1919

NAGENDRA LAL DAS v. THE CHAIRMAN, CHITTAGONG MUNICIPALITY.

Rule 24 (*e*) is, we consider, *intra* and not *ultra vires*. It seems to us to be a reasonable provision.

In the view we have taken, it is needless to discuss the cases which were cited before us, the general principles enunciated in which were not disputed. The Court has received the assistance of having both points of view thoroughly argued. We think it only right to add that we ought not to interfere with rules and conditions, authority for which has been expressly provided for, as in this case, unless they are clearly in conflict with the law.

The result is that the decree of the lower Appellate Court cannot be successfully assailed, and the present appeal must be dismissed with costs.

S. M. *Appeal dismissed.*

CRIMINAL REVISION.

Before Newbould and Shams-ul-Huda JJ.

1919

Aug. 20.

MARIAM BEWA

v.

MERJAN SARDAR.*

Revision—Proceeding under s. 145, Criminal Procedure Code—Difference of opinion—Jurisdiction of High Court—Grounds for exercise of its jurisdiction—Omission to add a party—Material prejudice—Criminal Procedure Code, (Act V of 1898) ss. 145 435, 439—Government of India Act (5 & 6 Geo. V. c. 61) s. 107.—Letters Patent, cl. 36.

Section 439 of the Criminal Procedure Code does not apply to a proceeding under s. 145 which is outside s. 435. On a difference of opinion, on revision of such a proceeding, the opinion of the senior Judge prevails under cl. 36 of the Letters Patent.

* Criminal Revision No. 596 of 1919, against the order of Lalit Chandra Guha, Subdivisional Magistrate of Kushtia, dated May 7, 1919.

Laldhari Singh v. *Sukdeo Narain Singh* (1) and *Shaikh Sujaddi Mondal* v. *Cork* (2) commented on.

Emperor v. *Har Prasad Das* (3) relied on.

Mathura Sahu v. *Damri Ram* (4) and *Bapu* v. *Bapu* (5) approved.

Queen-Empress v. *Dada Ana* (6) dissented from.

Semble: If it be held that cl. 36 applies only to original or appellate jurisdiction, the Court should act, in the absence of any provision to the contrary, upon the principle underlying the clause.

The power of the High Court to interfere under s. 107 of the Government of India Act, in cases under s 145 of the Criminal Procedure Code, is not confined to questions of jurisdiction alone. It may also interfere when the Magistrate has acted with illegality or material irregularity and a party has been prejudiced thereby.

Sukh Lal Sheikh v. *Tara Chand Ta* (7) followed.

Per NEWBOULD J. The omission to add a party in a proceeding under s. 145 of the Code is not an error of jurisdiction.

Krishna Kamini v. *Abdul Jubbar* (8) followed.

There was no irregularity in the present case resulting in such material prejudice as would justify the Court's interference.

Per SHAMS-UL-HUDA J. Where the refusal of the Magistrate to add a party, on his application, to the proceedings has resulted in a serious failure of justice, the Court will set aside the order under s. 145. There was such failure of justice in the case.

UPON the receipt of a report, dated the 29th March 1919, from the sub-inspector of Khokra thana, Kushtia, alleging the likelihood of a breach of the peace between Merjan Sardar and two others, first party, and Torap Ali Sheikh and others, second party, concerning four bighas of land in village Betbaria, in the subdivision of Kushtia, the Subdivisional Officer drew up a proceeding under s. 145 of the Criminal Procedure Code and fixed the 14th April for the filing of the written statements and the production of evidence. On that date both parties applied for time on the ground of shortness of the service of notice, and the

(1) (1900) I. L. R. 27 Calc. 892.
(2) (1917) 22 C. W. N. 499.
(3) (1913) I. L. R. 40 Calc. 477, 500.
(4) (1911) 15 C. L. J. 337.
(5) (1912) I. L. R. 39 Mad. 750.
(6) (1889) I. L. R. 15 Bom. 452.
(7) (1905) I. L. R. 33 Calc. 68.
(8) (1902) I. L. R. 30 Calc. 155.

