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examined in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellant. Of the witnesses examined in 1898, Musammat Vilayatan cannot be relied upon. Mohan Chamar and Muhammad Yusuf distinctly say that they did not see Rustam the appellant, strike the deceased. The other witnesses Imtiazan, Ram Singh and Husaini do swear that they recognized Rustam as the assailant of the deceased. It should be observed here that none of the witnesses was present actually on the spot when the assault on Sad-ullah is said to have taken place. All the witneses say that they ran upon hearing the cries of Sad-ullah. Imtiazan and Husaini also ran up. It was a dark night, and, according to Muhammad Yusuf, it was not possible to recognize any person at any distance. There is therefore room for doubt as to the evidence of Imtiazan, Husaini and Ram Singh. In our opinion it would serve no useful purpose to send back the case for re-trial with the direction to admit the evidence taken in 1898. We therefore accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

BANERJI, J.—I concur.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* BHOLE SINGH.*

1915 *August*, 4.

Criminal Procedure Code, sections 4 and 476—"Complaint"—Statement made to magistrate in his executive capacity - Act No. XLV of 1860 (Indian Penal Code), section 211.

Held that it was not competent to a Magistrate to treat as a complaint, and found thereon such procedure as would naturally follow on a complaint, including a prosecution under section 211 of the Indian Penal Code, a statement which was made to him extra-judicially and without any intention or desire that it should be taken as a complaint, but merely in reply to a question asked by the Magistrate.

THE facts of this case are, shortly, as follows :—

One Paras Ram, who was a village headman, appeared before the District Magistrate of Jhansi and put in a petition stating

* Criminal Revision No. 459 of 1915, from an order of E. A. Phelps, District Magistrate of Jalaun, dated the 6th of April, 1915.

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that he wished to resign his post. The District Magistrate asked him the reason for his wishing to resign and he then made a statement charging the police Inspector with extortion and tyranny in connection with a dacoity. The Magistrate summoned certain persons who were mentioned by the headman as having been compelled to pay money to the Sub-Inspector, examined them and Paras Ram on oath and came to the conclusion that a *primâ facie* case had been made against the police. He, however, sent the case to the Superintendent of Police to make an inquiry under paragraph 383 of the Police Regulations. The Superintendent made a report that the charges were groundless. The District Magistrate thereupon ordered the prosecution of Paras Ram and of his witnesses under section 211 of the Indian Penal Code, for giving false evidence. The witnesses applied to the High Court in revision. The Magistrate submitted an explanation saying that he had treated the examination on oath as a complaint.

Babu *Piari Lal Banerji*, for the applicant :—

The application was made to the Magistrate in his executive capacity and the inquiry that followed was only a departmental one. He could not examine the witnesses, as he did, because he was not sitting as a court. The utmost he could do was that he could file a complaint. Though the order was executive, this Court has still power to interfere because the order purported to have been passed under section 476 of the Code of Criminal Procedure. The words "committed before it" in that section meant committed while he was sitting in his judicial capacity. The offence was not brought to his notice judicially. The Code gave a right to the Magistrate to order an inquiry without a complaint having been filed, but the inquiry was not a judicial one. See Part V, Chapter XIV. Paras Ram never made a complaint. He tendered his resignation, and on questions being put to him by the Magistrate he gave out the story. When a complaint is filed the usual procedure is to examine the complainant and issue process against the accused person and not to direct a police inquiry. The fact that the Magistrate only directed a police inquiry showed that he did not treat it as a complaint. Paras Ram did not ask the Magistrate to take action against the Police. The statement was not therefore a complaint. But, if it be taken to be a complaint,

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it was still pending and no prosecution could be ordered until it was finally disposed of. The Magistrate could not keep the complaint pending and order prosecution for making a false complaint. *Sangilia Pillai* v. *The District Magistrate of Trichinopoly* (1).

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

The Magistrate either acted in his executive capacity or judicially and in either case the order is right. If the order was an executive order the High Court could not interfere. The Magistrate stated that he treated the statement as a complaint. The charge, however, related to the Police, and under paragraph 383, Police Regulations, the Magistrate sent it on to the Superintendent. The Magistrate treating it as a complaint could examine anybody he pleased, and acting under section 190 he examined witnesses without protest by the accused. The complaint was found to be false and sanction had been rightly given.

Piari Lal Banerji, in reply cited *Queen-Empress* v. *Deokinandan* (2) and *Empress* v. *Phulel* (3).

TUDBALL, J.:—The present application has arisen from the following facts:—One Paras Ram, a village headman, on the 17th of February last, filed before the District Magistrate a petition in which he stated that he wished to resign his post as village headman as he was too old and unable to do his work. The District Magistrate apparently doubted the correctness of the reason given and questioned the man. In reply to questions put to him the man stated that the police of a certain police station were investigating a dacoity case and in the course of their investigation they were forcing a large number of people to pay money to them; that he was afraid of getting into trouble through this matter and he therefore wished to resign. The District Mgistrate in his explanation states that he treated this as a complaint and he thereupon put Paras Ram on oath and examined him again. What he stated was then reduced to writing. On completion of his statement the Magistrate gave a rubkar to a chaprasi of his court, which contained the names of twelve persons, and in this he

(1) (1901) I.L.R., 25 Mad., 659, 661. (2) (1887) I.L.R., 10 All., 39.
(3) (1912) I.L.R., 35 All., 102.

