

Two reasons seemed to me very strong to show this. If section 34 can be worked only against a person who having entered as a trespasser continues in possession "without permission" of the landlord, it is difficult to see how the landlord is to get rent from a person who remains in possession with his permission. Secondly, such a person is said by the section not to be deemed to hold the land within the meaning of section 11 of the Agra Tenancy Act until he begins to pay rent. Section 11 deals only with tenants, and, I cannot see how such a person could be deemed to be a tenant within section 11 so as to make it necessary for the Legislature to exclude him from the operation of section 11 unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of Sir GEORGE KNOX and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

BY THE COURT :—We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EMPEROR v. RAM DAS.*

Criminal Procedure Code, section 350—Procedure—Jurisdiction—Magistrate ceasing to have jurisdiction by reason of the transfer of a case pending before him to another court—Evidence not necessarily to be re-heard.

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.

Mohesh Chandra Saha v. Emperor (1), Kudrutulla v. Emperor (2) and Palaniandy Goundan v. Emperor (3) followed.

THE facts of this case were as follows :—

One Ram Das was charged with an offence under section 323, Indian Penal Code, and tried by an Honorary Magistrate exercising second class powers. After the whole of the prosecution

* Criminal Reference No. 977 of 1917.

(1) (1908) I. L. R., 35 Cal., 457. (2) (1912) I. L. R., 39 Cal., 781.

(3) (1908) I. L. R., 32 Mad., 218.

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evidence and a portion of the defence evidence had been recorded, Ram Das applied to the District Magistrate to have the case transferred to some other court, and gave an undertaking that he would not ask for the re-hearing of the entire evidence *de novo*, but would be satisfied if the court to which the case might be transferred proceeded to hear the rest of the defence evidence and to pronounce judgement on the whole of the record before it. The District Magistrate transferred the case to the court of a Deputy Magistrate of the First Class and directed him to proceed with the trial from the stage to which it had reached in the court of the Honorary Magistrate. Ram Das abided by his undertaking; and the Deputy Magistrate, after taking the remaining evidence for the defence, convicted Ram Das under section 323, Indian Penal Code, and sentenced him to one month's rigorous imprisonment. The Sessions Judge before whom the matter came in revision, referred the case to the High Court under section 438, Criminal Procedure Code, with a recommendation that the conviction be quashed as illegal.

Babu *Piari Lal Banerji*, (with him Babu *Krishnarao Narain Laghate*, Munshi *Janki Prasad* and Munshi *Kamla Kant Varma*) for the applicant:—

It is a well-recognized principle of Criminal law that a Judge or Magistrate can convict only on evidence heard by himself. Except in so far as this principle is modified by Statute, a judge or magistrate has no jurisdiction to act upon evidence a part of which only has been recorded by himself and another part by another officer. And, except where the law expressly sanctions waiver, no consent or undertaking given by the accused in respect of an illegal procedure can confer jurisdiction; his rights are not lost by reason of his consent; *King-Emperor v. Sakharam Pandurang* (1), *The Deputy Legal Remembrancer etc., v. Upendra Kumar Ghose* (2). The only modification of the principle mentioned above is to be found in section 350 of the Code of Criminal Procedure, and the question is as to the true scope of that section. That section applies only to cases where there is a change in the *personnel* of the court, or *forum*, which remains the same; it does not apply where a case is transferred from one

(1) (1901) L. J. R., 26 Bom., 50.

(2) (1906) 12 C. W. N., 140.

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court to another. If the case itself remains where it was, but the individual Magistrate is succeeded by another incumbent of the same post, section 350 applies. But if the Magistrates remain where they were, and the case itself is removed from one court to another, the section does not apply. This construction of the section was accepted in the following cases; *Queen-Empress v. Radhe* (1), *Queen-Empress v. Angnu* (2), *Queen-Empress v. Bashir Khan* (3) and *The Deputy Legal Remembrancer etc., v. Upendra Kumar Ghose* (4). A different view was taken in the recent case of *King-Emperor v. Nanhua* (5). That case, however, as well as one of the cases which it followed, namely *Palaniandy Goundan v. Emperor* (6); were distinguishable on the ground that there the proceedings in respect of which the question arose were only preliminary inquiries and not regular trials. The decisions in those cases not only recognized, but were influenced by, that distinction. In the case of an "inquiry" no consideration of possible prejudice to the accused can arise, and the matter stands on an entirely different footing from that of a trial. The cases of *Mohesh Chandra Saha v. Emperor* (7) and *Kudrutulla v. Emperor* (8) are at variance with the former case, already cited, in 12 C. W. N., 140. In the second of these cases, the cross-examination of the witnesses for the prosecution, as well as the whole of the evidence for the defence, were heard by the Magistrate who convicted the accused; so, there could be no prejudice. In the present case the question of prejudice may fairly be said to arise. The order of transfer required the Magistrate to whose court the case was transferred to hear the remaining witnesses for the defence, without giving him any option to re-hear the witnesses who had been heard by the other Magistrate. There was no room left for the accused to exercise his privilege if he wanted to, and the discretion of the Magistrate was absolutely fettered. There was only the 'anticipatory' consent which had been given by the accused before his right of option had even accrued. A plea was also taken as to the severity of the sentence.

