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Lal in an explanation furnished by him says that as the case was a petty one he transferred it for trial to Chaudhri Dharam Singh, Special Magistrate of Kanth, and a magistrate subordinate to the Sub-Divisional Magistrate of Amroha. When this case first came before this Court it seemed doubtful whether Mr. Panna Lal had power to make this last order of transfer. We asked the Public Prosecutor to appear in the case, and after hearing him we are confirmed in the opinion that this last order of transfer was an order *ultra vires*. When a District Magistrate has referred a case for trial to a Sub-Divisional Magistrate, the latter has no power to transfer it to any other Magistrate who may happen to be subordinate to him. This case was especially called up because frequent cases of transfer from other districts and specially from this district have lately come before this Court, and in some cases transfers have been so frequent and have caused such extraordinary delay as to amount practically to a denial of justice. We might have set aside the proceedings before the Special Magistrate of Kanth as void, but we do not think it necessary to exercise our powers in this particular case and therefore we make no further orders. Let the record be returned.

Record returned.

APPELLATE CRIMINAL.

1914

January, 13.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir George Knox.

EMPEROR *v.* GHURE*

Statute 24 *and* 25 *Vict., C.* 104, *sections* 1 *and* 2—*Power of Crown to appoint a sixth Puisne Judge—Criminal Procedure Code, section* 417—*Appeal from acquittal—Procedure.*

Held, on a construction of sections 1 and 2 of the Letters Patent of the High Court for the North-Western Provinces, that it was competent to the Crown to appoint by means of its Letters Patent a sixth Puisne Judge to the said High Court.

Held also, following the decision in *Queen Empress* v. *Prag Dat* (1), that in the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and the right of appeal against a conviction. *Queen-Empress* v. *Robinson* (2) referred to.

THIS was an appeal by the Local Government from an order of acquittal passed by the Sessions Judge of Aligarh. The facts

*Criminal Appeal No. 827 of 1913 by the Local Government from an order of A. Sabonadiere, Sessions Judge of Aligarh, dated the 26th of September, 1913.

(1) (1898) I.L.R., 20 All., 459. (2) (1894) I.L.R., 16 All., 212

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of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. *M. L. Agarwala*, for the accused, raised a preliminary objection to the hearing of the appeal on the ground that there was no legally constituted High Court in these Provinces. The Charter Act of 1861 by section 16 empowered the Sovereign to constitute the High Court for these Provinces with as many Judges as she might from time to time appoint. Under this section it was open to the Sovereign to issue a Letters Patent erecting a High Court here without mentioning the number of Judges as was done in the case of the High Courts of Calcutta, Bombay and Madras. Section 17 of the same Act empowered Her Majesty to revoke or amend the Letters Patent of a High Court within three years of the establishment thereof. The imperative character of this section is shown by the fact that Statute 28 and 29 Vict., Chap. XV, had to be passed in order to enable the Sovereign to issue fresh Letters Patent up to the 1st January, 1866. The Letters Patent that were issued to the High Court for these Provinces fixed the constitution of the High Court at a Chief Justice and five Judges until such further or other provision as might be made by Her Majesty. The only section that allows further or other provision to be made is section 17 of the Charter Act. Under that section such further or other provision could only be made by a fresh Letters Patent issued within three years of the establishment of the High Court. The mere appointment of a Judge is not equivalent to the making of such further or other provisions within the meaning of section 2 of the Letters Patent.

The officiating Government Advocate (Mr. *W. Wallach*) for the Crown, was not called upon to reply to the preliminary objection.

The case was then argued on the facts.

RICHARDS, C. J. and KNOX, J :—A preliminary objection was taken to the hearing of this appeal on behalf of the accused. It is contended that this High Court is no longer properly constituted by reason of the fact that some years ago a sixth Puisne Judge was appointed. In our opinion there is no force in the contention. Under 24 and 25 Vict., Chap. 104, section 16, the Sovereign was

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authorized by Letters Patent to establish at any time thereafter a High Court of Judicature in the territories of India other than those comprised within the jurisdiction of the other High Courts. The only limit as to the number and qualifications of the Judges was as therein stated. By Letters Patent, dated the 17th day of March of the twenty-ninth year of the reign of Queen Victoria Her Majesty was pleased to constitute a High Court for the North-Western Provinces in these words :—

"Section 1. Now know ye that We upon full consideration of the premises and of Our special grace certain knowledge and mere motion have thought fit to erect and establish and by these presents We do accordingly for Us, Our heirs and successors erect and establish for the North-Western Provinces of the Presidency of Fort William aforesaid a High Court of Judicature which shall be called 'The High Court of Judicature for the North-Western Provinces'. And We do hereby constitute the said Court to be a Court of Record."

