1889

MUHAMMAD SAMI-UD-DIN KHAN v. MANNU LAL.

Then arises the question: Is there any principle such as s. 115 of the Evidence Act lays down, or any other equitable principle of estoppel that should bar the plaintiff from maintaining his present suit? I find nothing in the course of the proceedings in the former litigation of 1882 to lead one to the conclusion that the defendant was in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff. I need scarcely say, it is not enough that he should have put forward or consented to have put forward the original mortgagors as the persons entitled to redeem. It would no doubt have been far more satisfactory under all circumstances had he been joined as a party in that litigation, but by his action and his abstinence from asking to be joined therein, I cannot hold that there was any conduct on his part in respect of which it can be reasonably inferred that the defendants were led to do anything they would otherwise not have done. I am of opinion that there is no estoppel of any kind to bar the suit. This being the view that upon a very anxious and careful consideration of the whole matter I have arrived at, I have come to the conclusion that the appeal should be allowed and that the decree of the lower Court should be set aside. That decree practically being passed upon a preliminary ground, this case must be dealt with under s. 562, Civil Procedure Code, and must be remanded to the Court of the Judge of Aligarh for restoration to the file of pending appeals and disposal upon the merits according to law. Costs to abide the result.

BRODHURST, J.—I concur. *Cause remanded.*

CRIMINAL REVISIONAL.

1889
May 3.

Before Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* KHALAK.

Criminal Procedure Code, s. 35—"*Distinct offences*"—*Act XLV of* 1860 *(Penal Code), ss.* 75, 411—*Practice.*

A person convicted under ss. 411—75 of the Penal Code is not convicted of "distinct offences" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress* v. *Zor Singh* (1) explained.

(1) I. L. R., 10 All., 146; Weekly Notes, 1888, p. 5.

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QUEEN-EMPRESS v. KHALAK.

Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session.

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Mainpuri. The facts of the case are stated in the judgment of Brodhurst, J.

BRODHURST, J.—The reference in this case is made under the following circumstances :—The Joint Magistrate of Mainpuri tried Khalak Kisan under ss. 411, 75 of the Indian Penal Code. In his judgment he stated all the facts of the case and he concluded as follows :—" Defendant has given no satisfactory proof how he came to be in possession of them—the stolen articles—and it further appears that it is only about six months since he was released after two and a half year's imprisonment on two charges under s. 411 of the Penal Code. I convict defendant under s. 411 of the Penal Code (retaining possession of stolen property knowing the same to be stolen). He is further charged with having been previously convicted on the 22nd December, 1885, on two charges under s. 411 of the Penal Code. He admits these convictions (the *misls* have been produced). Under ss. 411, 75 of the Penal Code (acting on the ruling in *Queen-Empress* v. *Zor Singh (Weekly Notes*, 1888, p. 5), I sentence defendant to be rigorously imprisoned for four years."

The Sessions Judge in his referring order mentions that he called for the record under the provisions of s. 435 of the Criminal Procedure Code for the purpose of satisfying himself as to the legality of the sentence. He observes, " Under the provisions of s. 35 *(b)* of the Criminal Procedure Code a Magistrate can, in the case of a person convicted at one trial of two or more *distinct offences*, impose an aggregate punishment not exceeding twice the amount of punishment he is ordinarily competent to inflict. In the present case I would submit that the prisoner was not convicted of two distinct offences; he was convicted of having been in dishonest possession of property stolen in a burglary committed in the prosecutor's house, and he was further charged under s. 75 of the Indian Penal Code

with having been previously convicted of a similar offence. I am therefore of opinion that the fact that the prisoner was convicted under s. 411 of the Indian Penal Code after having been previously convicted of the same *(sic)* offence, was not sufficient to give the Joint Magistrate the increased powers referred to in s. 35 of the Criminal Procedure Code."

I am responsible for the judgment in *Queen-Empress* v. *Zor Singh* (1). There is no doubt that just at the time I wrote that judgment, I was under the impression that a Magistrate of the first class might, under the provisions of s. 75 of the Penal Code on a second conviction as referred to in that section, award double the amount of punishment, as he may under the provisions of s. 35 *(b)* of the Criminal Procedure Code award an aggregate punishment not exceeding twice that which he is in the exercise of his ordinary jurisdiction competent to inflict. I think a Magistrate of that class might well be entrusted with such powers, but I soon became aware of the error referred to, and with my sanction the few words referred to by the Sessions Judge as *obiter dicta* were omitted from the judgment as reported in I. L. R., 10 All., 146. I think that, under the circumstances stated by the Joint Magistrate, Khalak Kisan was deserving of enhanced punishment, and that following the remarks made by me in the case of *Queen-Empress* v. *Zor Singh* (1), the best course for the Joint Magistrate to have adopted would have been to have committed the accused for trial in the Court of Session under ss. 411, 75 of the Indian Penal Code. I direct that notice issue to Khalak Kisan to show cause why his conviction and sentence under ss. 411, 75 of the Penal Code should not be set aside and why he should not be committed for trial, under the same sections, in the Court of Session (2).

(1) I. L. R., 10 All., 146; Weekly Notes, 1888, p. 5.

(2) The accused not having appeared in answer to the notice to show cause, Brodhurst, J., directed that he should be committed for trial under ss. 411, 75 of the Penal Code in the Court of Session.