APPELLATE CRIMINAL.

1884

January 14.

Before Mr. Justice McDonell and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF NOBIN KRISTO MOOKERJEE.
NOBIN KRISTO MOOKERJEE *v.* RUSSICK LALL LAHA.*

Criminal Procedure Code (Act X of 1882), ss. 435, 437—Further enquiry, Power of District Magistrate to direct—"Inferior Criminal Court"—Notice to accused.

The words "inferior Criminal Court" in s. 435 of the Criminal Procedure Code mean, inferior so far as regards the particular matter in respect to which the superior Court is asked to exercise its revisional jurisdiction.

A criminal charge instituted before a Magistrate of the first class was finally disposed of by him by an order discharging the accused. Subsequently the Magistrate of the district proceeding under s. 437 of the Code of Criminal Procedure directed a further enquiry to be made by a Subordinate Magistrate. This order was made without notice to the accused.

Held, that the Magistrate of the district had no jurisdiction to direct a further enquiry.

Semble, that as a matter of strict law the accused was not entitled to be heard by the District Magistrate before granting the order directing the enquiry.

Mr. *Evans*, Baboo *Umbica Charan Bose*, Baboo *Grish Chunder Chowdhry*, Baboo *Saroda Prosad Roy*, Baboo *Harendro Nath Mookerjee*, and Baboo *Dwarkanath Chuckerbutty* for the petitioner.

Mr. *Allen* for the opposite party.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and FIELD, JJ.), which was delivered by

MCDONELL, J.—In this case a rule was granted by Maclean and Norris, JJ., on the 20th December last, calling upon one Russick Lall Laha to shew cause why a certain order made by the Magistrate of the 24-Pergunnahs under s. 437 of the Code of Criminal Procedure and dated the 5th December last should not be set aside.

The facts of the case are briefly these: On or about the 27th day of September 1881, one Baboo Romanath Laha lent a sum of Rs. 5,000 upon a mortgage bond to a person who represented

* Criminal Motion No. 351 of 1883, against the order of C. C. Stevens, Esq., Magistrate of 24-Pergunnahs, dated the 5th December 1883.

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himself to be one Khirode Chunder Mookerjee. This person was identified by Nobin Kristo Mookerjee, the petitioner now before us. The sum so lent upon mortgage was payable upon the expiry of six months. The money not having been paid, a demand was made on behalf of the mortgagee upon the real Khirode Chunder Mookerjee, who denied any knowledge whatever of the transaction and repudiated liability under the mortgage bond. Subsequently Khirode Chunder Mookerjee instituted a suit in the Civil Court to have the mortgage bond cancelled on the ground that he had not executed it, and that the whole transaction was an attempt to commit a fraud upon him. That suit was decreed; and immediately after its being so disposed of, a criminal charge was preferred by Russick Lall Laha, the brother of Romanath Laha (who had in the meantime died), against the petitioner before us, Nobin Kristo Mookerjee, and another person who is said to have been the broker in the transaction. The broker absconded, and the criminal charge proceeded as against Nobin Kristo Mookerjee alone. This criminal charge was instituted on the 20th June 1883 before a Magistrate of the First Class sitting at Sealdah; and after numerous postponements, it was finally disposed of by him three months later, *viz.*, on the 25th September 1883 by an order discharging the accused person. Subsequently an application was made to the Magistrate of the district, that is, the Magistrate of the 24-Pergunnahs, and the Magistrate of the district, proceeding under s. 437 of the Code of Criminal Procedure, made, on the 5th of December 1883, the order which is now sought to be set aside. By that order the District Magistrate, after referring briefly to the facts of the case, directed that a further enquiry be made, and for the purposes of making this enquiry he made over the case to a Subordinate Magistrate. It is now contended before us that the order of the District Magistrate of the 24-Pergunnahs is bad and ought to be set aside on two grounds, *first*, because the order of discharge having been made by a Magistrate of the First Class, the District Magistrate had, upon the proper construction of s. 435 of the Code of Criminal Procedure, no jurisdiction to call for the record, and therefore had no jurisdiction under s. 437 to direct a further enquiry; *secondly*, because

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the order was made without notice having been given to the accused person, and therefore without such accused person having had an opportunity of being heard before the District Magistrate proceeded to make an order to his prejudice. We shall deal with these two points *seriatim*.