(1) (1889) I. L. R., 12 All., 66.

(2) Weekly Notes, 1889, p., 130.

(3) (1892) I. L. R., 14 All., 246.

(4) (1908) 12 C.W.N., 140.

(5) (1914) I. L. R., 36 All., 315.

(6) (1908) I. L. R., 32 Mad., 218.

(7) (1908) I. L. R., 35 Calo., 457.

(8) (1912) I. L. R., 39 Calo., 731.

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Pandit *Uma Shankar Bajpai*, for the opposite party, was not called upon.

PIGGOTT, J.—The case before us is a reference by the learned Sessions Judge of Ghazipur, recommending that the conviction of one Ram Das on a charge under section 323 of the Indian Penal Code and the sentence of rigorous imprisonment for one month passed on him be set aside, on the ground that the trial in the Magistrate's court was vitiated by illegality. It appears that the complaint filed against Ram Das was referred for trial to the court of an Honorary Magistrate, exercising the powers of a Magistrate of the second class. This court recorded the whole of the evidence for the prosecution and a portion of the evidence for the defence. When it had reached this stage, Ram Das applied to the District Magistrate to have the case transferred to some other court. He gave an undertaking that, in the event of such transfer, he would not ask the court to which the transfer was made to re-hear the entire evidence *de novo*, but would be satisfied if that court proceeded to call and examine the remainder of the defence witnesses and pronounce judgement on the materials then before it. The case was then transferred by the District Magistrate to the court of a stipendiary Magistrate of the first class. Ram Das made no attempt to evade the undertaking which he had given to the District Magistrate; that is to say, he did not demand that the witnesses, or any of them, who had been already examined by the original trial court should be re-summoned and re-heard. The first class Magistrate accordingly heard and examined the remainder of the defence witnesses named on behalf of Ram Das, convicted him on the charge as framed under section 323 of the Indian Penal Code and sentenced him to rigorous imprisonment for one month. The learned Sessions Judge has referred the case to this Court on the ground that the provisions of section 350 of the Criminal Procedure Code do not apply to cases which are transferred from one court to another, and that the first class Magistrate on receiving this case for trial was bound to commence the trial *de novo* by the examination of all the prosecution witnesses. There is authority for this proposition in one single case of this Court, *Queen-Empress*

v. *Angnu* (1). That case was decided by a single Judge upon a reference by a Sessions Judge. The case was not argued, and the judgement is of the briefest. We can only take it that in the opinion of the learned Judge of this Court who disposed of that reference the provisions of section 350 of the Criminal Procedure Code were not intended to apply to cases of transfer. There was a suggestion in the referring order in that case that the accused had been prejudiced by the course adopted. Apparently there had been some complaint on his part against the manner in which the evidence had been recorded by the original trial court. We do not know how far the learned Judge of this Court was affected by this consideration in passing the order which he did. The learned Sessions Judge has referred to another decision of this Court, *Queen-Empress v. Bashir Khan* (2). He is entitled to rely upon the opinion, expressed by the learned Judge who disposed of this case, by way of *obiter dictum*; but the actual point for decision was different. On the facts of that case, even assuming that the provisions of section 350, Criminal Procedure Code, did apply, those provisions had been contravened and the order quashing the proceedings was obviously right on this ground alone. In a recent case, *Emperor v. Nanhua* (3), one of us has committed himself to a contrary view. Some stress was laid in deciding that case on the fact that the proceedings transferred from one court to another were only an inquiry preliminary to commitment, and no doubt the question of possible prejudice to the accused person would require to be more carefully considered in the case of the transfer of a trial than in the case of an inquiry preliminary to commitment. At the same time it is quite clear that either the provisions of section 350, Criminal Procedure Code, do not apply at all to cases of transfer, or they apply to trials just as much as to preliminary inquiries. This decision is based on certain recent pronouncements of the Calcutta and Madras High Courts. It is sufficient to refer to the cases of *Mohesh Chandra Saha v. Emperor* (4), *Kudrutulla v. Emperor* (5) and *Palaniandy Goundan v. Emperor* (6). The last of these cases was also a case of an inquiry preliminary to commitment; but in this case,

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(1) Weekly Notes, 1889, p. 130.

(4) (1908) I. L. R., 35 Cal., 457.

(2) (1892) I. L. R., 14 All., 346.

(5) (1912) I. L. R., 39 Cal., 781.

(3) (1914) I. L. R., 36 All., 315.

(6) (1908) I. L. R., 32 Mad., 218.

