REVISIONAL CRIMINAL.

1922
March, 30.

Before Mr. Justice Lindsay.

EMPEROR *v.* DURGA PRASAD*

Criminal Procedure Code, sections 202 *and* 203—*Case partially inquired into—Subsequent order directing a local investigation—Results of investigation taken into consideration against the accused.*

Under section 202 of the Code of Criminal Procedure a Magistrate may either inquire into the case himself or may direct a local investigation, but he cannot combine the two procedures. If a Magistrate, having partially inquired into a case, then directs a local investigation, he commits an irregularity. And if he suffers his mind to be influenced prejudicially to the accused by the results of such local investigation, his proceedings will be vitiated.

THIS was a reference in a case under sections 342 and 384 of the Indian Penal Code, made by the Sessions Judge of Banda.

The facts out of which the reference arose are fully set forth in the following order of the Sessions Judge :—

"Durga Prasad, teacher, of the village of Mungas, Sahai, a co-sharer and lambardar of the village, and Madho were tried together and convicted of offences punishable under sections 342 and 384 of the Indian Penal Code. Durga Prasad was fined Rs. 50 only; the other two, more than Rs. 50. Sahai and Madho prefer this appeal from the order of conviction and sentence passed against them.

"Having heard the learned vakil for the appellants and the Government Pleader, I have arrived at the conclusion that the convictions and sentences of Sahai and Madho should be set aside and they should be retried by any other Magistrate of the first class.

"Six persons brought the complaint which gave rise to the trial against the accused persons in the lower court on the 4th of October, 1921. The complainants were examined on the same date. Processes for the appearance of the accused persons were not ordered to be issued. The complainants were told instead, under section 202, Criminal Procedure Code, to produce evidence on the 19th of October. Ordinarily, after the examination of the complainant, processes are issued. And, according to decided cases, a Magistrate has no discretion to make a judicial inquiry, unless he is not satisfied as to the truth of the complaint. The

*Criminal Reference No. 153 of 1922.

above order is, therefore, *prima facie* proof of the fact that the learned Magistrate was not satisfied as to the truth of the complaint, even after hearing the statements of the complainants on oath. On the 19th, the evidence of two witnesses, Gajju and Bharosa, was recorded. Having heard them, the learned Magistrate wrote the following order, which is to be found in the order-sheet :—

'I am not satisfied with the section 202 evidence produced today. It is admitted that the complainants had stipulated to plough up the fields and, therefore, the subsequent alleged extortion may not have any truth in it.'

"If the reasons given by the learned Magistrate were valid, the proper order in the ordinary course of things ought to have been a dismissal of the complaint under section 203, with brief reasons for such dismissal. Instead of that, the learned Magistrate proceeded to make an order directing a naib-tahsildar "*to report after an inquiry.*" The meaning of this order is not quite clear. Under section 202 an "*inquiry*" into the case is the province of the Magistrate only. Any officer subordinate to such Magistrate, or a police officer, or any other person may, if so directed, hold a previous "*local investigation.*" In a case decided by the Hon'ble High Court, *Baij Nath* v. *Raja Ram* (1), the suggestion was thrown out that cases, in which there were any disputes about boundary, or any matter of that kind was involved, were alone fit cases for a "*local investigation.*" But I presume that the learned Magistrate's order directing the Naib-Tahsildar to hold "*an inquiry and report,*" was really an order directing an investigation authorized by section 202. The Naib-Tahsildar examined a number of witnesses on the spot besides the complainants, the accused and the two witnesses whom the complainants produced before the learned Magistrate under section 202. After a perusal of the Naib-Tahsildar's proceedings and the report, on the 3rd of November, 1921, processes were issued for the appearance of the accused persons, who appeared on the 18th of November. On this date two out of the six complainants, two witnesses, who were examined under section 202, and one further witness Manzur Nabi, who proved not a word of the charge,

(1) (1912) 10 A. L. J., 79.

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were examined. The court then adjourned, and on the 3rd of December, 1921, the Naib-Tahsildar and one Ram Prasad, an assistant teacher in the school of one of the accused, Durga Prasad, were examined. I notice that the counsel for defence objected to any question being put to the Naib-Tahsildar relating to what the accused persons or the witnesses stated to him. This objection was over-ruled. On the other hand, the prosecution wanted the Naib-Tahsildar to prove the statements of persons recorded by him. That was also disallowed. The Naib-Tahsildar proved (1) that Sahai, one of the accused persons, saluted the witness in a manner which led him to think that he wanted the matter to be hushed up; and (2) that the assistant teacher, Ram Prasad, told him that one of the boys, who had been produced before the witness, was tutored by one of the accused. The evidence of the assistant teacher, Ram Prasad, before the court did not help the prosecution. The latter thereupon declared the witness hostile, and was permitted to cross-examine him. The record indicates that to this witness was put in cross-examination a statement said to have been made by him before the Naib-Tahsildar, where he mentioned that the accused, Durga Prasad, realized Rs. 10 each from the complainants. He was apparently contradicted by his statement before the Naib-Tahsildar, for he goes on to say that the Naib-Tahsildar did not record his full statement, that he made notes only, that his statement was not shown or read out to him, and that he signed it merely because he was desired by the Naib-Tahsildar to do so.

