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BHAGWATI PRASAD v. RADHA KISHEN SEWAK PANDE.

entitled in equity to have it declared that the sums claimed with interest are a charge upon the property.

Their Lordships will humbly advise Her Majesty that an order be made in terms of the following minutes :—Discharge the decrees of both Courts below. Declare that the sum of Rs. 12,336-3-6, together with interest Rs. 864-9-0, awarded by the decree of the Subordinate Judge, amounting in all to the sum of Rs. 13,200-12-6, together with interest on the said sum of Rs. 12,336-3-6 at the rate of 8 annas per cent. per mensem from the date of the decree of the Subordinate Judge, is well charged upon the properties named at the foot of the plaint in favour of Sarju Prasad. Liberty for the appellant, as the representative of Sarju Prasad, to apply to the High Court for the realization of the amount due in respect of the said charge by sale of the said properties charged, in the event of the said amount not being paid within six months of the date of Her Majesty's order made hereon. Order the appellant to pay the costs of Nandan Tewari in the first Court, and the respondents as the representatives of Bir Bhaddar to pay to the appellant the costs incurred by Sarju Prasad in both Courts below.

The respondents as the representatives of Bir Bhaddar will pay the costs of this Appeal.

Solicitors for the appellants :—Messrs. *Ochme, Summerhays and Co.*

Appeal decreed.

P. C. 1893 *May* 13.

IN THE MATTER OF MACCREA.

Petition for leave to appeal from a judgment of the High Court at Allahabad.

Refusal of leave to appeal from a judgment and conviction under the Indian Penal Code—General rule as to refusal of leave to appeal in criminal cases—Misdirection of a jury not of itself a ground.

Although in very special and exceptional circumstances, leave to appeal to Her Majesty in Council may be granted in a criminal case, no countenance was given to the view that an appeal would be allowed merely on the ground that the Judge trying the case had misdirected the jury.

Present : The LORD CHANCELLOR, LORDS WATSON AND MORRIS, SIR RICHARD COUCH and the HON'BLE GEORGE DENMAN.

There was no reason to believe that there had been any misdirection by the Judge, or that he had, as he was alleged by the petitioner to have done, misconstrued, in charging the jury, a section of the Penal Code. Not only on the latter ground, but on the broader ground above stated, the petition was rejected.

Petition for special leave to appeal from a judgment and conviction (13th June 1892), of the High Court in Criminal Sessions, under ss. 511 and 420, Indian Penal Code.

The petitioner was convicted, on the above date, of (1) an attempt to cheat and fraudulently induce the Comptroller-General to deliver to him, or to Asad Ali, a Government Promissory Note for Rs. 500, and to pay the accused interest thereon; (2) conspiring with Asad Ali with that object; (3) abetting an attempt by Asad Ali to cheat. He was sentenced to two years' rigorous imprisonment.

The High Court refused an application, made on the 1st December 1892, under s. 32 of the Charter of 1866, that the case might be declared a fit and proper one for appeal to Her Majesty in Council, on the ground that the jury had been misdirected, to the effect, that the acts shown in evidence amounted to an attempt at cheating within the meaning of the sections above mentioned.

The charge related to a lost Government Note for Rs. 500, No. 9764, with arrears of interest thereon from 1865, which had been alleged to belong to the estate of one Mirza Husain Ali, brother of Asad Ali; it was, in effect, that the petitioner had attempted to cheat, at Lucknow, by writing to the Comptroller-General, and doing other acts, between the 17th of June and the 20th of October in the year 1891, attempting dishonestly to induce the Comptroller to pay the accrued interest to the petitioner, or Asad Ali, and to deliver a duplicate of the note to one or the other of them.

The petition stated that there was no evidence that an application had ever been made to the Comptroller, for the arrears of interest, or for the duplicate to be delivered, upon which he could act.

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All that was done was, according to the petition, that inquiries had been made at the Public Debt Office whether the note was outstanding or not: the petitioner had caused letters of administration to the deceased to be issued, which recited that note No. 9764 belonged to his estate, and had requested the police to investigate the alleged loss, producing to them a copy of the lost note, sending also a copy of the same, as a copy of the letters of administration, to the *Exchange Gazette* for publication.

It was stated in the petition that KNOX, J. directed the jury that, besides being satisfied as to the petitioner's intention to cheat, they must be satisfied, before they could convict him, that he had done acts towards cheating sufficiently important, and sufficiently near to the act of cheating intended and contemplated.

Also that upon this question they must consider whether those acts were sufficient to excite reasonable apprehension that the act attempted would be carried out, with the intention to cheat. A subsequent application for leave to appeal to the Queen in Council was refused, the Judges drawing a distinction between the phrase "attempt to commit" used in the English law in connection with crime, and the word "attempt" as defined in the Indian Penal Code.

The Court was of opinion that in the s. 511 the word "attempt" was used in a sense that would comprehend the acts of the accused.

