BEFORE A FULL BENCH.

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February 16.

(Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.)

QUEEN *v.* THAKUR PARSHAD.

Act X of 1872, s. 390—Convicted Person—Bail—Sessions Court.

The Court of Session has no power, under s. 390, Act X of 1872, to admit a convicted person to bail (1), a *convicted person* not being an *accused person* within the meaning of that section.

THIS was a reference to the Full Bench by Stuart, C.J., arising out of the following facts :—

The Magistrate trying an offence mentioned in s. 222, Act X. of 1872, in a summary way, sentenced the offenders, on conviction, to one month's rigorous imprisonment each. There was no appeal in the case, under the provisions of ss. 273, 274, Act X of 1872. On the application of the convicted persons the Court of Session called for the record of the case, under the provisions of s. 296 of that Act, and at the same time directed the Magistrate to admit them to bail pending its decision as to the legality of their conviction. This order purported to be made under s. 390, Act X of 1872. The receipt of the order by the Magistrate gave rise to certain correspondence, which it is immaterial for the purposes of this report to notice, between that officer and the Court of Session as to the legality of the order. This correspondence the Court of Session submitted to the High Court for orders.

The main question involved in the reference to the Full Bench was whether the Court of Session was competent to make the order directing the admission of the convicted persons to bail, under s. 390, Act X of 1872.

The order of reference by Stuart, C. J., so far as it is material for the purposes of this report, was as follows :—

That section (390) provides that "the Court of Session may in any case, whether there be an appeal on conviction or not, direct

(1) So held by Glover and Romesh Chunder Mitter, JJ., in *Queen* v. *Ram Rutton Mookerjee*, 24 W. R. Cr. 8, and in *Queen* v. *Kanhai Shahu*, 23 W. R. Cr., at p. 42. See also *Queen* v. *Mahendra-narayan Bangabhushan*, 1 B. L. R. A. Cr. 7, in which Loch and Glover, JJ., held that, under s. 436, Act XXV of 1861, the law then in force, in which the term *accused person* was also used, the Court of Session had no power to admit a *convicted person* to bail.

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that the accused person shall be admitted to bail, or that the bail required by a Magistrate be reduced." This, it was argued, meant "whether there be *allowed by law* an appeal on conviction, or *not allowed by law*." In connection with this view, however, it must be remembered that the Sessions Judge has no power under s. 297 of the Code of Criminal Procedure, or otherwise, to revise the proceedings of Criminal Courts subordinate to him, and that, in the case of an appeal not allowed by law, an application to him to admit to bail would be unmeaning and futile. If, on the other hand, the true meaning of the section is "whether there be an appeal *entered or taken* on conviction, or *not entered or taken*," then the power of the Judge would appear to be confined to appealable convictions, and not to extend to cases, like the present, where there is no appeal, the Judge at the same time having no power of revision.

Mr. *Raikes* for the convicted persons—The terms of s. 390 are purposely large. [TURNER, J.—It seems to me that the use of the words "accused person" in the section is sufficient to show that the Court of Session cannot admit a "convicted person" to bail under it.] The terms are synonymous, the words "accused person" are used in the sense of "convicted person" in ss. 283, 297, of the Code. S. 281 and s. 390 must be read together. The first gives the Court of Session as an appellate Court power to admit to bail, the second gives it a general power. [TURNER, J.—If s. 390 gives the Court of Session a general power, s. 281 appears unnecessary as far as that Court is concerned.] [OLDFIELD, J.—Your construction of s. 390 gives the Court of Session a greater power than the High Court as a Court of Revision possesses.] The section refers to cases where the Court of Session is proceeding under s. 296. Suppose this case had not been tried in this district but in a remote district, and the Court of Session had determined to report the case for the orders of the High Court, being satisfied that the conviction was illegal. In such a case it would be most desirable for the Court of Session to have the power of admitting the convicted persons to bail, pending the orders of the High Court. [PEARSON, J.—referred to the heading of Part ix of the Code.]