"The learned Magistrate in his judgment observes as follows:—

'Manzur Nabi, witness, gives clue to the first *panchayat* having been held in the school, although he denied all knowledge of the second. (I may note here that no offence was committed in the first *panchayat*, and the offences which are the subject of the charge were said to have been committed in the second *panchayat* alone). Pandit Suraj Nath Misra, the Naib-Tahsildar who held the preliminary investigation, has also been formally examined. Ram Prasad, assistant teacher, has retracted the statement made by him before the Naib-Tahsildar, obviously under pressure.'

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"The learned Magistrate bases his judgment in the above circumstances on the evidence of the two complainants and the two witnesses, the same who were examined under section 202, alone. A comparison of their evidence under section 202, and at the time of the trial, will show that there was nothing new in their subsequent statements; but so far as their testimony went, the case stood exactly where it did after the proceedings under section 202.

"Now, under section 202 the learned Magistrate had the option of only one out of two alternatives, namely, either to inquire into the case himself, or direct a previous local investigation. Assuming that this was a fit case for a local investigation, there is nothing in section 202 which empowered the learned Magistrate to have recourse to both the alternatives. The record shows that he chose one of the two alternatives, namely, to inquire into the case himself, which he did. His order, therefore, directing a local investigation was irregular. And if it be found that any material obtained through this irregular course acted on the mind of the learned Magistrate in arriving at a conclusion prejudicial to the accused persons, it must be held that the accused persons were prejudiced in consequence of that irregularity. It would, therefore, vitiate the proceedings. Upon a perusal of the judgment under appeal and the passages quoted, I have scarcely any doubt that a material portion of the irregular proceedings had a share in the formation of the learned Magistrate's judgment. I would accordingly set aside the order of conviction and sentence made against the appellants and send down the record to the District Magistrate to pass it on to some other Magistrate empowered to try the case, for re-trial of the appellants. In view of the ruling in *Bhola* v. *Emperor* (1), I refer the case of Durga Prasad, against whom a *non-appealable sentence* was passed and who has not appealed, to the Hon'ble High Court after taking the learned Magistrate's explanation."

LINDSAY, J.- For the reasons stated in the referring order of the Sessions Judge, I set aside the conviction and sentence of the accused, Durga Prasad, and direct that he be re-tried before a competent Magistrate along with the two other accused,

(1) (1917) 40 Indian Cases, 382.

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namely, Sahai and Madho, in whose case a re-trial has been directed by the learned Sessions Judge.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

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PACHKAURI LAL AND ANOTHER (DEFENDANTS) *v.* MUL CHAND AND ANOTHER (PLAINTIFFS)*

Act No. XXVI of 1881 *(Negotiable Instruments Act), sections* 64 *and* 76—Hundi *drawn by drawer on himself—Presentation for payment not necessary.*

The fact that the drawer and the drawee of a *hundi* are the same person will not make the *hundi* a promissory note; but in such case no presentation on due date is necessary, as from the nature of the case the drawer cannot suffer damage from the want of such presentation.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal* and Dr. *Surendra Nath Sen*, for the appellants.

Dr. *S. M. Sulaiman*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—This appeal arises out of a *hundi* drawn by Bihari Lal Balmakund on the firm of Bihari Lal Balmakund in favour of Mul Chand, the plaintiffs agreeing to pay him Rs. 2,000 within ninety days from the 30th of April, 1918, with interest at 12 per cent. per annum. The plaintiffs gave the defendants credit for certain items and sued for Rs. 1,906, the balance with interest.

The main defence of the contesting defendants was the denial of the execution of the *hundi*. Alternatively, it was claimed that execution by one member of the firm would not bind the other members, as the money was not required for or used in the business of the firm.

The trial court decreed the suit. On appeal a further point was taken, namely, that as the *hundi* had not been presented, the provisions of section 64 of the Negotiable Instruments Act

* Second Appeal No. 1089 of 1920, from a decree of L. S. White, District Judge of Cawnpore, dated the 1st of July, 1920, confirming a decree of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 21st of November, 1919.