REVISIONAL CRIMINAL.

1901
March 9.

Before Sir Arthur Strachey, Knight, Chief Justice.

IN THE MATTER OF THE PETITION OF ALAMDAR HUSAIN.*

Criminal Procedure Code, sections 439, 476—Revision—Power of High Court to revise an order under section 476—Circumstances under which such power should or should not be exercised.

The High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code of Criminal Procedure, but such power should not be exercised where the Court below has arrived at a judicial opinion on evidence that there is ground for inquiring into an offence referred to in section 195, merely because the High Court disagrees with that opinion.

THE facts of this case sufficiently appear from the order of the Court.

Mr. *W. Wallach* and Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*) in support of the order.

STRACHEY, C.J.—This is an application for revision of an order made under section 476 of the Code of Criminal Procedure. An appeal was being heard by the Collector as a Revenue Court from the Court of a Tahsildar. The Tahsildar had dismissed the suit for default of appearance by the plaintiff, and the appeal to the Collector was from that dismissal of the suit. At the hearing of the appeal before the Collector there was present a mukhtar of the appellant who had represented him in the Court of first instance. It was contended in appeal before the Collector that the Court of first instance ought not to have dismissed the suit for default, because there was no default of appearance, inasmuch as this mukhtar had actually appeared for the appellant at the hearing before the Tahsildar on the date of the dismissal, and had on that occasion presented to the Tahsildar a certain receipt. In support of that contention the Collector took the evidence on oath of the mukhtar, who swore that he was present in the Tahsildar's Court with his client when the suit was dismissed, that he produced the receipt, and that the Tahsildar dismissed the suit after argument about the receipt. That was a plain circumstantial story told by

* Criminal Revision No. 90 of 1901.

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the mukhtar as to what occurred in the Tahsildar's Court at the time of the dismissal of the suit, and this story was supported by an endorsement upon the receipt bearing the date of the dismissal and purporting to be made by the Tahsildar himself. I am informed by the learned counsel for the petitioner that the date in this endorsement appears to have been tampered with. Now the Collector after taking this evidence called for a report from the Tahsildar as to what had occurred at the time of the dismissal of the suit, and in due course the Tahsildar made a report, the substance of which was that there was no such appearance as sworn to by the mukhtar, no production of the receipt at the time of the dismissal and no argument about the receipt, but that there had been an actual default of appearance, in consequence of which the suit was dismissed. After the determination of the appeal the Collector made an order directing the trial of the mukhtar for the offence of giving false evidence, punishable under section 193 of the Indian Penal Code. He made that order, not upon any application for sanction to prosecute, but of his own motion. He signed that order "G. A. Tweedy, Magistrate." An application was made to the Sessions Judge for revision of that order, and the Sessions Judge held that, although the order was signed by Mr. Tweedy as "Magistrate," still, as all the preceding orders in the case had been signed by the Revenue officers as such, and the Collector as a Revenue Court was alone seised of the case, the order must be treated as one made by the Collector of the district. He held that he had no jurisdiction under section 435 of the Code. An application for revision is now made to this Court on behalf of the mukhtar, and I am asked to set aside the order under section 476. The first ground on which I am asked to do so is that it was made without jurisdiction because it was made by the District Magistrate, and the District Magistrate had as such no power under section 476 to take action in regard to any offence not committed before him as District Magistrate, or brought under his notice as District Magistrate in the course of judicial proceedings, but committed before him in his capacity as Collector and Court of Revenue. Now there can be no doubt that Mr. Tweedy had power, under the circumstances, to make the order under section 476. He had that power as the Collector before whom the alleged offence was committed

in the course of a judicial proceeding. Therefore as a matter of substance his power was undoubted. But it is suggested that because in signing the order he described himself as Magistrate, and possibly thought that he was acting as District Magistrate, the order was one made without jurisdiction. In my opinion the true way of looking at the matter is, that the order was made by one who had jurisdiction to make it, but who in making it misdescribed, or possibly misconceived, the authority which he had to make it. On a ground like that I would not interfere in revision. I should look in revision at the substance of the thing, and if the Collector had power to make the order which he did, he did not lose that power because he signed the order as "Magistrate" instead of as "Collector."

The other ground on which I am asked to interfere in revision is this. It is, shortly, that the Collector was mistaken in his opinion that there was sufficient ground for inquiring into the offence which, in his opinion, this mukhtar had committed. That is the only other ground which has been suggested for my interference. Now it has been held by this Court that the High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code; and I assume that this view is correct Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under section 476, any more than in any other case, allow what would virtually be an appeal from the order of the Court below. It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision. Now let us see whether there is any fault of that kind to be found in the Collector's proceedings. The condition of his acting under section 476 is his forming the opinion that there was ground for inquiring into any offence referred to in section 195. The test is his opinion, and not the opinion of any superior Court; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because, no doubt, if a case arose in which the Court acted on

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merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates. The opinion spoken of by section 476 no doubt is a judicial opinion founded on evidence. If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it: the case must go on. In the present case I see no reason whatever to doubt that the Collector formed a serious, deliberate, judicial opinion that there was ground for inquiry. I think myself that there was ground for inquiry, although I guard myself against expressing any strong opinion as to that. Here is a man who swore to certain events taking place in his presence at a certain time and on a certain occasion before the Tahsildar and upon inquiry being made, the Tahsildar contradicts the whole of what he says, and declares it to be absolutely untrue. The Collector had before him the statement of this man, who was examined as a witness before him, and of whose veracity he had an opportunity of judging, and also had the Tahsildar's contradiction. I think that there is no cause for interfering in revision. The application is dismissed.

APPELLATE CIVIL.

1901
March 11.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

ABDUL GHAFUR (JUDGMENT-DEBTOR) *v.* RAJA RAM (DECREE-HOLDER).*

Civil Procedure Code, section 211—*Execution of decree—Mesne profits—Allowance of collection expenses to a trespasser against whom a decree for mesne profits has been passed.*

Ordinarily in the case of a decree for mesne profits against a trespasser in possession of immovable property the collection expenses incurred by him during the period of his possession will be allowed; it is only when the trespass is of a very aggravated character that the Court, in the exercise of its discretion, may refuse such expenses. *McArthur & Co.* v. *Cornwall* (1) followed. *Hurro Doorga Chowdhrani* v. *Maharani Surut Soondari Debi* (2)

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* Appeal No. 21 of 1900 under section 10 of the Letters Patent.

(1) L. R., 1892, A. C., 75.

(2) (1881) L. R., 9 I. A., 1.