Act must be strictly a sale as defined in the Transfer of Property Act, 1882, and that a transfer of property which is brought about by a decree of court cannot for purposes of pre-emption be treated as a sale in the Act.

1927

PARAS RAM v. NEKSAI.

The result, therefore, is that the plaintiff had no suit. We allow this appeal, set aside the decrees of the courts below and direct that the plaintiff's suit do stand dismissed with costs to the contesting defendants in all three courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Iqbal Ahmad.

EMPEROR *v.* SUKHAI AHIR AND OTHERS.*

1927 *November,* 17.

Criminal Procedure Code, section 537—Irregularity—Riot—Cross cases—Use of evidence given in one case as evidence in the other—Inferences from consent of counsel to irregular procedure.

There were two cases of riot being tried by the same Magistrate, which, though technically distinct, were both parts of the same controversy. The Magistrate, having tried one of the cases, when he came to the second, treated some of the evidence in the first case, by agreement of counsel in either case, as evidence in the second case—as though it had been solemnly repeated all over again by the witnesses or had been read over to them and acknowledged to be correct, although it was not formally transferred to the record of the second case.

Held, that, inasmuch as the accused could not point to any way in which they might have been prejudiced, the procedure, though irregular, did not vitiate the trial. *Queen-Empress* v. *Chandra Bhuiya* (1), followed.

While no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the

*Criminal Reference No. 565 of 1927.

(1) (1892) I.L.R., 20 Calc., 537.

1927

EMPEROR v. SUKHAI AHIR.

advocate of the accused, the fact that a certain course of procedure was in fact consented to by counsel for an accused person is an important element in considering the equally important question whether there has been any prejudice. *Abdul Rahman* v. *King-Emperor* (1), followed.

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

Pandit *Kapil Deo Malaviya*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

WALSH and IQBAL AHMAD, JJ. :—This case has been referred to two Judges of this Court by another member of the Court who was dealing with a reference by the Sessions Judge. The reference raises the broad question, where there are strictly speaking two cases of riot which are practically one controversy, how far a Magistrate, who tries both, whether as separate cases or simultaneously at one hearing, may treat the evidence given in the first case in order of date, which has not been repeated in the second case and has not been formally transferred to the record, as evidence in the second case, as though it had been solemnly repeated all over again by the witnesses or had been read over to them and acknowledged by them as part of the evidence in the second case. We think that all these cases, which are not of uncommon occurrence, and the difficulties which occasionally arise in the procedure, must be judged, each by its own particular circumstances. As has been said in one case, and as the learned Judge referring this case pointed out, a court has no right, technically speaking, to consider at all the evidence given in one case for the purpose of reaching his conclusions in another, and if the two cases are totally unconnected, it is obviously impossible to say that such a procedure could be covered by the general excuse that no prejudice could be done to either side. If the two cases

(1) (1926) L.R., 54 I.A., 96.

deal with separate issues, even although they arise out of the same set of circumstances and to some extent raise the same controversy, and if also the parties claim that the evidence in the first case is irrelevant to the issues in the second case, the matter is clear. But if the reception of the evidence required to enable the point to be decided in the second case is merely a formal repetition of evidence, which has already been given and heard and possibly also decided by the same tribunal and it is directed to the same issue or issues of fact, its vain repetition may be reasonably waived. If the parties for their own convenience, and other obvious motives, consent to treat the evidence in the former case as though it had been repeated in the latter case, such evidence is by implication and for all practical purposes brought on to the record of the second case, although not actually recorded. Whatever may be said about the Magistrate's handling of the merits, with which we have at this moment nothing to do, the explanation which he tendered dealing with this objection which was before the Sessions Judge, is a singularly clear and able document. He sets out the facts which are important in this as in every other case, and it is upon those facts alone that we propose to dispose of this matter.

In this village there are two parties who have been fighting for eight or ten years. They have had so much friction and so many cases that it is impossible to obtain a single independent witness to any thing which occurs between them. On the 22nd of January of this year they had a fresh dispute. Both parties made a report against the other in the usual way, one to the *thana*, one by wire to the Sub-Divisional Officer. The police made inquiry and came to the conclusion that strictly speaking there were two separate riots, although they were intimately connected with one another, and this is a most important fact in what we have to decide. Each party alleged in his own defence that there was only one riot.

1927

EMPEROR v. SUKHAI AHIR.

The party, who may be said to be complaining in this reference, set up an incorrect motive, which the Magistrate disbelieved. He has given his reasons for not believing it and he says that the reasons which he gives were features common to both cases, that is to say, the prosecution in one case conducted its case and framed its evidence upon the same theory which it asked the court to accept as the theory in defence of the charge against it in the second case. Nor is it as though the evidence relied upon by the complainants in this reference in their own defence was confined merely to the evidence of witnesses whom they had already called in the counter case; they called separate evidence as well and the Magistrate says that they relied upon the same motive as the evidence given on the same motive in the other case had been directed to establish which he had disbelieved. He says that without a reference to the evidence in the other case which had not been technically brought upon the record in the second case, he would have been forced, in the absence of evidence to the contrary, to come to the conclusion that the motive was established and he rightly says that he would have found himself in a most absurd situation, created by the law as it is suggested to be by this reference, of disbelieving something in one case and believing it in the other under precisely similar circumstances. He submits, by the way, as a matter of argument that where two incidents and two charges arising out of the same circumstances have to be dealt with strictly as two cases and two charges, although they are in substance one, either that each case should be tried by a different Magistrate, or that if a Magistrate tries both, he should allow himself to be assisted by evidence in one case not technically recorded in the other. But in addition to the facts above stated it appears that although separate judgements were written and although the charges and cases were separate, and,

1927

EMPEROR v. SUKHAI AHIR.

therefore, would ordinarily be heard independently, in substance they were heard together and the arguments in both cases were heard on the same day and were addressed to the court by the same gentlemen, who freely referred to the evidence in the one case in support of their arguments in the other, and were therefore, on behalf of their clients guilty of the very irregularity which their clients now ask the High Court to say renders the trial a nullity.