With reference to the *first* point, s. 435 of the present Code of Criminal Procedure provides as follows:

"The High Court or any Court of Session or District Magistrate, or any Subdivisional Magistrate empowered by the local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court, &c." Then s. 437 provides as follows: "On examining any record, under s. 435 or otherwise, the High Court or Court of Session may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make or direct any Subordinate Magistrate to make, further enquiry into any complaint which has been dismissed under s. 203, or into the case of any accused person who has been discharged." Now, we have first to consider what is the meaning of the term "inferior Criminal Court" in s. 435, and in order to determine what the correct meaning of this expression is, we must resort to a usual mode of construction, that is, we must examine the present Code as compared with the provisions of the previous Code upon the same subject. Section 435 of the present Code corresponds with s. 295 of the Code of 1872, and in that section the words used are "any Court subordinate to such Court or Magistrate." Now, we may observe that as to the meaning of the term "subordinate" no question can now arise. The subordination of the Magistrates in a district, other than the District Magistrate, to the Magistrate of the district, was provided for by the second paragraph of s. 295 of the Code of 1872; and these provisions are re-enacted and amplified by s. 17 of the present Code. It being then clear that the Legislature has made no change in the subordination of Magistrates, we have to consider what is the intention which is to be gathered from the substitution of the term "inferior Criminal Court" in the present Code for the words "subordinate to such Court" in the former Code. It appears to us unreasonable to

suppose that this new expression has been substituted without any definite object; and the conclusion to which we are ultimately led is this, that the term "inferior Criminal Court" must be construed to mean "judicially inferior," that is, a Court over which the Court or Magistrate proceeding under s. 435 of the Code has appellate jurisdiction. It was contended before us by the learned Counsel Mr. Allen that a Subordinate Magistrate of the first class is a Criminal Court *inferior* to the Magistrate of the district, because there are in the present Code certain provisions under which a Magistrate of the first class is in certain matters subject to the appellate jurisdiction of the Magistrate of the district. These provisions are to be found in ss. 406 and 515. Undoubtedly there is much weight in this argument, which we have carefully considered. It appears to us, however, that a construction can be put upon s. 435 which will in no wise be contradicted by the existence of the appellate jurisdiction given to the Magistrate of the district over First Class Magistrates by ss. 406 and 415. We think that the words "inferior Criminal Court" in s. 435 must be construed to mean inferior, so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction. In arriving at this conclusion, we have considered, as I have already stated, the intention to be gathered from the substitution of the word "inferior" in the existing Code for the word "subordinate" in the Code of 1872. But there is another and a material circumstance which has also influenced our minds. It was settled law under the old Code that when a Magistrate other than the Magistrate of the District had discharged an accused person after hearing the evidence for the prosecution, the Magistrate of the district had no jurisdiction to direct a further enquiry or revive the prosecution upon the same evidence. It was held in two cases, the case of *Mohesh Mistri* (1), and the case of *Donnelly* (2), that if the District Magistrate was of opinion that further proceedings should be taken upon the evidence on the record (in a case, that is, where no fresh evidence is forthcoming, see page 411 of the Report in the latter case), he must refer the case for the orders of the High Court. The District

(1) I. L R., 1 Calc. 282. (2) I. L. R., 2 Calc. 405.

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Magistrate had at the same time the power of directing a further enquiry in one particular case, that is, where a complaint had been made, and such complaint had been summarily dismissed without the examination of witnesses (see s. 298 of the Code of 1872 as amended by s. 31 of Act XI of 1874). Section 437 of the present Code extends this power *to the case of any accused person who has been discharged* (see the last ten words of the section), and it is very reasonable to suppose that the Legislature in conferring upon the District Magistrate a new power, a power, that is, which he was not competent to exercise under the law of 1872, considered it proper that this power should be exercised by him over those Magistrates only who are subject to his appellate jurisdiction. We think that this is a reasonable construction, and when we further construe the term "inferior" used in s. 435 to mean, as I have already said, inferior, so far as regards the particular subject-matter, we are enabled to put upon the Code a construction which reconciles sections at first apparently conflicting.

