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The suit therefore does not come under the provisions of s. 42, and as it is not contemplated by either of the other statutes to which I have referred, I am of opinion that it is not maintainable. I may add that even if it were possible to hold that the suit was maintainable under s. 42 of the Specific Relief Act, I am of opinion that this is not a case in which this Court, in the exercise of its discretion, would be disposed to grant relief. Under s. 42, such relief is always a matter of the Court's discretion, and inasmuch as the evidence adduced by the plaintiff himself shows that the defendant was using the property for charitable purposes, I do not think that it would be proper to pass such a decree as the plaintiff asks for, even if he could bring the suit. Under these circumstances the appeal must be decreed with costs.

OLDFIELD, J.—I am of the same opinion.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice and Mr. Justice Oldfield.

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AFZAL-UN-NISSA BEGAM (PLAINTIFF) *v.* AL ALI (DEFENDANT.)*

Civil Procedure Code, Chapter XV., s. 191—Hearing of suit—Power of Judge to deal with evidence taken down by his predecessor.

A Subordinate Judge having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed.

Held that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity.

Held also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner.

Jagram Das v. *Narain Lal* (1) referred to.

THE facts of this are sufficiently stated for the purposes of this report, in the judgment of Petheram, C. J.

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* First Appeal No. 29 of 1885, from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 23rd December, 1884.

(1) I. L. R., 7 All. 857.

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AFZAL-UN-NISSA BEGAM v. AL ALI.

Munshi *Hanuman Prasad* and Mir *Zahur Husain* for the appellant.

Pandits *Ajudhia Nath* and *Sundar Lal*, for the respondent.

PETHERAM, C. J.—I am of opinion that this case must go back to be tried by the Subordinate Judge of Moradabad, on the ground that nothing that can be called a judgment by a Judge trying the case has ever been given. The observations which I made in *Jagram Das* v. *Narain Lal* (1) are applicable to the present case, and the considerations which then weighed with me, affect my mind now in the same manner. I should not have thought it necessary to add anything to the observations which I made on that occasion, if I had not been informed that my judgment had led to some confusion as to the mode in which cases of this kind should be dealt with. The only addition I propose to make to my former observations is by pointing out what appears to me to be the course which should have been adopted in the present case, which is a fair illustration of what commonly happens.

The suit was instituted on the 25th May, 1883, in the Court of the Subordinate Judge of Moradabad, an office which was then filled by Maulvi Nasir Ali Khan. It went through the ordinary course of the proceedings necessary for fixing issues and ascertaining the matters to be tried. Maulvi Nasir Ali Khan fixed a date for proceeding with the evidence, and accordingly on various occasions he sat for the purpose of taking evidence, and on the 17th April, 1884, the taking of evidence was concluded before him. He then heard everything that was brought before him, and he directed that an account should be prepared in the office. After this, various adjournments took place for various reasons which it is not necessary to mention, until the 20th September, 1884, which was a date fixed by him for the disposal of the suit before himself, the evidence being then complete. Upon the 20th September there was a proceeding to the effect that there was no time for disposing of the case on that day, and making a further adjournment to the 9th December. That proceeding seems to be of the kind which is generally adopted when an adjournment is necessary. When the 9th December arrived, the case would be taken up as adjourned from the 20th September, 1884, which was

(1) I. L. R., 7 All. 857.

itself the date of an adjournment from the date originally fixed by the Subordinate Judge for the hearing of the case. That original date would be the date of the hearing, and all subsequent dates would be those of adjournments. What took place on the 9th December, therefore, would be a proceeding held by adjournment in the trial heard on the original date.

Now, when the 9th December arrived, Maulvi Nasir Ali Khan had left Moradabad, and was succeeded in the office of the Subordinate Judge by Maulvi Zainulabdin. When the case was called on, it was his duty to try it. The Judge who had originally heard it had gone, and therefore the trial, so far as it had gone before him, was abortive, and, as a trial, became a nullity, because the person conducting it had ceased to be a Judge, and could not give judgment in a trial held before him.

The question then arises—What was the duty of Maulvi Zainulabdin? I think that when the case was called on before him on the 9th December, he ought to have fixed a date for the hearing, that is to say, for the entire hearing and trial of the case before himself. He might, at the request of the pleaders, have fixed the same day, the 9th December, and proceeded to try the case at once. But by the act of fixing a date, he would have avoided the danger of making it appear possible that he was deciding a case which he himself had not heard. Then, when the time fixed—either the same day, by such an arrangement as I have suggested, or a future date—arrived, the trial would proceed in the ordinary way, as if the day were the first on which the case had ever come on for hearing; except that the parties would be allowed, by s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. The Code has provided a mode of avoiding the inconvenience which might arise if the witnesses had to be called twice over, if neither the parties nor the Judge consider such a course to be necessary. But no Court can, in my opinion, extend the operation of the statute so as to enable a new Judge to take up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself.

For these reasons, I am of opinion that the trial of this case is a nullity, and that the case must be remitted for trial by the

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Subordinate Judge of Moradabad. The costs will be costs in the cause.

OLDFIELD, J.—I am of the same opinion.

Cause remanded.

CRIMINAL REVISIONAL.

1885 *December* 2.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* GANGA RAM AND ANOTHER.

Act XLV of 1860 (*Penal Code*) *s.* 211—*Prosecution for making a false charge—Opportunity to accused to prove the truth of charge.*

A complaint of offences under ss. 323 and 379 of the Penal Code, was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Magistrate of the District passed an order, under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code.

Held that the order under s. 195 of the Criminal Procedure Code should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government* v. *Karimdad* (1) referred to.

IN this case the petitioners, Ganga Ram and Durga, prosecuted two persons, named Chidda and Chandan, for theft, under s. 379, and assault, under s. 323 of the Penal Code. The complaint was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon the Joint Magistrate of Aligarh dismissed it, ordered the prosecution of the petitioners under s. 211 of the Penal Code for making a false charge, and sent the case to the Magistrate of the District, who, on the 25th July, 1885, passed an order under s. 195 of the Criminal Procedure Code, referring the case to the Deputy Magistrate for disposal. An application for revision of this order was made to the District Judge of Aligarh, upon grounds which it is not necessary to set forth. The Judge dismissed the application by an order dated the 29th August, 1885. The petitioner applied to the High Court to revise this order on the following grounds:—

"The sanction for the prosecution should not have been given without giving the complainants an opportunity of proving the truth of their case, which was merely thrown out on the report of the police.

(1) I. L. R., 6 Calc. 496.