1904

KAMTA PRASAD v. SHEO GOPAL LAL.

this submission, they would no doubt have entertained and considered the matter. In the absence, however, of any such it is impossible for us in second appeal to entertain such a question. The appeal is therefore dismissed with costs.

Appeal dismissed.

1904
February 9.

REVISIONAL CRIMINAL.

Before Mr. Justice Aikman.

EMPEROR v. THAKUR DAYAL AND OTHERS.*

Criminal Procedure Code, section 349—Case submitted with regard to sentence to District or Sub-Divisional Magistrate—Such Magistrate not competent to return the case to Magistrate who submitted it.

Where a Magistrate of the second or third class has submitted a case to the District or Sub-Divisional Magistrate under section 349 of the Code of Criminal Procedure, it is not competent to the District or Sub-Divisional Magistrate to return the case to the submitting Magistrate if in his opinion the reference was unnecessary. *Imperatrix* v. *Abdulla* (1), *Queen-Empress* v. *Viranna* (2), *Dula Faqueer* v. *Bhagirgt Sirear* (3) and *Queen-Empress* v. *Haria Tellapa* (4) followed.

IN this case three men were charged before a Magistrate of the second class with the offence of theft. The Magistrate after hearing the evidence was of opinion that the accused were guilty; but, considering that they ought to receive a punishment more severe than he could himself inflict, he recorded his opinion to that effect and forwarded the accused with his proceedings to the Sub-Divisional Magistrate under the provisions of section 349(1) of the Code of Criminal Procedure. The Sub-Divisional Magistrate before whom the case came, being of opinion that the punishment which the second class Magistrate could inflict would be sufficient, instead of giving effect to that opinion and himself passing sentence on the accused, sent the case back to the second class Magistrate from whom it had come to him for disposal. The Sessions Judge, being of opinion that the Sub-Divisional Magistrate had no power to return the case to the second class Magistrate, made a report to the High

* Criminal Reference No. 49 of 1904.

(1) (1880) I. L. R., 4 Bom., 240.
(2) (1886) I. L. R., 9 Mad., 377.
(3) (1880) 6 C. L. R., 276.
(4) (1886) I. L. R., 10 Bom., 196.

1903

EMPEROR v. THAKUR DAYAL.

Court under section 438 of the Code of Criminal Procedure, recommending that the order in question should be set aside. The following order was passed:—

AIKMAN, J.—In this case three men were charged before a Magistrate of the second class with the offence of theft. The Magistrate, after hearing the evidence, was of opinion that the accused were guilty, but considering that they ought to receive a punishment more severe than he could himself inflict, he recorded his opinion to that effect and forwarded the accused with his proceedings to the Sub-Divisional Magistrate under the provisions of section 349(1) of the Code of Criminal Procedure. The Sub-Divisional Magistrate before whom the case came, being of opinion that the punishment which the second class Magistrate could inflict would be sufficient, instead of giving effect to his opinion and passing such sentence as he thought fit, adopted the very inconvenient and illegal course of sending the case back to the second class Magistrate at Chunar for disposal. The learned Sessions Judge has very properly referred the case for the orders of this Court. A Magistrate to whom a case is submitted under section 349 has no power to send it back. He must dispose of it himself by acquitting, or convicting and sentencing the accused or committing the accused for trial. The order referred to in sub-section (2) of that section is, as was held in the case of *Imperatrix* v. *Abdulla* (1), *ejusdem generis* with the words "judgment" and "sentence" which precede it, and does not include an order returning the case to the Magistrate who submitted it. In the case of *Queen-Empress* v. *Viranna* (2) the learned Judges remark:—"It has been many times ruled by this Court that a Magistrate to whom proceedings are submitted under section 349 of the Code of Criminal Procedure is not at liberty to return the case to the submitting Magistrate, but must dispose of it himself." The same view was taken in *Dula Faqueer* v. *Bhagirat Sircar* (3), where the learned Judges remark:—"It was not competent to him (the District Magistrate) to return the case to the Subordinate

(1) (1880) I. L. R., 4 Bom., 240. (2) (1886) I. L. R., 9 Mad., 377.
(3) (1880) 6 C. L. R., 276.

1904

EMPEROR v. THAKUR DAYAL.

Magistrate because in his opinion that officer could pass an adequate sentence." The case of *Queen-Empress* v. *Havia Tellapa* (1) is to the same effect. I set aside the order of the first class Magistrate, dated the 17th of December, 1903, returning the case to the Tahsildar Magistrate, and direct that the first class Magistrate dispose of it himself, passing such judgment, sentence or order as he thinks fit and as is according to law.

1904
February 5.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

JWALA SAHAI (DEFENDANT) *v.* MASIAT KHAN (PLAINTIFF) *

Execution of decree—Sale in execution of property not belonging to the judgment-debtor—Suit by owner of property so sold to recover possession —Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 12 and 144.

Where in execution of an order under section 412 of the Code of Civil Procedure for payment of Court fees certain immovable property was sold as the property of the persons liable under such order, which in fact did not belong to them, but to a third person, who had no notice of the sale, it was *held* that the true owner of the property so sold was competent to treat the sale as a nullity and to bring his suit for recovery of possession at any time within 12 years from the date when he lost possession. *Malkarjun* v. *Narhari* (2) distinguished. *Nathu* v. *Badri Das* (3), *Balwant Rao* v. *Muhammad Husain* (4) and *Sukhdeo Prasad* v. *Jamna* (5) referred to.

THE facts out of which this appeal arose are as follows:—

The creditors of one Net Ram instituted a suit against him in 1889 and obtained a decree for payment of a sum of money. In execution of that decree the decree-holders put up for sale certain immovable property belonging to Net Ram, and it was purchased by one Sanwal. The sale was duly confirmed in favour of Sanwal, who was put into possession on the 12th of February 1890. During the pendency, however, of the litigation between Net Ram and his creditors, Net Ram had

---

* Second Appeal No. 68 of 1902, from a decree of Babu Ramdhan Mukerji, Subordinate Judge of Bareilly, dated the 15th of October 1901, confirming a decree of Pandit Bishambar Nath, Munsif of Aonla-Faridpur, dated the 20th of July 1901.

(1) (1886) I. L. R., 10 Bom., 196.
(2) (1900) I. L. R., 25 Bom., 337.
(3) (1883) I. L. R., 5 All., 614.
(4) (1893) I. L. R., 15 All., 324.
(5) (1900) I. L. R. 23 All., 60.