But then it is contended that the words "or otherwise" in s. 437 give the District Magistrate a power quite independent of the power conferred upon him in cases in which he has proceeded under s. 435. We have considered this argument, and we are unable to accede to it. We think that these words "or otherwise" being words of general import following the particular words "under s. 435" must be construed according to the usual rule, and that they mean not "in any other way whatsoever," but in any other way provided by the Code. For example, in the case of an appeal, the Appellate Court is empowered by s. 423 to send for the record, and this would be a case in point. Then there is the further argument that if we were to put upon the words "or otherwise" the wide and general construction contended for, the whole of the limitation necessarily implied in the provisions of s. 435 would become unnecessary; and such a result would suppose in the Legislature an absence of all intention, which we think ought not to be imputed or presumed.

We now come to the second contention, *viz.*, that no notice was given to the accused, and that no order could have have been made without giving him an opportunity of being heard. Section

440 provides as follows: "No party has any right to be heard either personally or by pleader before any Court when exercising its power of revision, provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, &c." This is the general rule provided by the Legislature, and it must be taken to be a legislative *recission* of the usual principle that persons are entitled to be heard before any order affecting them to their prejudice can be made. To this general rule so laid down by the Code there are two exceptions to be found in the Code itself. The first is to be found in clause (*a*) of the provision to s. 436. The second is contained in the second paragraph of s. 439. The case now before us does not come within either of these exceptions. We therefore think that, as a matter of strict law, it is impossible to say that the petitioner in this case was entitled to be heard by the District Magistrate of the 24-Pergunnahs before the order complained of could be made. But this Court, in the exercise of its revisional jurisdiction, is competent to question not only the *legality*, but the *propriety* of any finding, sentence or order, and we therefore think that it is quite open to us to deal with the question whether a District Magistrate, in exercising the power conferred upon him by s. 437, exercises a proper discretion in proceeding to make an order for further enquiry without giving notice to the accused, and allowing him an opportunity of being heard. As the present case can, however, be sufficiently disposed of upon the first point, we do not propose to enter into the merits, or to express any opinion whether the District Magistrate in the present instance exercised a proper discretion in making the order complained of without giving notice to the accused person. A case was quoted by the learned Counsel for the petitioner in which Mr. Justice Mitter and myself thought that the accused ought to have had notice. That opinion had reference to the particular facts of that case and we laid down no general rule. In the case now before us, having read the petition which was presented to the District Magistrate, the inclination of our minds is that that petition contained arguable matter—matter upon which it would have been fair to the accused to have heard him in person or by Counsel before an order was made,

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which was followed immediately by a warrant issued for his arrest. But, as I have already said, inasmuch as the present case can be sufficiently disposed of upon the first point, we think it unnecessary to come to any definite conclusion upon the second point.

It appears to us that, for the reasons which I have stated, the Magistrate of the 24-Pergunnahs had no jurisdiction to make the order of the 5th December 1883 complained of, and we must therefore set aside that order. We were asked by Mr. Allen, the learned Counsel for the opposite party, to take up this case under s. 429, and proceed to exercise our revisional jurisdiction after entering into the merits. We have considered this application, and we think that it is not one with which we can comply. The accused person has had no notice of such an application; and has not come here prepared to meet such a case. If we thought that we ought to exercise our revisional jurisdiction, it would be necessary to issue a fresh notice, and appoint a further day for the hearing of the case upon its merits. But having regard to the fact that if the prosecutor desires to proceed further, the Court of the Sessions Judge of the 24-Pergunnahs, which has jurisdiction, is close at hand, we think it unnecessary that the time of the High Court should be taken up in disposing of a matter which can be dealt with by that tribunal.

The rule will be made absolute.

Rule absolute.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter and Mr. Justice Field.

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January 17.

ANONYMOUS CASE.*

Stamp Act (I of 1879), Schedule I, Art. 44 (clauses a and b)—Mortgage-Deeds.

Per Curiam—Clause (a) of Art. 44 of Schedule I of the Stamp Act, 1879, applies only to those deeds in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed, or in other words where immediate possession of the property is given or agreed to be given by the terms of the deed to the mortgagees.

Reference No. 7 of 1883 from the Board of Revenue.