passed by the Magistrate or Court in the exercise of his powers. This indeed seems clear, for instance from the word "proceeding "as used in Sub-section 7 of Section 145 of the Criminal Procedure Code. Powers to act under Section 94 and Section 96 of the Code are given to all Magistrates (see Section 94 itself and Schedule 3 of the Code) and the question is whether a Magistrate can exercise those powers on verbal information only or whether it is necessary for him to wait till something has been written or he is sitting in Court before he can do so. The learned Judge seems to be of opinion that this preliminary is essential.

But is it so ? Offences are divided into two broad classes (1) Cognizable, i.e., those for which a police officer may arrest without a warrant from a Magistrate and (2) Non-cognizable, i.e., those in which a police officer may not arrest without a warrant. The former seems to mean cases of which a police officer, as such, can take cognizance and the latter, those of which as such he cannot take cognizance. Section 190 of the Criminal Procedure Code lays down the conditions under which a District Magistrate or other Magistrate referred to in that section may take cognizance of an offence. It must be remembered that the defendant in this case was at the time of the search the District Magistrate of Mymensingh. He had therefore power under the law throughout the whole District to take cognizance of the offences with fire-arms, which are alleged to have been committed on the 27th April. And he would be empowered to take cognizance under that section on (a) complaint, (b) police report of such facts and (c) on information received by any person other than a police officer or upon his own knowledge, or suspicion that such an offence has been committed. There is nothing in the section to lay down strictly that either (a), (6) or (c) must be written; and in fact the latter portion of Clause (c) would favour the contrary view. Nor is there anything in the law which strictly lays down that the police officer must have something written before he can take action in respect of an offence, of which he can take cognizance without the order of the Magistrate. Clearly in India as well as in England a police officer must often take cognizance of an offence and arrest the offender on verbal information alone. There seems to be nothing in the law or in common sense to prevent a Magistrate from acting on verbal information and taking cognizance of an offence and taking the steps necessary to arrest the offender or, as in the present case, to secure the production of the weapon with which an offence has been committed. Manifestly there are cases when the offender would escape or material evidence would disappear, if a written proceeding were in law strictly necessary. In this case the defendant has stated in his evidence that before directing the search he had received the information verbally from Mr. Barniville, the Sub-divisional Magistrate, as well as from Mr. Luffman, the District Superintendent of Police, that the two offences had been committed on the preceding day, and in these circumstances it seems difficult to agree with the learned Judge that the defendant had no power to direct or make the search under the provisions of Section 105 read with Sections 94 and 96 of the Criminal Procedure Code, because no proceeding was pending before him. The verbal direction to search was in fact in itself a proceeding taken in taking cognizance of the offences. I regret, therefore, that I am unable to agree with the learned Judge that for the reasons given by him the defendant was not authorised to make or direct the search in the premises of the plaintiff. Nothing in this case seems to turn on the meaning of the term "competent" in the provisions of Section 105. It simply means that the Magistrate has, under the powers with which he is vested by the Local Government, and in the circumstances stated in the preceding Sections 94 and 96, power or authority as such Magistrate to issue the search-warrant.

74. The next question raised is the alternative whether under the provisions of Section 165 of the Code the defendant is protected from the present action. This question has not been considered by the learned Judge. He has simply held that it does not arise.

75. The learned Counsel for the appellant has relied on the provisions of Sections 156, 157, and 165 of the Code of Criminal Procedure as showing that Mr. Luffman as District Superintendent of Police had full power to hold an investigation into the two offences committed on the 27th April and power under Section 165 of the Code to search the premises of the defendant for the arms with which the offences were committed and which he had reason to believe were in the cutchery, because such a proceeding was necessary for the conduct of the investigation. And all the provisions of the Code as to search-warrants, so far as may be applied, apply, to searches under this section, (see Sub-section 4 of Section 165). If Mr. Luffman as a police officer was acting within the law in conducting such a search it is contended that the defendant, who directed the search, and accompanied the police officer, when he went to make it, would be equally protected by the law. It is to be observed that under the provisions of Section 4 of Act V of 1861 powers of general control and direction over the police are given to the Magistrate of a District throughout the limits of his local jurisdiction, and whether the defendant in this instance acted under the powers given by that section or under his powers as a Magistrate under the Code of Criminal Procedure, it is urged that he was equally protected.

76. This argument seams to be unanswerable, if we take it that the defendant was acting under the powers with which he is vested by Section 4 of Act V of 1861, if the search was being made by the District Superintendent of Police.

