

## CRIMINAL REVISION.

Before C. C. Ghose and Chotzner JJ.

ABDUL MATLAB

v.

NANDA LAL KHATEL.\*

1922

Dec. 22.

*Revision—Practice—Application to the High Court without previous recourse to the Sessions Judge—Criminal Procedure Code (Act V of 1898) ss. 435 and 439.*

Ordinarily, a person who has been convicted and whose appeal has been dismissed by a Magistrate of the first class, empowered under s. 407 (2) of the Criminal Procedure Code, should, in the first instance, move the Sessions Judge to report the case under s. 438, but when the High Court has once issued a Rule it will not be discharged on such ground only, but must be heard on the merits.

*Empe, or v. Abdus Sebhan (1), and Rash Behari Saha v. Phani Bhusan Haldar (2) referred to.*

The facts of the case were as follows. One Bechu Jemadar died leaving him surviving a widow, two sons and four daughters. By a *kobala*, dated the 15th June 1908, the widow and elder son purported to sell the 16 annas share in a *bheel* to Ibrahim Mistry. On the 28th November 1921, the petitioner, Abdul Matlab, purchased from the younger son and three daughters their undivided shares in the same *bheel* by a registered *kobala*. On the 16th December Sital and Kartik, two tenants of the petitioner, caught fish in the *bheel*. A quarrel arose with Nanda Lal Khatel, Ibrahim's tenant, who claimed exclusive title, and a complaint was lodged by him against the petitioner and two

\* Criminal Revision No. 944 of 1922, against the order of Banadhir Chatopadhyaya and Braja Gopal Ray, Honorary Magistrates, Amta, district Hooghly, dated June 29, 1922.

(1) (1909) I. L. R. 36 Calc. 643. (2) (1920) I. L. R. 48 Calc. 534.

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others named Tabarak and Mokshed. The case was tried by a Bench of Magistrates exercising second class powers at Amta. They acquitted Tabarak and Mokshed, but convicted the petitioner, under s. 426 of the Penal Code, and sentenced him to a fine. An appeal from the conviction and sentence was dismissed by a Deputy Magistrate empowered under s. 407 (2) of the Code. The petitioner then moved the High Court, and obtained the present Rule without any previous application to the Sessions Judge.

*Mr. K. Ahmed* (with him *Babu Debi Prosad Dutt*), for the petitioner. The accused acted under a *bonâ fide* claim, and the conviction is bad.

*Babu Birbhusan Dutt*, for the opposite party. The petitioner should have moved the Sessions Judge to report the case before applying to this Court. The Rule ought to be discharged: *Emperor v. Abdus Sobhan* (1), and *Rash Behari Saha v. Phani Bhusan Haldar* (2).

GHOSE AND CHOTZNER JJ. This is a Rule calling upon the District Magistrate of Howrah and the complainant to show cause why the conviction and sentence passed on the petitioner should not be set aside on the ground that the petitioner, having purchased a certain share in the disputed *bheel* from the rightful owner thereof, acted *bonâ fide* in catching fish in the said *bheel*.

The facts, so far as is necessary for the disposal of this Rule, shortly are these: one Ibrahim Mistry purchased a certain share in this disputed *bheel* from the widow of one Bechu Jemadar. The latter sold to Ibrahim for herself, and as guardian of her minor son and minor daughter. It appears that subsequently there was a sale of certain other shares in

(1) (1909) I. L. R. 36 Calc. 643. (2) (1920) I. L. R. 48 Calc. 534.

this *bheel* to the accused Matlab. The accused having purchased this last mentioned share caught fish in this *bheel*.

The question that arises is whether his act in catching fish in this *bheel*, by virtue of the conveyance last referred to, was a *bona fide* act or not.

Now having regard to the facts found by the learned Magistrate, it is impossible to come to the conclusion that the act of catching fish in this *bheel*, by virtue of the conveyance last referred to, on the part of the accused Matlab was not *bona fide*; and in that view of the matter the conviction and sentence must be set aside and the fine, if paid, refunded.

A point has, however, been urged by Mr. Birbhusan Dutt, who appears to support the conviction, that the appeal in the lower Court having been disposed of by a first class Magistrate, who was empowered to dispose of appeals from the decisions of 2nd and 3rd class Magistrates under the provisions of section 407, sub-clause (2) of the Criminal Procedure Code, the application to this Court, without going to the Sessions Judge and asking him to make a reference to this Court, was not in order. In support of this contention our attention has been drawn to the cases of *Emperor v. Abdus Sobhan* (1) and *Rash Behari Saha v. Phani Bhusan Haldar* (2). We are in agreement with Mr. Dutt in the contention which he has put forward, namely, that ordinarily an applicant like the present petitioner ought to go to the Sessions Judge and move him for a reference to this Court. But so far as this Rule is concerned, we cannot discharge this Rule on that ground. The application having been heard and the Rule having been granted, we are bound to dispose of the Rule on the merits.

E. H. M.

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