1919

MARIAM BEWA v. MERJAN SARDAR.

case was adjourned to the 25th instant. On the latter date the case was again postponed, on the application of the first party, to the 7th June for the written statements and evidence.

The petitioner alleged that she went to the Magistrate's Court on the 25th April to file an application to be made a party on the grounds of actual possession and incorrectness of the boundaries given in the proceedings. On the 7th June the parties filed their written statements. All the members of the second party, except No. 10, Torap Ali Sheikh, who claimed to have cultivated the disputed land in *burga* under the petitioner, disclaimed possession of the land and asserted that the petitioner was in possession. The petitioner put in her application before the recording of any evidence, but it was rejected by the Magistrate, and he then examined four witnesses on behalf of the first party, who were not cross-examined, and declared such party to be in possession. The effect of the order was that the first party took possession and destroyed the dwelling huts of the petitioner on the land. She then moved the High Court and obtained the present Rule.

The Rule was heard by Newbould and Shams-ul-Huda JJ., who differed in opinion but held that the judgment of the senior Judge (Newbould, J.) prevailed. The petitioner's vakil, thereupon, contended that the case should have been referred to a third Judge under ss. 429 and 439 of the Criminal Procedure Code, and a date was fixed for arguments on the point.

Babu Nitish Chandra Lahiri, for the petitioner. The case should be referred to a third Judge under ss. 429 and 439 of the Criminal Procedure Code: *Laldhari Singh* v. *Sukdeo Narain Singh* (1), *Shaikh Sujaddi Mondal* v. *Cork* (2). Cl. 36 of the Letters

(1) (1900) I. L. R. 27 Calc. 892. (2) (1917) 22 C. W. N. 499.

Patent has been practically repealed by the Code: *Queen-Empress* v. *Dada Ana* (1). Cl. 36 refers to the Original and Appellate and not the Revisional Jurisdiction.

Babu Dinesh Chandra Roy (with him *Babu Phanindra Lal Maitra*, and *Babu Manindra Nath Roy*), for the opposite party. Jurisdiction is exercised under s. 107 of the Government of India Act, 1915, and not s. 439 of the Code, on revision of proceedings under s. 145 of the latter: *Emperor* v. *Har Prasad Das* (2). Ss. 429 and 439 of the Code, therefore, do not apply. When this is the case the matter is governed by cl. 36 of the Letters Patent: see *Mathura Sahu* v. *Damri Ram* (3) and *Bapu* v. *Bapu* (4).

Cur. adv. vult.

NEWBOULD AND SHAMS-UL-HUDA JJ. In this case after we delivered our respective judgments,* the learned vakil for the petitioner contended that the case should be referred to a third Judge. He argues that section 439 of the Criminal Procedure Code is

*NEWBOULD J. I would discharge this Rule. In my opinion, having regard to the decision of the Full Bench in the case of *Krishna Kamini* v. *Abdul Jubbar* (5), the omission to join a party in proceedings under section 145 is not an error of jurisdiction. Nor can I agree with my learned brother that there has been an irregularity, resulting in such material prejudice as would justify our interference. There was considerable delay on the part of the petitioner. Though she says the Magistrate left Kushtia by the morning train on the 25th April 1919, it is not stated in the affidavit that she was unable to file her petition on that account. I also think that the Magistrate had good reason for holding that the application was not made in good faith. If the petitioner really wished to prove her claim to possession she could have done so through her alleged *bargadar*, Torap Ali Sheikh.

(1) (1889) I. L. R. 15 Bom. 452.
(2) (1913) I. L. R. 40 Calc. 477, 500.
(3) (1911) 15 C. L. J. 337.
(4) (1912) I. L. R. 39 Mad. 750.
(5) (1902) I. L. R. 30 Calc. 155.