We agree with what was said by their Lordships in their judgement in *Queen-Empress* v. *Chandra Bhuiya* (1), the case quite rightly referred to by the Magistrate in his explanation, and we are not satisfied that the case referred to by the Sessions Judge is really applicable. In the Calcutta case in question it was held that where two cross-cases of riot and grievous hurt were committed separately, a trial before a Sessions Judge, who having heard the evidence in the first case heard the evidence in the second case, examined some of the accused in one case as witnesses for the prosecution in the other and *vice versa*, and subsequently heard the arguments in both the cases together; this mode of trial, although irregular, did not prejudice the accused in their defence, and under such circumstances a re-trial was not necessary by reason of such irregularity. The case seems to us to be exactly in point.

It so happens that we are able to seek guidance and considerable assistance from two recent decisions in the Privy Council. There is one, namely *Abdul Rahman* v. *King-Emperor* (2), in which the irregularities with regard to the depositions were considerable, but were held by the Privy Council as having been rightly treated by the High Court as an irregularity curable under section 537 of the Code, it being clear that no failure of

(1) (1892) I.L.R., 20 Calc., 537. (2) (1926) L.R., 54 I.A., 96.

1927

EMPEROR v. SUKHAI AHIR.

justice had been occasioned by the irregularities complained of in that case. We refer to the case partly for that reason but mainly because it lays down a principle, which it is well to bear in mind. We have referred to the mode in which the hearing and the arguments in the two cases were conducted by the pleaders. No consent by counsel, whether for his own convenience, or that of his client, or for the convenience of the court, can by itself create jurisdiction in the court to commit irregularities; nor can the commission of irregularities of a serious nature substantially affecting the conduct of the trial and prejudicing the accused be waived, merely by consent on the part of the accused's representative. As the Privy Council puts it:—"No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused". All we mean to say in this case and in similar cases is that the consent of counsel to such procedure as was adopted here is obviously an element and an important element to take into account in considering the equally important question whether there has been any prejudice.

Lastly, there is a recent decision of the Privy Council in *Madat Khan* v. *King-Emperor,* in which special leave was granted to an appellant from the High Court at Lahore for the purpose of considering what is practically the same complaint as is made in this case. The case does not appear to have been reported, presumably because it was not considered to lay down anything new, but we refer to it because of its valuable re-statement of the principle by which this case has to be decided. Its official designation is Privy Council Appeal No. 72 of 1926. As in this case, two parties were charged for attacks on each other in the same occurrence and the charges were tried separately at two distinct trials and were tried by the same tribunal. Lord

HALDANE thus expresses the opinion of their Lordships :—

"Naturally the evidence given for the prosecution was similar to a substantial extent. In each case each party, no doubt, was a witness against the other, but, on the other hand, there was also independent evidence. In a case of that kind it is almost impossible to keep the cases wholly separate. The High Court gave one judgement but treated the case as two cases. It is said that they imported considerations from one case into the other. When one looks at it, to some extent that was inevitable and to some extent it did so happen."

We may pause here to note that that is just what the explanation of the Magistrate says—

"There was, however, a body of separate evidence which was applicable to each case which in itself was enough for the conviction."

With regard to one case, the Magistrate tells us that the separate evidence was not itself enough for the conviction and to that extent this case differs. Although technically it might have been better to keep the evidence entirely distinct and to have delivered two separate judgements, no injustice has followed from what was done.

We think both authority and reason compel us to reject this reference except to the extent to which we propose to interfere, as will appear in a moment. We, however, might add that even if the case were not so clear as it appears to us to be, we should have hesitated a very long time before directing what would appear to us to be almost the disaster of a re-trial of this unfortunate quarrel.

We propose, however, to ameliorate the fines in both cases. It is, perhaps, as well to state the principle on which we do so. Taking individually one of the fines inflicted on one of the persons, it does not seem in itself very large and probably would not have surprised that particular individual, and in one sense it is the fault of

1927

EMPEROR
v.
SUKHAI
AHIR

the parties themselves that the number of persons fined is very large, and that, therefore, the total sum is substantial. But on the other hand, as every one knows, these faction fights consist very largely of either a particular set of families or a particular set of *biradari*, and when the individual fine is multiplied by a large number, no doubt it falls very heavily on the whole community. We, for this reason, reduce the fines in each case from Rs. 25 to Rs. 15 under section 147 and from Rs. 25 to Rs. 10 under section 323 in case of each of the persons who was convicted by the Magistrate in the two cases. In other respects the order of the Magistrate will stand. The fines, if paid, shall be refunded.

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Cecil Walsh and Mr. Justice Kendall.

1927
November,
22.

JAMES PETER SHERRING (PETITIONER) *v.* SHAHZADI SHERRING (RESPONDENT) AND JACKSON IBRAHIM PETER (CO-RESPONDENT).*

Divorce—Husband's petition—Wife charged with committing adultery—Misconduct of petitioner—Discretionary bar—Principles governing exercise of discretion vested in matrimonial court.

In the trial of matrimonial cases, the court must have regard not only to the rights and liabilities of the matrimonial person wronged and of the wrong-doer, respectively *inter se*, but also to the interests of society and public morality, and the court should, therefore, in the exercise of every discretion which is vested in it, endeavour to promote virtue and morality and to discourage vice and immorality while exercising its discretion.

Where Parliament has not thought fit to define or specify any cases, or classes of cases, for its application the court ought not to limit or restrict that discretion by laying

*Matrimonial Reference No. 5 of 1926.