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directed the aforesaid chaprasi to produce the persons named therein before him at once. Apparently the chaprasi obeyed orders and produced all these persons. These persons are those whose names were mentioned by Paras Ram in the course of his statement as being connected in some way or other with the alleged extortion. The District Magistrate then recorded the evidence of all these persons on oath. Having proceeded so far he then sent the papers to the Superintendent of Police with directions to him to take action under paragraph 383 of the Police Regulations. This paragraph lays down that before a Superintendent punishes any police officer departmentally or prosecutes him criminally, he must make an inquiry, reduce the substance of the accusation to the form of a charge and record the officer's explanation, using a certain form. After completing these proceedings, if he considers that further steps should be taken, he should decide whether the officer ought to be criminally prosecuted or departmentally punished. If he decides to institute a prosecution, he must send the papers to the District Magistrate, and obtain his concurrence before taking further action, whatever the rank of the officer accused may be. The Superintendent of Police made an inquiry and submitted a report to the District Magistrate to the effect that the allegations of extortion were entirely false and suggested that the person who had made them and reported them, should be criminally prosecuted. Thereupon the District Magistrate passed an order purporting to be one under section 476, directing the prosecution of the present applicants and certain others including Paras Ram, the latter to be prosecuted for an offence under section 211; the others to be prosecuted for offences under section 193 of the Indian Penal Code. It is against this action of the District Magistrate that the present revision has been presented. It is contended, and I must say with considerable force, that Paras Ram made no complaint; that he did not intend to make any complaint; that he called no witnesses and the proceeding before the District Magistrate was not a judicial proceeding in the course of which he was legally empowered to administer an oath. The explanation of the District Magistrate is that he treated what Paras Ram said as a complaint and that the inquiry that he made was under section 202 of the Code of Criminal Procedure. The only

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unfortunate point in this explanation is that a complaint means an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence. It is not open to the District Magistrate to treat this petition and statement of Paras Ram as a complaint whether Paras Ram liked or not. It may be of course that Paras Ram wished to make a complaint in such a form that, if subsequently it was found to be false, he should be able to save himself from a criminal prosecution. If there was evidence in the case to indicate that Paras Ram intended the Magistrate to take action under the Code against the police officers, I should not hesitate for an instant in holding that the Magistrate had power to treat the petition as a complaint and that he was justified in sending for the witnesses and examining them on oath. But an examination of the record shows that Paras Ram's petition was simply a petition tendering his resignation; that even in his statement taken on oath, which statement was made in reply to questions put by the District Magistrate, he made allegations of fact and at the end stated that these were his reasons for resigning his post. He nowhere asked for the witnesses to be summoned. He nowhere asked for an inquiry to be made, and I may add that if the Magistrate was knowingly acting under section 202, it is curious that on completion of his inquiry he should send the complaint to the Superintendent of Police with a view to the latter officer taking action under paragraph 383 of the Police Regulations. It is also curious, that up to the present time the District Magistrate has passed no order dismissing the complaint. Looking at the circumstances of the case I find it impossible to hold that Paras Ram made a complaint to the District Magistrate; that is to say, that the allegation was made with a view to the Magistrate taking action under the Code of Criminal Procedure against the police officers who were said to have committed the extortion. Paras Ram may perhaps have given false information to the District Magistrate in reply to his questions. The point which I have to decide is whether or not there was a complaint, within the true meaning of the word, before the District Magistrate. In my opinion there was no such complaint. The action of the Magistrate was not action taken under section 202 of the Code. It was apparently

executive action in the form of a departmental inquiry which was continued by the further inquiry made under paragraph 383 of the Police Regulations. There was no judicial proceeding before the District Magistrate and therefore he had no power to take action under section 476. The present applicant is one of those whose prosecution for perjury has been directed, and it cannot be said that he committed perjury in course of a departmental inquiry. No oath ought to have been administered to him at all. I would point out that throughout the inquiry made by the District Magistrate, he nowhere mentioned that he was taking action under any specific section. If, as the District Magistrate says, the unfortunate police officers will not have an opportunity of clearing their character, they will have only the District Magistrate to blame for their unfortunate position, though perhaps it is still open to the District Magistrate to prosecute Paras Ram for giving false information. I allow the application, set aside the order of the District Magistrate and quash the proceedings.

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Order set aside.

APPELLATE CIVIL.

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

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August, 4.

DESRAJ (OBJECTOR) *v.* SAGAR MAL (JUDGEMENT-DEBTOR) AND RAO GIRRAJ SINGH AND OTHERS (DECREE-HOLDERS.)*

Act No. III of 1907 (*Provincial Insolvency Act*), *section* 37—*Insolvent—Effect of lease of occupancy holding granted shortly before filing petition of insolvency.*

Section 37 of the Provincial Insolvency Act, 1907, has no application to the case of a lease granted for good consideration by an insolvent shortly before the filing of his petition, unless the object thereof is to give a preference to one creditor over the others. If the lease is found to be a merely colourable transaction, the insolvent still retaining possession of the property leased, it can be avoided and the property placed in the hands of the receiver; otherwise the rents should be paid to the receiver for the benefit of the creditors. The leased property being an occupancy holding, *held* that there was no reason for directing the surrender thereof to the zamindar.

THE facts of this case were as follows :—

One Sagar Mal was adjudicated an insolvent upon his own petition on the 1st of August, 1914. His petition of insolvency

* First Appeal No. 113 of 1915, from an order of L. Johnston, District Judge of Meerut, dated the 7th of May, 1915.