1919

MARIAM BEWA v. MERJAN SARDAR.

comprehensive enough to include all cases of revision, whether the power is exercised under the Code or under any other enactment and that, so far as criminal cases are concerned, section 36 of the Letters Patent has been superseded by the Criminal Procedure Code. In support of his contention the learned vakil relies on the decision of the Bombay High Court in *Queen Empress* v. *Dada Ana* (1). He also relies on two decisions of this Court in *Laldhari Singh* v. *Sukdeo Narain Singh* (2) and in *Shaikh Sujaddi Mondal* v. *Cork* (3) in which a difference of opinion, regarding the propriety of an order passed under section 145 of the Criminal Procedure Code, was referred to a third Judge, instead of being dealt with in accordance with the provisions of section 36 of the Letters Patent. No great value, however, attaches to the last two cases because the point was not argued, and it was apparently assumed that section 429 applied

As this application is made under section 107 of the Government of India Act, the decision of the senior Judge will prevail and the Rule will be discharged.

SHAMS-UL-HUDA J. In a proceeding under section 145 of the Criminal Procedure Code there were three persons in the first party and twenty in the second. Of the twenty persons forming the second party all except No. 10 stated in their written statements that they had no concern with the land which belonged to Mariam Bewa. Second party No. 10 alleged that he had been cultivating about a bigha of land as *bargadar* under Mariam Bewa. Apparently they took no further interest in the case, adduced no evidence and even did not cross-examine the witnesses of the first party. On the day the written statements were filed Mariam Bewa appeared and asked to be made a party alleging that the land in respect of which there was the dispute had not been correctly described, and that the boundaries given in the proceeding included land on which stood her dwelling house and part of which she cultivated. She said that the other side had been trying fraudulently to deprive her of her homestead of which she with her sons was in possession. The petition was filed before any

(1) (1889) I. L. R. 15 Bom. 452.
(2) (1900) I. L. R. 27 Calc. 892.
(3) (1917) 22 C. W. N. 499.

by the operation of section 439. There are, however, other cases of this Court in which a different procedure was adopted. In the case of *Mathura Sahu* v. *Damri Ram* (1) a difference of opinion regarding the propriety of a sanction under section 195 of the Criminal Procedure Code was dealt with under section 36 of the Letters Patent, and the judgment of the senior Judge prevailed. This was apparently on the ground that the power exercised by the High Court under section 195 (*6*) of the Criminal Procedure Code was not in the exercise of an appellate or revisional jurisdiction, and that the jurisdiction was original to which neither s. 429 nor s. 439 applied. A similar view was taken by a Full Bench of the Madras High Court in *Bapu alias Audimulam Pillai* v. *Bapu alias Krishnayen* (2). In an unreported case a difference of opinion between two learned Judges of this Court regarding the propriety of granting bail to an under-trial prisoner was dealt with under section 36 of the

evidence was recorded. The Magistrate rejected the application of Mariam Bewa on the ground that it was filed too late. Ultimately the Magistrate passed an order in favour of the first party in terms of section 145 of the Criminal Procedure Code.

It appears that the first date of hearing was fixed on the 14th of April 1919, and on that day the second party applied for time alleging that the notice had been served only the day before. A similar petition was filed by the first party. The next date fixed was the 25th of April and on that day the first party again asked for an adjournment and adjournment was given. Mariam Bewa states in her petition to this Court, which is supported by an affidavit, that she came to Court on that day with a petition praying to be made a party but found that the learned Subdivisional Magistrate had left Kushtia for Khoksa by the morning train. The petition which was actually filed on the 7th of May, however, shows that it was not ready before that date as the Court-fee stamp was purchased on that day, and the petition is itself dated the 7th of May, but it is possible that finding the Magistrate absent on the 25th April the Court-fee stamp was not purchased on that day. There is intrinsic evidence that the application was ready

(1) (1911) 15 C. L. J. 337. (2) (1912) I. L. R. 39 Mad. 750.

1919

MARIAM BEWA v. MERJAN SARDAR.

Letters Patent. These cases are against the view of the Bombay High Court that the Criminal Procedure Code has overruled the provisions of section 36 of the Letters Patent.