Mr. *H. Cowell*, and Mr. *A. H. Bodkin* for the petitioner, submitted that leave should be granted on the ground that substantial and grave injustice had been done to him by reason of an erroneous construction of s. 511 of the Penal Code by the judge who tried the case. A conviction had taken place in the absence of any evidence that there had been an attempt to cheat. The jury should have been instructed to consider whether there had been any act done by the petitioner which actually began the execution of an intention to cheat. The Penal Code did not render a man punishable, under ss. 511 and 420, for acts which merely tended towards such beginning, or which showed that, unless interrupted, he might possibly begin such execution. A clear distinction existed and was

recognised by the code between preparation to cheat, and attempts to carry it out. See ss. 393, 399, 402, as to the former, and s. 307, (*c*) and (*d*) as to the latter. Even if, as the Judge appeared to have said, the Penal Code used the word "attempt" in a sense different to that attributed to it by English law, still it was not intended by the Code to obliterate the distinction between acts which amounted to preparation for, and acts which amounted to beginning the execution of an offence. So far as what the petitioner had done, went, no act of his had rendered it possible for the Comptroller-General to deliver up any property in his control. Many other things would have had to be done before the delivery would have taken place, and before the offence would have been completed. As to what constituted attempts reference was made to:—

The Empress v. *Riasat Ali* (1); *The Queen-Empress* v. *Dhundi* (2); *In the matter of Francis Cassidy* (3); *R.* v. *Eagleton* (4); *R.* v. *Cheeseman* (5).

It was submitted that this erroneous construction had the effect of creating a new offence unknown to the code; of general importance; inasmuch as s. 511 applied to nearly every offence under it. Thus, it was contended, there had arisen a case of that substantial and grave injustice, referred to in their Lordships' judgment *in re Abraham Mallory Dillet* (6), which removed the petition from the effect of the rule forbidding appeals from ordinary convictions.

Also were cited:—

Macleod v. *The Attorney General for New South Wales* (7).

Attorney General of N. S. Wales v. *Bertrand* (8).

Their Lordships' judgment was delivered by LORD HERSCHELL.

THE LORD CHANCELLOR—Their Lordships are of opinion that leave to appeal ought not to be granted in this case.

(1) I. L. R., 7 Calc., 352.
(2) I. L. R., 8 All. 303.
(3) 4 Bom. H. C. Rep. (Cr. C.) 17.
(4) 1 Dearsly 376, 515.
(5) Leigh & Cave, 140.
(6) 12 Ap. Ca., H. L., 459.
(7) (1891), A. C., 455.
(8) 4 Moore P. C., N. S., 474.

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The ground upon which leave is asked is that the petitioner being indicted under the 511th section of the Indian Penal Code for an attempt to cheat, there was no evidence of an attempt to cheat, but only of preparation for such an attempt.

S. 511 provides that "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence" shall be punished in the manner therein directed.

The facts are that the petitioner had obtained, with a fraudulent intent, as must be taken to be the fact after the finding of the jury, letters of administration to be granted, which recited that a certain lost Government promissory note was the property of one Asad Ali, and that further he had with fraudulent intent sent those letters of administration to the Public Debt Office as the foundation for an application for payment of the money.

The learned Judge who tried the case laid down in his charge to the jury that in order to convict the prisoner they must be satisfied, not only that he intended to cheat, but that he had done an act towards that cheating, and the learned Judge clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence.

The jury found the petitioner guilty. Their Lordships see no reason to believe that there was any misdirection on the part of the learned Judge, or that there has been a miscarriage of justice. But they do not desire to dispose of the petition simply upon that ground. If there be any foundation for this application it rests upon this:—that the learned Judge did not in his charge to the jury correctly construe the 511th section of the Penal Code, or that he left the case to the jury when there was no evidence to go to the jury. In their Lordships' opinion, if they were to sanction an appeal in the present case, it would be very difficult to refuse leave to appeal in all cases in which it could be established that there had been a misdirection by the Judge who tried the case,

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There are, no doubt, very special and exceptional circumstances in which leave to appeal is granted in criminal cases, but it would be contrary to the practice of this Board, and very mischievous, if any countenance were given to the view that an appeal would be allowed in every case in which it could be shown that the learned Judge had misdirected the jury.

Petition rejected.

Solicitors for the petitioner:—Messrs. *Ranken Ford, Ford,* and *Chester.*

APPELLATE CIVIL.

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April 27.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Aikman.

UDIT NARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* JHANDA (PLAINTIFF),*

Civil Procedure Code, ss. 566, 567—*Reference of issues for determination—Transfer.*

Where an appellate Court has made an order of reference under s. 566 of the Code of Civil Procedure, the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere.

The plaintiff in this case sued in the Court of the Munsif of Mahaban to recover possession of certain immovable property from the defendants by redemption of a mortgage given by the plaintiff's predecessor in title. The defendants pleaded that the amount alleged by the plaintiff to be due on the mortgage was not correct; that they had been in adverse possession for more than 12 years; that the share to which the plaintiff was entitled was much less than that claimed, and that under the terms of the mortgage the suit was premature. The Munsif gave the plaintiff a decree for redemption of a $\frac{1}{6}$th share of the property claimed on payment of a sum of Rs. 200-10-4 with interest. The defendants having appealed, the District Judge referred to the Court of first instance an issue as to whether it was a condition of the mortgage that profits were to be taken in lieu of interest, and directed the Court to take an

* Second Appeal No. 1290 of 1890, from a decree of Babu Ganga Saran, Subordinate Judge of Agra, dated the 20th September 1890, modifying a decree of Babu Raj Nath Prasad, Munsif of Mahaban, dated the 22nd January 1890.