1896

F. H. PERCY v. J. PERCY.

advised, present an original petition for dissolution of marriage in this Court under section 13 of Act No. IV of 1869.

Memorandum of appeal returned.

1896. *May* 18.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF RUDRA SINGH AND OTHERS.

Criminal Procedure Code, section 212—*Sessions case—Defence reserved—Examination by Magistrate of witnesses named for the defence.*

The fact that an accused person, against whom a charge has been framed by a Magistrate under the provisions of section 210 of the Code of Criminal Procedure, has reserved his defence does not preclude the Magistrate from acting under section 212 of the Code of Criminal Procedure.

THE facts of this case so far as they are necessary for the purposes of this report sufficiently appear from the judgment of the Court.

Kúnwár Parmanand, for the applicants.

The Public Prosecutor (Mr. *E. Chamier*) for the Crown.

KNOX and BLAIR JJ.—This is an application praying that this Court will set aside an order passed by the Joint Magistrate of Etah, and grant an order directing that Magistrate not to examine certain witnesses whom the accused has named in a list as witnesses whom he wishes to be summoned to give evidence on his trial. The order complained of is an order passed by the Joint Magistrate acting under and within the provisions of section 212 of the Code of Criminal Procedure. We are called upon to set aside that order and to hold that where an accused person says that "he reserves his defence," committing Magistrates have no longer any discretion to act in the terms of section 212 of the Code. This is the broad proposition contended for with great earnestness by the learned vakil who appears on behalf of the petitioner. In the argument which he addressed to us he maintained that when an accused person reserved his defence he was entitled to keep back the defence and withhold from the witness-box all the witnesses who might have had anything to say about it, and who had not

been examined under the provisions of section 208, until the trial went before the Court of Sessions, on the ground that his right of reserving his defence would be infringed and materially prejudiced. Another argument which he addressed to us was that when a charge had been drawn up against an accused person and that charge was a charge of an offence triable only by a Court of Session, however erroneous that charge may be, the case must proceed to trial before the Court of Session and the accused was entitled to an acquittal of that offence, if he could secure it; that the Magistrate was *functus officio* as soon as he had framed the charge, and, as he was compelled to commit, there was no object in his hearing witnesses for the accused.

We have before us the provisions of section 212 of the Code of Criminal Procedure. That section did not exist in the Act of 1861. It appears for the first time in the Act No. X of 1872. About the time when it was enacted, and when the Code of Criminal Procedure of 1872 was under preparation, two cases were decided by the High Court of Calcutta bearing upon this very point. One was the case *in the matter of Mahesh Chandra Banerji. The Queen* v. *Purna Chandra Banerji and others. The Queen* v. *Kali Sirkar and others* (1) and the other was the case of *Queen* v. *Kishto Doba* (2). The learned Judges who decided these cases took a diametrically opposite view of the duties of committing Magistrates with regard to the examination of witnesses named in a list filed by an accused as witnesses whom he intended to call in evidence on his trial before the Court of Sessions. With those cases before them the Legislature inserted a new section—section 200—in Act No. X of 1872, and retained it as section 212 in Act No. X of 1882. That section gave the Magistrate the widest possible discretion to summon and examine any witness named in any list given in to him under section 211. With that discretion we cannot interfere, nor do we see how any line could be drawn limiting it one way or another. The Code of Criminal Procedure does not require a Magistrate to record his reasons for acting or refusing to act under section 212, and we cannot

(1) 4 B. L. R., App. 1. (2) 14 W. R., C. R., 16.

1896

IN THE MATTER OF THE PETITION OF RUDRA SINGH.

lay down a direction that before exercising his powers he should record reasons. He is given a discretion which he may be trusted to use properly, and it will be for a person impugning his order to satisfy us that a judicial discretion has not been used before we can interfere with an order passed under this section. We need not go into or state any reason why it is necessary that this section should appear on the statute book. It is there; and as it is there, it is the duty of every Magistrate, who considers that the use of it is necessary and expedient in the interests of justice, to make use of it to the fullest extent necessary in the interests of justice. If he does not do so, he neglects an obvious duty. No case has been made out to us showing that in the present instance the Joint Magistrate of Etah failed to exercise his discretion or abuse it. We decline to interfere and return the record.

Application dismissed.

APPELLATE CIVIL.

1896
May 18.

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

UJAGAR LAL (PLAINTIFF) *v.* JIA LAL AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Right of pre-emption not forfeited by breach on a former occasion of the rules of the wajib-ul-arz relating to pre-emption.

Semble that a claimant for pre-emption under a *wajib-ul-arz* would not forfeit his right to pre-emption if upon a former occasion he had violated the provisions of the *wajib-ul-arz* by mortgaging his share to a stranger. *Gokul Chand* v. *Ram Prasad* (1) followed: *Bhajjo* v. *Lalman* (2) referred to.

This was a suit to obtain possession as mortgagee of certain zamindari which had been mortgaged by a deed of conditional sale by three of the defendants to the fourth defendant. The plaintiff claimed under a clause of the *wajib-ul-arz* relating to pre-emption and he alleged his right as a co-sharer to be superior to that of the defendant mortgagee.

* Second Appeal No. 357 of 1894, from a decree of G. E. Gill, Esq., District Judge of Mainpuri, dated the 30th January 1894, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mainpuri, dated the 28th November 1892.

(1) Weekly Notes 1889, p., 127. (2) I. L. R., 5 All., 180.