77. The learned Counsel for the respondent has, however, argued that in an investigation made under Chapter XIV of the Code of Criminal Procedure, the police officer must proceed strictly in accordance with the provisions of the sections in that Chapter. He must under Section 157 send a report to the Magistrate empowered to take cognizance of the offence on the police report, and that report must be submitted through his superior officer (Section 158), and on completion of the investigation he must submit a report in the form prescribed by Section 173, and if in the course of such an investigation he makes a search, he must note that he has done so in red ink on the report under a departmental order of the police department.

78. The learned Counsel relies on the report submitted by Mr. Luffman in respect of the offences under Sections 326 and 307 of the Indian Penal Code alleged to have been committed on; Genda Shaikh, (which is printed at page 47 of the Paper Book) as proving that in fact the cutchery of the plaintiff was not searched in the course of an investigation made by Mr. Luffman into that offence. The report bears date the 2nd May 1907 and contains no entry of any search having

been made.

79. It is not clear, however, that the report is the final report in the case, but the point is not very material. It is to be observed that two dates for the first information are given in it, viz., the 27th April 1907, and the 2nd May 1907, and this seems to support the explanation that the information was given verbally on the 27th April, but [not recorded till the 2nd May. The omission to record the entry in red ink to the effect that a search had been made in the course of that investigation, if due to inadvertence, would not itself be sufficient to establish that no search was made, if in fact it was made.

80. It seems open to considerable doubt whether it would be safe to construe the provisions of the law so strictly in the present case, as the learned Counsel desires, as to deprive the defendant or the police officers acting under his orders of the protection of the law.

81. If in fact the police officer Mr. Luffman went to the cutchery of the plaintiff under the directions of the defendant to investigate the offence committed against Genda and the search was made in the course of that investigation, it seems only reasonable to hold that they were acting bona fide under the provisions of the law and therefore the act did not amount to an actionable trespass.

82. To prove that they did so act there is the evidence of the defendant himself and his written statement. There is the further fact that the defendant went to Jamalpur that day in consequence of the receipt of the telegram from Mr. Luffman with regard to the events of the 27th April. There is nothing on the record to indicate that he went in order to make a general search for arms. It is clear that the Mahomedans generally were at the time in a very excited and infuriated state and it was urgently necessary to keep them under control. A search made to ascertain who were the persons guilty of the offences committed on the 27th April would certainly be a movement in that direction.

83. To support the contrary conclusion the learned Counsel for the plaintiff relies on paras. 6, 8 and 9 of the defendant's written statement and on the absence of any entry relating to any search in the police report of the case instituted by Genda. Paragraph 13 of the same written statement, however, indicates clearly enough that the defendant pleaded from the first that he was acting under the Code of Criminal Procedure and that he relied on Section 165 of the Criminal Procedure Code against others to support his plea. If in the press of work and under the stress of circumstances resulting at the time from the disturbed state of the district and the special steps necessary to keep the peace at Jamalpur, the police officer failed by inadvertence to make the entry as to the search required by the rules in the report, the omission can hardly be regarded as

of serious importance.

84. There seems to be no sufficient grounds for disbelieving the truth of the story as told by the defendant in his evidence, and the balance of probability both from the defendant's conduct at the time and from his defence seems to be in favour of the view that he all along thought he was acting under the Code of Criminal Procedure and not under the Arms Act. In fact it would rather appear that he relied on the provisions of the Arms Act as an after-thought.

85. In these circumstances his act in directing the search does not appear to amount to a trespass in Civil Law, whether it was done under his orders as a Magistrate, or under his directions by the police in the 'course of the investigation into the offence committed against Genda.

86. We have next to consider whether the search, if it was made under the provisions of the Arms Act, amounted to a civil trespass on the part of the defendant, because he failed to comply with the provisions of Section 25 of the Act and to record his reasons for making it before he directed it to be made. To prove that the defendant had good reasons for making the search there is his own evidence, which appears to have been accepted as sufficient by the learned Judge, who tried the case. The Judge has found that the defendant acted bond fide and that he was not actuated by malice or improper motives against any particular individuals or section of the community. He holds, however, that the omission of the defendant to comply with the provisions of the law rendered his act under the Common Law of England a trespass, for which he was liable in damages at Civil Law, though otherwise it might have been right and proper. On behalf of the defendant reliance is placed on the circumstances that the conditions under which he acted were exceptional and that he was obliged under the stress of circumstances and the emergency to take prompt action. On this point the defendant in his evidence says when asked why he omitted to record his reasons for the search under the Arms Act: "There was a great deal to be done, I had not time to look everything up. I could not spare the force of men to watch the cutcheries and have the search later on. I thought of the Arms Act, but I had not it with me and it would take sometime to get a copy. At the time I was not aware of the provisions of the Arms Act. I thought I had power (to direct a search), if I had reasonable grounds. I did not realise I had to record that." Further on he says that in good faith he believed he had jurisdiction in the matter.

