

of payment after allowing credit for the sum of Rs. 135 already paid for interest. The decree must be modified accordingly. The amount due on the mortgage of the 26th of November, 1888, will be calculated in the office on the basis which we have indicated and the total amount to which the plaintiffs respondents are entitled will be modified accordingly. We extend the time for payment of the sum which shall be ascertained to be due up to the 20th of July, 1906. The appellant is entitled to his costs of this appeal. As regards the costs in the Courts below the parties will pay and receive costs proportionate to failure and success.

1906

SAKHAWAT
HUSAIN
v.
GAJADHAR
PRASAD.

Before Sir John Stanley, Knight, Chief Justice.

BALLI PANDE v. CHITTAN AND ANOTHER.*

Criminal Procedure Code, sections 250, 423(1)(d).—Fivolous complaint—Compensation—Appeal—Power of appellate Court.

Held that an appellate Court is not empowered to grant compensation under section 250 of the Code of Criminal Procedure in view of the express terms of section 250—"Magistrate by whom the case is heard." Section 423(1)(d) cannot be taken to confer such power.

In this case on the complaint of Balli Pande two persons Chittan and another were tried by a Magistrate of the third class for offences under sections 426 and 352 of the Indian Penal Code, and were convicted and sentenced to small fines. On appeal the District Magistrate of Azamgarh set aside the convictions and sentences, and, being of opinion that the charge brought by Balli was frivolous, ordered the complainant to pay Rs. 10 as compensation to the two accused. The District Magistrate purported to act under section 250 of the Code of Criminal Procedure. Balli applied to the Sessions Judge for revision of this order, who, being of opinion that section 250 was not available to an appellate Court, submitted the record of the case to the High Court for orders under section 438 of the Code of Criminal Procedure.

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

STANLEY, C.J.—This case comes before the Court on a reference by the learned Sessions Judge of Azamgarh, recommending that an order for compensation passed by the District Magistrate

1906

April 21.

* Criminal Reference No. 178 of 1906.

1906

BALLI
PANDE
v.
CHITTAN.

against a complainant should be set aside as illegal. The complainant brought a charge against two persons of offences under sections 426 and 352 of the Indian Penal Code which was heard before a Magistrate of the third class. The accused were convicted, but upon appeal the learned District Magistrate set aside the conviction, and, holding that the complaint was frivolous or vexatious within the meaning of section 250 of the Criminal Procedure Code, ordered the complainant to pay Rs. 10 compensation. The learned Sessions Judge being of opinion that the District Magistrate had no authority to grant compensation, has made this reference to the Court. Being called upon for an explanation the District Magistrate submitted that the order in question could be legally passed under section 423(1)(d), and he relied upon what he terms "the opinion expressed by Mr. Justice Prinsep in his work on the Criminal Procedure Code." By section 423(1)(d) an appellate Court is empowered to make any amendment or any consequential or incidental order that may be just or proper, and it is suggested that the order for compensation in question was an order within the meaning of this section. It appears to me that in view of the language of section 250 it is only the Magistrate by whom the case is originally heard who can pass an order for compensation. The words of that section are:—"If the Magistrate *by whom the case is heard* discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious" he may in his discretion by his order of discharge or acquittal direct the person upon whose complaint or information the accusation was made, to pay to the accused or to each of the accused such compensation, not exceeding Rs. 50, as he may think fit. It was not intended by the Legislature, as it seems to me, that any other tribunal before whom the case might come should have the power to grant compensation under this section. It would be inconvenient, if, when the tribunal before whom a case is heard, finds a charge to be proved, an appellate tribunal when reversing that finding could pass an order for compensation on the ground that the accusation which was established in the Court below was either frivolous or vexatious. It appears to me that the Legislature intended that only the Magistrate by whom a case is in the first instance heard can pass an

order for compensation. In reference to what is stated to be the opinion of Mr. Justice Prinsep in his work on the Criminal Procedure Code, I have referred to his work, and I find that in his note on section 250 he does not express an opinion on the question, but after a reference to a case in the Madras High Court,* in which it was held that the appellate Court was not competent to award compensation under the provisions of the Code as it existed before the introduction of section 423(1)(d), merely adds the words "but see section 423(1)(d) of this Code, which enables an appellate Court to make any consequential or incidental order that may be just or proper in a case under appeal." The learned author does not here express an opinion, but merely directs attention to the section which he quotes. In a later edition of his work, namely, the 13th edition at page 250, Sir Henry Prinsep has altered his previous comments, substituting for the words which I have quoted from his earlier edition the following words:—"It is doubtful whether under the terms of section 423(1)(d) of this Code, which enables the appellate Court to make any consequential or incidental order that may be just and proper in the case under appeal, this ruling has not become obsolete." For the foregoing reasons I set aside the order of the District Magistrate in so far as he directs Rs. 5 to be paid as compensation to each of the opposite party.

1906

 BALLU
 PANDE
 v.
 CHITTAN.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
 Sir George Knox.*

 1906
 April 21.

BISHESHAR DAS AND ANOTHER (PLAINTIFFS) v. RAM PRASAD AND
 ANOTHER (DEERDANTS).†

*Joint Hindu family—Partition—Suit for partition dismissed for default—
 Fresh suit—Civil Procedure Code, sections 13, 102 and 103.*

Where a suit for partition was dismissed for default and a fresh suit was instituted, held that the right to enforce partition is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to the Court for partition of the joint property. *Nusrat-ullah v. Mujib-ullah* (1), followed.

 * (1875) 8 Mad., H. C. Rep., App. vii.

† Second Appeal No. 1035 of 1904, from a decree of J. H. Cuming, Esq., District Judge of Aligarh, dated the 11th of July, 1904, confirming a decree of Maulvi Maula Baksh, Additional Subordinate Judge of Aligarh, dated the 30th of April, 1904.

(1) (1891) I. L. R., 13, All., 309.