Cur. adv. vult.

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The following opinions were delivered by the Full Bench:—

PEARSON, J.—The question upon which I understand that the opinion of the Full Bench is required is whether the Court of Session at Allahabad was warranted by the terms of s. 390, Act X of 1872, in directing the Magistrate to admit to bail a person who had been convicted and sentenced to one month's imprisonment under s. 352, Indian Penal Code. My answer to that question is in the negative. S. 390 declares that "the Court of Session may in any case, whether there be an appeal on conviction or not, direct that an *accused* person shall be admitted to bail." The section occurs in a part of the Code which prescribes procedure incidental to inquiry and trial; and it is thus evident that an accused person is one against whom an accusation is the subject of inquiry and trial and not a *convicted* person. That this is so further appears from the context, if s. 390 be read in connection with the preceding and following section. By "any case" is meant only any case the subject of inquiry or trial before a Magistrate, whether or not, in the event of a conviction, an appeal would lie from the Magistrate's sentence or not. The section does not refer to cases in which the Court of Session is proceeding under s. 296 of the Procedure Code.

TURNER, J.—Reading the terms of s. 390 by themselves, the natural construction appears to be that in all cases, both in those which, resulting in a conviction, would be appealable to the Sessions Judge, and in those which, resulting in a conviction, would not be so appealable, a Court of Session has power to admit to bail an accused person, that is to say, a person charged but not as yet convicted of an offence, or to reduce the bail required by a Magistrate.

It may be dangerous to draw an inference as to the proper construction of this section from the place it occupies in the Code, because at the conclusion of the chapter we find s. 399 applying to all cases in which bail may be taken except those therein specially excepted. The proper construction of s. 390 rests on the meaning to be given to the word "accused." In its ordinary sense it is most properly applied to persons against whom a charge is made, and it is opposed to the term "convicted." But the learned counsel for the petitioner contends that, in other parts of the Code, we find the

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term "accused" applied to persons convicted—to which it appears a reasonable answer that, in those places, as for instance in ss. 283 and 297, it is apparent from the context that the term is used in a particular sense, whereas in s. 390 there is nothing in the context to affect its ordinary meaning. It must, therefore, be held that the provisions of s. 390 do not empower the Sessions Judge to order the Magistrate to admit to bail a person who has been convicted. Of course, as an appellate Court, a Sessions Judge has power on or after the admission of the appeal to admit the convicted appellant to bail, but in the case out of which this reference has arisen no appeal lay to the Sessions Court.

SPANKIE, J.—On the question as to the legality of the order, there can be no doubt, I think, that, if made under s. 390 of the Criminal Procedure Code, it was illegal. The section is found in Part ix of the Code, which refers to procedure incidental to inquiry and trial. S. 388 directs when bail shall be taken when any person is accused before a Magistrate; s. 389 directs when it shall not be taken in non-bailable offences, and when it may be taken. Under those sections it is the Magistrate who orders bail. S. 390 empowers the Sessions Court in any case, whether appealable to itself or not so appealable, either to admit to trial or to reduce the amount of bail ordered by the Magistrate. But the power given is to be exercised before conviction is had, and it may be exercised in all cases and without exception.

OLDFIELD, J.—The Judge's order directing the Magistrate to release the prisoners on bail is, in my opinion, illegal. The case not being appealable, the Judge could not act under s. 281, Criminal Procedure Code, as an appellate Court and admit to bail, and the power given by s. 390, Criminal Procedure Code, appears to me to refer to the procedure incidental to inquiry and trial, and to allow the Judge in any case to admit an accused person to bail at any time during the trial, but not after conviction. S. 390 should be read with the preceding section.

To interpret s. 390 so as permit the Judge to take bail, without restriction, in any case after conviction, would be to allow the Judge a higher power in admitting to bail than is given to the High Court as a Court of Revision, since s. 297, Criminal Procedure

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Code, limits that Court's power to take bail in cases coming before it as a Court of Revision to cases where the offence for which a person has been imprisoned is bailable.

