

required by section 5 of the Court Fees Act, 1870, to refer it for final determination to his Lordship the Chief Justice."

The Chief Justice (PETHERAM, C. J.) appointed Mr. Justice Ameer Ali and Mr. Justice Sale to decide the question referred. Their opinion was as follows :—

AMEER ALI, J.—Upon the facts as stated it seems to us that the view taken by Mr. Belchambers, the taxing officer, is correct. The property was purchased by four brothers, members of a joint Hindu family governed by the Mitakshara law, with moneys belonging to the joint estate. The property, therefore, though conveyed to them as tenants in common, vested in them as trustees for the benefit of all the coparceners and consequently is not liable to duty.

Attorneys for the petitioner : Messrs. *Morgan & Co.*

F. K. D.

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IN THE
GOODS OF
POKURMULL
AUGUR-
WALLAH.

CRIMINAL REFERENCE.

Before Mr. Justice O'Keenahy and Mr. Justice Banerjee.

NILRATAN SEN (ACCUSED) *v.* JOGESH CHUNDRĀ BHUTTACHARJEE
(COMPLAINANT.)^a

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August 11.

Complaint—Complaint, Dismissal of—Revival of proceedings—Criminal Procedure Code (Act X of 1882), sections 203, 437—Final disposal of case—Application of section 537 of the Criminal Procedure Code.

Where an original complaint is dismissed under section 203 of the Criminal Procedure Code, a fresh complaint on the same facts cannot be entertained so long as the order of dismissal is not set aside by a competent authority.

Section 537 of the Criminal Procedure Code is not intended to apply to a case which has not been finally disposed of.

THIS was a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Nadia.

The facts appear from the following letter of reference :—

" On the 9th December 1895 one Jogesh Chundra Bhuttacharjee filed a petition on behalf of Maharaja Jogendra Narain Bahadoor of Natore in the Court of the Joint Magistrate of Kushtea, in which it was alleged that he

^a Criminal Reference No. 169 of 1896, made by Kumar G. K. Deb, Sessions Judge of Nadia, dated the 29th June 1896.

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(complainant) remitted Rs. 50 through the accused Nilratan Sen, who was his superior officer, in Jaisto 1300B.S. to the Maharaja's *sadar kucherry*, and that when an account was being taken from him he discovered that the accused had credited Rs. 36 only and misappropriated Rs. 14. This petition was made over by the Joint Magistrate on the same day to Baboo Rangopal Dutta, an Honorary Magistrate, for disposal. The Honorary Magistrate, after recording the statements of the complainant, dismissed the case on the 9th December 1895, being of opinion that the case was of a civil nature. On the 21st December complainant moved the Joint Magistrate by a petition to revive the case. That Officer called upon the Honorary Magistrate to show cause why the record of the case should not be sent to the District Magistrate in order that a further enquiry might be ordered into the case. The Honorary Magistrate submitted an explanation on the 3rd January 1896, in which he stated that he considered the case to be of a civil nature, because the accused was authorized by his employer to receive the money, and that it was competent to him to spend it in any way he thought proper for the interest of his master. He also stated that the fact of a criminal case being instituted, for Rs. 14 only, two years after the date of the alleged misappropriation indicated some malice on the part of the complainant. The Joint Magistrate considered the explanation unsatisfactory, and sent up the record of the case to the District Magistrate in order that the case might be revived. On the 11th January the Deputy Magistrate in charge wrote a letter to the Joint Magistrate, stating that he had been directed by the District Magistrate to say that, as the complaint had not been instituted *on behalf of the Maharaja*, who was the rightful owner of the money alleged to have been misappropriated, he did not consider it necessary to order a further enquiry. On the 21st February the same man Jogesh Chundra Bhuttacharjee filed in the Kushtea Court a fresh petition of complaint on behalf of Maharaja Jogendra Nath Rai, stating the same facts as in his first petition of complaint, and the Joint Magistrate of Kushtea ordered the issue of a warrant against the accused, and after taking evidence on behalf of the prosecution drew up a charge against him under section 406 of the Indian Penal Code on the 23rd April last.