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as well as in the two Calcutta cases, the principle was most clearly affirmed that section 350 of the Criminal Procedure Code applied as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned, by reason of its transfer to another court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. It has been shown to us that the two Calcutta cases are not entirely consistent with certain prior decisions of that Court, but they do represent the latest views of that Court on the question for determination before us. On the wording of the section itself it seems impossible to deny that the words used are wide enough to cover cases of transfer, as well as those cases in which the court remains the same, but the person of the presiding officer is changed. As the learned Judges of the Madras High Court have pointed out, the words "ceases to exercise jurisdiction *therein*" must be given their appropriate meaning; and certainly a Magistrate who takes cognizance of a case on the passing of an order of transfer by a competent court has jurisdiction "*therein*," that is to say, in the said case, by reason of the order of transfer.

On the ground of public convenience there seems to be no good reason why the words of the section should not receive a liberal interpretation, provided such interpretation is not inconsistent with the words themselves.

It seems to us that there is no good reason why the practice of this Court should not be brought into conformity with that of the High Courts of Calcutta and Madras, and we are prepared to hold that the provisions of section 350, Criminal Procedure Code, do apply under the circumstances to the case now before us.

It has been further suggested that we ought to interfere on the ground that Ram Das was prejudiced in his defence by the form of the order of transfer passed by the District Magistrate. The learned District Magistrate would have been better advised if he had contented himself with calling attention to the fact that his order was made largely on an undertaking by Ram Das that he would not claim his right to have all the witnesses re-summoned and re-heard. He went a little further than this, and by his order of transfer purported to direct the first class Magistrate to whose

court he transferred the case to proceed with the trial from the stage which it had reached in the court of the Honorary Magistrate. If the applicant Ram Das had come before the first class Magistrate and had repudiated the undertaking which he had given to the District Magistrate, had offered some explanation of his conduct in doing so, and had definitely claimed the right conferred by proviso (a) of clause (1) of section 350 of the Criminal Procedure Code, it may well be that other considerations would arise. Certainly, the Magistrate who decided this case could not be bound in his judicial capacity by any direction in the order of transfer. It would have been his duty to consider the application and give such effect to it as he thought just and lawful. The fact remains, however, that Ram Das did not demand that any of the witnesses should be re-summoned and re-heard. Proviso (a) to clause (1) of section 350 of the Criminal Procedure Code has no application to the facts before us and cannot be relied on in support of the application.

Something has been said as regards the severity of the sentence. This point was not taken in the application to the Sessions Judge and we are not prepared to interfere on this ground, as the judgment convicting Ram Das seems to be a just and a proper one. We decline to accept the reference and order the record to be returned, the conviction and sentence to stand. If Ram Das has been released pending this reference he must surrender to his bail and undergo the unexpired portion of his sentence.

WALSH, J.—I entirely agree. Apart from authority, I think the section is clear and too strong for the argument of the applicant in this case. Criticism has been made upon the construction of the section, but it seems to me a simple and compendious statement to cover all cases thus—“Whenever any Magistrate ceases to exercise jurisdiction in a case and he is succeeded by another Magistrate having such jurisdiction,” (that may occur by death, promotion, retirement or transfer by a superior authority) “the Magistrate so succeeding may act on the materials already before him.”

Lest it should be supposed that the accused is caught by a strict application of the technical provisions of the Statute, I want to draw attention to one or two matters, to which my brother

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has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand, he brought a cross charge against a prosecution witness for assaulting him at the place in question. Under these circumstances, having a reasonable apprehension that he was going to be convicted, he applied for transfer. In my judgement the accused, Ram Das, got a very favourable order out of the District Magistrate, and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded the Magistrate committed any irregularity which could not be cured by section 337 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother in the order that this reference must be rejected.

Reference rejected.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KALLU (PLAINTIFF) v. SITAL (DEFENDANT)*

Act (Local No. II of 1901 (Agra Tenancy Act), section 20—Occupancy tenancy acquired by a member of joint Hindu family—Profits thrown into common stock—Member of joint family other than the tenant allowed to cultivate.

A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters.

Where a zamindar admitted as an occupancy tenant a person who was a member of a joint Hindu family it was held that such tenant did not, by throwing the profits derived from this land into the common stock of the joint family, cause the tenancy to become part of the joint family property nor did he, by allowing another member of the joint family to cultivate specific plots forming parts of the holding, effect anything more than the creation of a sub-tenancy in favour of such member.

THIS was a suit for a declaration of right to joint possession of certain occupancy holdings.

The facts of the case are shortly as follows :—The plaintiff's father, Ganga, and the defendant's father, Matola, were first cousins. The holding in suit was acquired by Matola in his own

*Second Appeal No. 417 of 1916, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 10th of December, 1915, reversing a decree of Muhammad Javid, Munsif of Fatehpur, dated the 21st of August, 1916.