87. For the plaintiff, it has been urged that as the greater number of the Hindus had fled out of panic and the cutchery was deserted there was no necessity for haste, and the learned Judge has expressed the opinion that in searching the cutchery of the plaintiff the defendant should have proceeded with great circumspection as the fact that he had previously searched the temple and the cutcheries of three other zemindars and had found no arms, should have led him to doubt whether the information given to him by the police was correct. But must not the searches made

of the temple and the cutcheries be rather regarded as acts forming part of one transaction ? It is not as though the cutcheries and the temple were in different places at some distance from one another. The map filed in the record shows that they are all close together and the information appears to have been to the effect that there was a combination amongst the servants of the different landlords to collect the arms for unlawful purposes and that the arms could not be left in their possession without danger to the public peace. In such circumstances it seems hardly reasonable to expect that the defendant should have proceeded with greater circumspection in searching one cutchery than in searching the other buildings.

88. The real question, however, appears to be, whether the directions in Section 25 of the Arms Act that a Magistrate, before making a search, should record his reasons, are mandatory or directory, and in determining this question we may well be guided by the following remarks of Lord Campbell in The Liverpool Borough Bank v. Turner (1861) 30 L.J. Ch. 379. "No universal rule can be laid down for the construction of Statutes as to whether mandatory enactments shall be considered as directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be considered." Now the object of the provisions of the Arms Act, and especially of Section 25 of that Act, is clearly to preserve the public peace. Can it be held that the directions in Section 25 were in their nature so mandatory that the failure to comply with them would have the effect of nullifying the proceedings? Maxwell in his work on the Interpretation of Statutes, page 556, says. "When a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such condition may well be regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative." There can be no reasonable doubt that in laying down the conditions in Section 25 of the Arms Act the object of the Legislature was to insure that in each instance a Magistrate should not enter on a search without due care and good and sufficient reasons. At the same time, when, as in the present case, it has been found that the Magistrate acted bond fide and for good and sufficient reasons, can the failure on his part to record his reasons, which was due to exceptional conditions, stress of circumstances and the emergent necessity for prompt action, be held so to nullify his act as to convert what was right and justifiable for the preservation of the public peace into an actionable wrong ? To hold that it would have that effect appears hardly to be consistent with the rules referred to above or with the principles of justice and good conscience. It is no doubt most necessary to prevent public officers from exercising their powers in a harsh, careless or arbitrary manner. At the same time it appears to be hardly just or reasonable to hold that, when an officer has acted bond fide in what he believed to be the discharge of his duty, and when it has been found that he had good and

sufficient reason for his action, he should be liable under the Civil Law for damages for a trespass, because through inadvertence he failed strictly to observe, a formality, which in the circumstances of the case was not of serious importance, and which may be taken to constitute a technical rather than a substantial defect in his proceedings.

89. This seems to have been the fact in the present case and it seems difficult to say that in consequence the act of the defendant amounted to a trespass.

90. There remains lastly for determination the question whether the defendant can in this case claim to be protected by the provisions of Act XVIII of 1850, and in dealing with this question it has to be determined whether his act was a judicial act or purely an executive act. The learned Judge has held that the act was an executive act. The distinction between a judicial and an executive act in India is not very clearly drawn as many acts, which are, purely administrative, are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of Hope v. Evered (1886) L.R. 17 Q. B.D. 338 to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of Mahomed Jackariah & Co. v. Ahmed Mahomed (1887) I.L.R. 15 Calc. 109, 141 and in the case of In re Lakhmidas Naranji (1003) 5 Bom. L.R. 980, 982 a similar view has been taken by the High Courts in India.

91. The question is whether the order directing a search Under the Arms Act or the proceedings in execution of that order differ in essence so materially from searches made otherwise under the law as to constitute the order passed under the Arms Act an executive rather than a judicial act. The whole scope and object of the Arms Act appears to be to impose restriction on the manufacture, sale, import, export and transport and the possession of arms and ammunition, with a view to preserve the public peace and in directing a search under Section 25 of the Act the Magistrate has to proceed on information laid to him disclosing that the person is in possession of arms, etc., for any unlawful purpose or that he cannot be left in possession of such arms without danger to the public peace. If he considers that such information is such as to afford sufficient reasons for a search, he is empowered to order one to be made. It can hardly be said that in arriving at the conclusion that the possession was for any unlawful purpose, or that possession of the arms could not be retained without danger to the public peace, the Magistrate is not exercising a judicial discretion, that is to say arriving at a conclusion on the evidence. Indeed, if the act is not a judicial act, it seems difficult to understand what the object of the Legislature was in requiring that the Magistrate should record his reasons. It seems difficult to suppose that

the Legislature intended to empower a Magistrate to deprive a person of his property even temporarily by an executive act. It seems to me, therefore, very difficult to hold that the order directing the search was an executive act on the part of the defendant.