Section 2 is in these words :—

"And We do hereby appoint and ordain that the said High Court of Judicature for the North-Western Provinces shall until further or other provision shall be made by Us or Our heirs and successors in that behalf in accordance with the said recited Act consist of a Chief Justice and five Judges

In our opinion it was perfectly competent by Letters Patent to appoint a sixth Judge. We accordingly overrule the preliminary objection.

The appeal is an appeal by Government against the acquittal of one Ghure on a charge of murder. The circumstances connected with the case are as follows :—There was a family of four brothers, Sunars, trading at Hathras. The names of these four brothers were Jhunna Lal, Ram Lal, Shama and Babu. There were living at a place called Arjunpur, about four *kos* away, three Brahman brothers Kunwar Lal, Rup Ram and the accused Ghure. In October, 1911, Jhunna Lal and Ram Lal were murdered. Ghure, Kunwar Lal and Rup Ram, the three Brahman brothers, were all accused of the murder. Ghure was alleged to be absconding, but Kunwar Lal and Rup Ram were put upon their trial, convicted of the murder of Ram Lal and sentenced to death. The sentence

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was confirmed by the High Court and subsequently carried into effect.

Ghure was arrested on the 18th of July, 1913, committed for trial and tried by Mr. Sabonadiere, Sessions Judge of Aligarh, and acquitted. It is against this acquittal that the present appeal is preferred by Government.

[After discussing the evidence their Lordships proceeded as follows:—]

The learned Sessions Judge says, and most truly says, that he was bound to hear and to decide the case altogether irrespective of the fact that there had been a previous trial and conviction upheld by the High Court against the other accused. There can be no doubt that the learned Sessions Judge is perfectly correct in this. If the evidence as he heard it did not convince him of the guilt of the accused he was bound to acquit. Just in the same way we are bound to deal with this appeal quite irrespective of the fact that another Bench of this High Court affirmed the conviction in a previous trial. If the learned Sessions Judge had referred less to the judgement of his predecessor, we think his own judgement would have been less open to criticism; for instance, we do not acquiesce in his remarks about the use of the word "apparently" by his predecessor in giving judgement in the previous case. It is quite clear that the learned judge in that case meant to say that so far as he could see the witness whose evidence he was referring to was trustworthy. He may have been right or wrong in this estimate of the witness, but his meaning is perfectly clear.

It has been argued on behalf of the accused that we ought to follow the ruling in *Queen-Empress* v. *Robinson* (1). In our opinion the law is correctly laid down in the case of *Queen-Empress* v. *Prag Dut* (2). We must, however, banish from our minds altogether the fact of the previous trial. Whether it was owing to the time that had elapsed between the occurrence and the present trial, or whether it was that Nanda purposely to spoil the case gabbled forth evidence, the learned Sessions Judge found him an unconvincing and unsatisfactory witness. With some of the reasons he has given for not believing him we cannot agree, but as regards some of the other reasons which he has given we are not prepared

(1) (1894) I. L. R., 16 All., 212. (2) (1898) I. L. R., 20 All., 459.

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to say they are not entitled to some weight. His reasons for not relying upon the evidence of Babu are justified, though he has failed to consider the corroboration of Hub Lal on the only vital part of his evidence. We are very far from saying that we believe Ghure to be innocent, far less that the conviction of the other accused was incorrect. But deciding this case entirely upon its own circumstances, and influenced mainly by the remarks of so experienced a Judge on the unsatisfactory way in which the principal witness gave his evidence, we have with great hesitation come to the conclusion that we ought not to set aside the verdict of acquittal given by the learned Sessions Judge. We accordingly dismiss the appeal. The accused, if in custody, will be set at liberty.

Appeal dismissed.

APPELLATE CIVIL.

1914

January, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MATA PALAT AND OTHERS (JUDGEMENT-DEBTORS) *v.* BENI MADHO (DECREE-HOLDER) *

Civil Procedure Code (1882), *sections* 373 *and* 375*A*—*Execution of decree—Procedure—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree.*

Held that the provisions of Chapter XXII of the Code of Civil Procedure (1882), which allowed withdrawal of a suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree, and did not permit the withdrawal of an application for execution with permission to make a fresh application.

THIS was an appeal arising out of an application made by the decree-holder to put up for sale certain interests held by the judgement-debtors as included in the decree for sale. The judgement-debtors contended that the decree for sale included only their proprietary rights and not their mortgagee rights. They further contended that on the 6th of August, 1908, the decree-holder's application for sale of the mortgagee rights was on their objection disallowed by the court of first instance on the 22nd of August, 1908; that an appeal against the order, by the decree-holder, was dismissed on the 15th of December, 1909, and that therefore that order had the effect of *res judicata*. The decree-holder in reply

* Appeal No. 70 of 1913, under section 10 of the Letters Patent.