In support of the contrary view the learned vakil for the opposite party has relied on the decision of the Full Bench of this Court in *Emperor* v. *Har Prasad Das* (1). In that case the point argued was that an order passed by a Civil Court under section 476 of the Criminal Procedure Code being outside the scope of section 435, the matter could not be dealt with under section 439. This contention prevailed, and after stating that section 435 did not apply to the case, the learned Judges observed: "Nor does section 439 "touch the matter. It is clear that sections 435-439 "must be read together as pointed out by Wilson J. in

before it was dated. The Magistrate, in his Explanation, does not deny that he had left Kushtia by the morning train that day. If the facts stated are correct—they are not denied by the Magistrate nor is there a counter affidavit from the other side—it is difficult to understand how it can be said that the petition was filed too late. In the muffasil, so far as I am aware, petitions in connection with a case are only filed on the dates fixed for hearing. If the facts stated in her petition to this Court by Mariam Bewa are correct, a grave injustice has been done to her. The land had been previously attached, and a postponement of the proceedings could not have led to any serious inconvenience, and ought under the circumstances to have been granted. Mariam Bewa alleges, and the fact is not denied, that the order has led to her eviction from her dwelling house which has been demolished.

The only material for the Magistrate's finding that the application is not *bonâ fide* is that the same muktear who filed the written statement of the second party also presented her petition for being added as a party. I need hardly say that this is very slender material upon which to base such a conclusion. I think Mariam Bewa should have been given an opportunity to show that she was actually in possession. It is only then that the Court could form an opinion regarding the *bonâ fides* of her claim.

It is argued that the question of adding parties does not involve a question of jurisdiction, and reliance has been placed on the Full Bench decision in *Krishna Kamini* v. *Abdul Jubbar* (2). In that case it was

(1) (1913) I. L. R. 40 Calc. 477, 500. (2) (1912) I. L. R. 39 Cal. 155.

"*Hari Dass Sanyal* v. *Saritulla* (1). Section 439 must, "therefore, be read along with and subject to the pro- "visions of section 435." This decision concludes the present question, and is a clear authority for the proposition that if a case is outside section 435, as the present case is, section 439 cannot apply to it. That being so, either section 36 of the Letters Patent applies, or there is no law regulating the procedure. If it be held that section 36 does not apply, because it only refers to original or appellate jurisdiction, we think, in the absence of any provision to the contrary, we should act in accordance with the principle underlying that section. We accordingly hold that in this case the opinion of the senior Judge prevails.

laid down by Mr. Justice Hill, and the majority of the Judges concurred with him, that *ordinarily* these questions do not go to jurisdiction. Assuming that they do not, there is no authority for the proposition that our power of superintendence is confined to questions of jurisdiction alone. In the subsequent Full Bench case of *Sukh Lal Sheikh* v. *Tara Chand Ta* (2) it was argued that this Court has the power of interference in all cases of injustice. It was conceded by the Advocate-General that the power could be exercised not only where inferior Courts had acted without jurisdiction or refused jurisdiction, but also when these Courts have committed illegality or material irregularity. But in every case it must be shown that justice has been denied, and Maclean C. J., in delivering the judgment of the Court observed as follows :—" In our opinion the power, which is discretion- " ary, ought in relation to cases under section 145 to be exercised with every " caution. Assuming that in any particular case the Court has proceeded " with irregularity, we do not think that this Court should interfere, unless " it can be shown that some one has been materially prejudiced by such " irregularity. If, however, the subordinate Court has acted without juris- " diction, this Court will interfere."

In this case I think there are reasonable grounds for the apprehension that the action taken by the Magistrate has resulted in a serious failure of justice, and I would make the Rule absolute.

I regret to have to differ from my learned brother, and although his opinion prevails, I have thought it necessary to express my opinion at some length regarding the merits of the case.

E. H. M.

(1) (1888) I. L. R. 15 Calc. 608, 617. (2) (1905) I L. R. 33 Calc. 68.