“ As the original complaint had been dismissed under section 203 of the Criminal Procedure Code by a competent Court, and that order had not been set aside by the District Magistrate under section 437 of the Criminal Procedure Code, the Joint Magistrate could not revive the case simply because a second petition of complaint had been filed. The Honorary Magistrate had no doubt improperly dismissed the case under section 203 of the Criminal Procedure Code, but so long as that order of dismissal was not set aside by a competent authority a fresh complaint on the same facts could not be entertained by the Joint Magistrate. The District Magistrate was in error when he stated that the original complaint had not been instituted on behalf of the Maharaja, and the Joint Magistrate should have pointed out the mistake in order that the District Magistrate might order a further enquiry into the

case. I should have ordered a further enquiry into the case myself under section 437 of the Criminal Procedure Code to cure the defect had not a charge been already framed against the accused, as the effect of such an order would be to set aside his proceedings, which I have no power to do, and hence this reference has become necessary."

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Babu *Kali Charan Banerjee* and Babu *Hara Prasad Chatterji* for the complainant.

Babu *Surendro Chundra Sen* for the accused.

The following judgments were delivered by the High Court (O'KINEALY and BANERJEE, JJ.)

BANERJEE, J.—This is a reference from the Sessions Judge of Nadia, recommending that the proceedings in this case from the institution of the second complaint be set aside on the ground that the second complaint was instituted after the original complaint had been dismissed under section 203 of the Code of Criminal Procedure and before that order of dismissal was set aside by a competent Court.

The facts of the case are shortly these :—

On the 9th December 1895, the complainant, Jogesh Chundra Bhattacharjee, filed a petition on behalf of Maharaja Jogendra Narain Bahadur of Natore in the Court of the Joint Magistrate of Kushtea, alleging that he had remitted Rs. 50 through the accused to the Maharaja's *sadar kucherry* in Joisto 1300, corresponding to May or June 1893, and that when an account was being taken from him he discovered that the accused had credited Rs. 36 only and misappropriated the balance Rs. 14. This petition was made over by the Joint Magistrate for disposal to an Honorary Magistrate, who, after examining the complainant, dismissed the complaint on that same day, being of opinion that the case was of a civil nature.

On the 21st December following the complainant moved the Joint Magistrate by a petition to revise the case; and he sent the case to the District Magistrate with a view to obtain an order for further enquiry; but he was informed by the District Magistrate that, as the complaint had not been instituted on behalf of the Maharaja who was the rightful owner of the money alleged to have been misappropriated, he did not consider it necessary to order a further enquiry.

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On the 21st February 1896 the complainant, Jogesh Chundra Bhuttacharjee, filed in the Joint Magistrate's Court of Kushtea a fresh petition of complaint on behalf of the Maharaja Jogendra Narain Rai Bahadur, stating substantially the same facts as those set out in his first petition, and the Joint Magistrate ordered the issue of a warrant against the accused, and after taking evidence for the prosecution drew up a charge against him under section 406 of the Indian Penal Code on the 23rd April 1896. Thereupon the accused moved the Sessions Judge who has referred the case to us.

These being the facts of the case, the question that arises for consideration is:—Are the proceedings of the Joint Magistrate taken in the case upon the second petition of complaint regular and valid, or ought they to be set aside? The answer to this question depends, no doubt, to some extent upon the answer to another question, namely, whether the dismissal of the complaint on the 9th of December was a proper one. If this last question be answered in the affirmative, the proceedings of the Joint Magistrate ought to be set aside. If, on the other hand, the last mentioned question is answered in the negative, then there will remain the further question, whether, notwithstanding that the dismissal of the original complaint was an improper one and ought to be set aside, and a further enquiry directed, the proceedings taken by the Joint Magistrate upon the second petition of complaint before the dismissal of the first complaint was set aside, and after the District Magistrate had declined to interfere in the matter, should not be held to be irregular and invalid and therefore set aside and an enquiry directed to be made *de novo*.

Now, with reference to the question whether the dismissal of the original complaint on the 9th December 1895 was a proper one, the conclusion we have arrived at is that the answer should be in the negative. The ground of the dismissal, as stated in the order of the Honorary Magistrate, is that the case is of a civil nature. This does not appear to us to be a valid ground, having regard to the facts stated by the complainant in his examination. If the complainant is to be believed there does not appear any good reason for thinking that the case ought not to be proceeded with any further. If, considering the smallness of the amount in

regard to which the criminal breach of trust is said to have been committed, and the lapse of time after which the complaint was lodged, the Honorary Magistrate had found reason to distrust the truth of the complainant's case and dismissed it accordingly, that might have been another matter; but that was not the ground of dismissal here. Considering all the circumstances of the case, and seeing that the first complaint was dismissed immediately after the examination of the complainant, and without any further enquiry, we are not prepared to hold that the dismissal was a proper one. We think the case is one in which there ought to be a further enquiry.