92. If that be the case, then the provisions of Act XVIII of 1850 appear to be sufficiently wide not merely to protect the defendant, but also those acting under him. The section runs: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or to order the act complained of, and no officer of any Court or other person, bound to execute the lawful warrants or order of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

93. The learned Judge, who tried the case, has expressed the opinion that the search was "one of the important executive acts, which as District Magistrate the defendant had to perform," but he has not stated his reasons for arriving at that conclusion. I regret to say that I am unable to agree that the order directing the search, based on information received, which was held to afford good reasons for it, and made for the preservation of the public peace, was in fact an executive act. It appears to me, therefore, that the defendant and the police officers acting under him are protected from suit by Act XVIII 0f 1850.

94. The learned Judge in dealing with the question of damages says that the law casts on the defendant as being in supreme control of the search party the obligation of seeing that the search was conducted in a proper and reasonable manner and the learned Judge goes on to say that he entertained no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, and that the defendant failed to exercise proper supervision and control over the people under him conducting the search.

95. On this point the defendant in his evidence says that he did not see or sanction the destruction of any property more than was reasonably necessary for the purpose of opening the boxes. He says that only one complaint was made to him that the police were doing unnecessary damage and that was when the cutchery and house of the Naib of the Ram Gopalpur cutchery was being searched and that "he took steps to see to it." He adds "I told Mr. Luffman to tell the police to put back the things left lying about, and it is not a fact that the complaint was repeated to me, while I was searching at the plaintiff's premises." He denied that armed Mahomedans accompanied him during the search or took part in breaking open the boxes. It is true that in a latter portion of his

evidence the passage occurs "I think daos were used by the Mahomedans, but I am not absolutely certain," but as just before that he had said that the Mahomedans took no part in the search, it seems not impossible that there may have been some confusion on this point in the record of his statement. The context seems to support that conclusion. He says that before breaking open the door of the cutchery and the boxes, he tried to obtain the keys, but none were produced.

96. In support of his conclusion on this point the learned Judge relies mainly on the evidence of Mr. Horniman. Now, without in any way wishing to question the veracity of that witness, what in fact does his evidence prove ? Mr. Horniman did not arrive at the cutchery till the morning of the 1st May, the search having taken place on the afternoon of the 28th April. To fill up the interval there is the evidence of Safatulla Jemadar. And to prove the character of the search proceedings themselves there is the evidence of Jogesh Chander Dutt, pleader, Issur Chander Guha, mukhtear, and Kali Kumar Mitter, medical practitioner. The evidence of these three last mentioned gentlemen is certainly not beyond suspicion of bias and Safatulla in a post-card, which is proved to have been sent after the occurrence, gave an obviously exaggerated account of what had happened.

97. But if the evidence of all these be taken into account, what in fact does it amount to ? The door of the cutchery house was fastened by a chain and padlock. The padlock was forcibly broken open. The boxes in the cutchery appear to have been fastened, some with chains and padlocks and others with locks, and to open them the padlocks were forced by bamboos and other boxes forced open with daos, that is to say, hatchets. Mr. Horniman expressed the opinion that lock-smiths might have been called in. The defendant on this point says that he did not think of sending for lock-smiths.

98. The point has been taken for the plaintiff respondent that defendant ought to have examined Mr. Luffman or the SubRegistrar to prove what was done at the time of the search. To this the learned Counsel for the appellant has replied that those gentlemen and others were cited and were present as witnesses. It was not deemed necessary to examine them as it was thought that if the Court would not believe Mr. Clarke it would not be likely to believe officers subordinate to him, who were in fact alleged to have been equally blameworthy for the method of the search and one of whom was a defendant in a similar action on the same facts. I must say that I fail to see how the evidence of these witnesses would have materially improved the position of the defendant, as clearly each of them would have been open to the imputation of bias.

99. It has been suggested that the papers contained in the boxes ought to have been replaced, when no arms were discovered. I doubt, however, whether in similar searches, when conducted by other authorities under similar circumstances, such consideration is shown however desirable

it may be. No attempt was made to support the case for the plaintiff as set out in the plaint that papers of value were lost and destroyed. The search does not appear to have been conducted in an unusual manner and I am unable to agree with the learned Judge that it was conducted with unnecessary damage to the property of the plaintiff.

100. For the above reasons, I am unable to agree with the learned Judge in holding that the defendant was liable to pay the damages, which has been awarded against him, and I would decree the appeal and dismiss the suit with costs.