STUART, C. J.—This reference has come back to me from the Full Bench with the opinions of the consulted Judges. They all consider that the Judge's order, purporting to direct the Assistant Magistrate to release the prisoners on bail, was illegal, and I am clearly of the same opinion. They very properly direct attention to the circumstance that s. 390 is to be found under Part ix of the Code, which is entitled as "Procedure incidental to inquiry and trial;" and, keeping that consideration in view in construing the section, I am of opinion that it only applies to the case of an "accused person," that is, to the case of a person accused of an offence, the conviction of which is appealable or not appealable, and that it was not intended to apply to such a case as the present, where there has been a conviction, final and complete. Such I think is the true meaning of the section. Any other reading of it, which would take it out of the category indicated by the heading of "Procedure incidental to inquiry and trial," would involve the necessity of holding that an "accused person" in the section was synonymous with a convicted person, and that therefore the compiler of the Code had made a mistake in placing it under the heading of "Procedure incidental to inquiry and trial." The Sessions Judge, I think, must be understood to be of this mistaken opinion, for it appears from the correspondence which accompanies his letter of reference and by his directing Mr. Pears' attention to s. 390 of the Criminal Procedure Code, that his idea was that he could admit to bail in *any* case *after trial*, whether there had been a conviction or not. We cannot, however, put such a construction on the terms of the section, a construction entirely repugnant to them and to the whole context. "An accused person" simply means an accused person, and nothing more, and this s. 390 was only intended for a person in that position, and who on conviction could appeal or not.

But in either view of the section the Judge's order in the present case ought not to have been made. If s. 390 does not apply, as I hold it does not, there is no other provision of the Code which

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empowered the Sessions Judge to admit to bail, and the order was altogether *ultra vires*. But if, on the other hand, it could be shown that the section does apply to such a case as this, the order was equally invalid, for (as I have already pointed out in my referring order) the Judge having no revisional authority, his admitting these convicts to bail was inoperative for any judicial purpose or effect and therefore futile.

APPELLATE CIVIL.

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March 13.

(Mr. Justice Spankie and Mr. Justice Oldfield.)

HUSSAINI BIBI (DEFENDANT) *v.* MOHSIN KHÁN (PLAINTIFF).

Act VIII of 1859, *s.* 327—*Arbitration—Award—Appeal.*

The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after inquiry into the matter, over-ruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of ch. vi, Act VIII of 1859. *Held*, that the order was not open to appeal as it did not operate as a decree (1). *Jokhun Rai* v. *Bucho Rai* (2) followed.

Per SPANKIE, J.—S. 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made. Where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

In this case there had been a reference to arbitration, without the intervention of a Court, and an award had been made. The plaintiff applied under s. 327, Act VIII of 1859, that the award

(1) *Contra* see *Lakshman Shiváji* v. *Rámа Esu*, 8 Bom. H. C. Rep., A. C. 17. As to whether an appeal lies from a decree enforcing the award, see *Sáshti Charan Chatterjee* v. *Tarak Chandra Chatterjee*, 8 B. L. R., 315; S. C., 15 W. R., F. B. 9.

(2) H. C. R., N.-W. P., 1868, p. 353—The Court also held in that case that the order rejecting an application for the filing of an award was not appealable. The Calcutta High Court has also held so—see *Chintamun Singh* v. *Roopa Kooer*, 6 W. R., Mis. 83; *Digamburee Dossee* v. *Poornanund Dey*, 7 W. R., 401; *Raj Kumar Singh* v. *Kali Charan Singh*, 2 B. L. R., App., 20: S. C., 11 W. R., 58; *Roy Priyanath Chowdhry* v. *Prasanna Chandra Roy Chowdhry*, 2 B. L. R., 249. So also the Bombay High Court—see *Vyankatish Ramchandra Jogekar* v. *Balajeerao*, 1 Bom. H. C. Rep., 184; *Petition of Bálkrishna Bhaskar Gupte*, 2 Bom. H. C. Rep., 96.