But then arises the question stated last, namely, whether the enquiry ought now to commence *de novo*, or whether the case that has been instituted in the Joint Magistrate's Court upon the second complaint should be allowed to go on from the stage it has reached. It was argued by Babu Kali Charan Banerjee, who appeared for the prosecution, in the first place, that the dismissal of the original complaint under section 203 of the Code of Criminal Procedure was no bar to the institution of fresh proceedings upon a new complaint, and in support of this argument the case of *The Queen-Empress v. Puran* (1) was cited; and in the second place that, even if that dismissal stood in the way of fresh proceedings being taken, the order of this Court setting it aside will remove every possible objection to the validity of the fresh proceedings, so that they may go on from the point they have reached. On the other hand, it was contended by Babu Surendra Chandra Sen, who appeared for the accused, that, though the dismissal of a complaint under section 203 does not operate as an acquittal, still before it is set aside in the manner provided by law, no fresh proceedings can be taken, and such proceedings as have been taken before the order of dismissal was reversed should be set aside as illegal; and he further urged, apparently with good reason, that his objection to the proceedings already taken being allowed to stand, was not a mere technical objection, as a part of the proceedings, namely, that relating to the examination of a certain witness who was ordered to be examined by commission, has been irregular, and the irregularity has prejudiced the

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(1) I. L. R., 9 All, 85.

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accused, and if the proceedings are commenced *de novo* he will have a further opportunity of having that witness examined.

The question raised is an important one, and is by no means free from difficulty. Section 403 of the Code of Criminal Procedure no doubt expressly provides in the explanation to it that the dismissal of a complaint is not an acquittal, and there is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed. But, on the other hand, there is no express provision to the contrary, not even such as there was in section 147 of the former Code (Act X of 1872); while section 437 provides that "the High Court or the Court of Sessions 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 a further enquiry into any complaint which has been dismissed under section 203, or into the case of any accused person who has been discharged. When the Code therefore distinctly lays down a procedure for having an order dismissing a complaint under section 203 or discharging an accused person set aside and a further enquiry directed, it seems to me reasonable to conclude that the Legislature intends that an order of dismissal of a complaint or discharge of an accused person should be interfered with only in the manner provided. The opposite view would lead to the anomalous and unreasonable result that, notwithstanding the dismissal of a complaint or the discharge of an accused person after an elaborate enquiry by one Magistrate, another Magistrate may, merely upon a fresh complaint being filed, take proceedings against the accused again for the same offence and on the same evidence, though he has no authority, as a Court of appeal or revision, to examine the correctness of the previous order made in the case. Section 403 of the Code of Criminal Procedure merely declares that an order of discharge or dismissal of a complaint is not an acquittal. That only shows that it is not a bar to fresh proceedings in the same way as an acquittal is, but it does not shew that an order of discharge or dismissal of a complaint is to have no effect at all, and that fresh proceedings may be instituted without any notice being taken of such an order. The practice of this Court,

as far as we are aware, has been in accordance with the view we take. That view is also in accordance with the rulings of the Madras High Court which are strong authority in its favour, seeing that they are rulings under the old Code (Act X of 1872), section 147 of which might be taken to be more in favour of the opposite view than anything contained in the present Code (see proceedings No. 671, 28th March 1878, and No. 1883, 14th November, 1878) (1). In the present case the subsequent proceedings were taken, not only after the order of dismissal of the first complaint, but also after the Magistrate of the District had declined to interfere with it, and to order a further enquiry, though upon an erroneous ground—erroneous, because it appears from the original petition of complaint that the complaint was preferred by Jogesh Chundra Bhuttacharjee on behalf of Maharaja Jogendra Narain Rai Bahadur. The learned Joint Magistrate in his explanation says that he took up the enquiry because the complainant on the second occasion was a different person. I do not think that this view of the matter is correct. It is true that in the second petition the complainant is described as Maharaja Jogendra Nath Rai, through his *karpardaz* Jogesh Chundra Bhuttacharjee, whereas in the first petition he is described as Jogesh Chundra Bhuttacharjee on behalf of the Maharaja Jogendra Narain Rai, but the person examined as the complainant was Jogesh Chundra Bhuttacharjee in both cases.

Then as regards the case of the *Queen-Empress v. Puran* (2) relied upon by Baboo Kali Churn Banerjee, I think that it is distinguishable from the present in two respects. In the first place, there the second complaint was entertained by the very same Magistrate that had dismissed the first, and so the anomaly of one Magistrate sitting in judgment upon the propriety of an order of another Magistrate of co-ordinate jurisdiction did not arise; and in the next place, there the objection to the proceedings was taken after conviction, and so it might perhaps have been deemed (though that is not stated in the judgment) to be met by section 537 of the Criminal Procedure Code. But be that as it may, I am not prepared to follow it in the present case.

For the foregoing reasons I am of opinion that the proceedings

(1) Weir, pp. 874-75.

(2) I. L. R., 9 All., 85.

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of the Joint Magistrate of Kushtea in this case were irregular and invalid by reason of their having been taken whilst the order of dismissal of the original complaint was in force.

It remains now to consider whether our setting aside that order and directing a further enquiry, as we propose to do, has not the effect of validating those proceedings, regard being had to the provisions of section 537 of the Code of Criminal Procedure. I am of opinion that in the circumstances of this case they ought not to be allowed to go on, and that the proper course will be to commence the enquiry *de novo*.

Moreover, I do not think that section 537 is intended to apply to a case like the present, which has not been finally disposed of. That section provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered in revision or appeal by reason of any error, omission or irregularity in certain respects, unless such error, omission or irregularity has occasioned a failure of justice.

The test prescribed for determining whether such error, omission or irregularity should be a ground for setting aside an order is thus one which can be properly applied only after the final result of the case is known. When an objection is taken on the ground of there being a material error, omission or irregularity before a case is finally disposed of, and while there is time to correct the same, it would be unreasonable to hold that section 537 intends the error, omission or irregularity to be allowed to remain uncorrected. To hold that would be to give to section 537 the effect, not only of curing more formal defects of procedure when discovered too late, but of practically subverting all procedure. Such a view is clearly opposed to the decision of this Court in *Raj Chundra Mozumdar v. Gour Chundra Mozumdar* (1).

The result then is that the proceedings of the Joint Magistrate of Kushtea in this case, from the institution of the second complaint, should in my opinion be set aside, the order of dismissal of the original complaint dated the 9th of December 1895 should also be set aside, and the District Magistrate directed under section 437 of the Code of Criminal Procedure, by himself or by any of the Magistrates subordinate to him, to make further

(1) I. L. R., 22 Calc., 176.

enquiry into the complaint in this case which has been dismissed under section 203.

O'KINEALY, J.—So far as I can ascertain it has been the constant practice of this Court, since the introduction of the Code, to prevent new proceedings when the first complaint has been disposed of by an order under section 203 until that order is set aside. I am content, therefore, to follow that practice in the present case without any further discussion. I therefore agree that the subsequent proceedings should in this particular case be set aside. Looking also at the reasons given for the disposal of the case under section 203, I think that the order should not be allowed to stand in the way of a further enquiry; and setting it also aside, I agree with my colleague that a further enquiry should be made as directed.

S. C. B.

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ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

RAMPERTAB MULL AND ANOTHER v. JAKEERAM AGURWALLAH
AND OTHERS, *

1896
May 18.

AND THREE OTHER SUITS BY SAME PLAINTIFFS AGAINST OTHER DEFENDANTS.
*Practice—Civil Procedure Code (Act XIV of 1882), sections 102, 103, 108—
Application to set aside order of dismissal made under section 102—
Appearance of parties—Ex parte decree.*

When the plaintiff's suit came on for hearing his Counsel applied for a postponement. This application was refused, and the plaintiff's Counsel, not being further instructed, left the Court. The suit was then dismissed for want of prosecution. Subsequently the plaintiff made an application under section 103 of the Civil Procedure Code (Act XIV of 1882) for an order to set the dismissal aside.

Held, refusing the application, that the above circumstances amounted to an appearance on the part of the plaintiff.

THIS was an application by the plaintiffs under section 103 of the Civil Procedure Code (Act XIV of 1882) to set aside an order dismissing four suits made under section 102 on the 4th February 1893.

* Original Civil Suits Nos. 217, 218, 220, and 221 of 1894.