APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Dalal.

1926
February, 2.

EMPEROR *v.* SHEORAJ SINGH.*

Criminal Procedure Code, section 512—*Evidence—Absconding offender—Use of evidence taken for other purposes as if it were evidence specially recorded under the terms of section* 512.

Evidence given at a trial for another purpose cannot be, by an *ex post facto* operation, converted into an equivalent of what is called a deposition taken under section 512, when at the time of taking the evidence the question of recording a deposition under that section was not under contemplation. *Emperor* v. *Bhagwati* (1), referred to.

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

Mr. *F. Owen O'Neill*, for the appellant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

WALSH and DALAL, JJ.:—In this appeal the first question which we have to decide is the admissibility of the evidence of two witnesses who are absent. The learned Judge in the court below has treated the evidence as though given under section 512 and his mind has been diverted from the real difficulty by reason of the fact that the defence objected under section 512 that it was not shown that the accused was absconding at the time when the statement of the witness were taken, and the Judge decided against that objection on the ground that although the declaration that the accused was absconding was subsequent, the fact that he

* Criminal Appeal No. 955 of 1925, from an order of H. Beatty, Sessions Judge of Moradabad, dated the 9th of November, 1925.

(1) (1918) I.L.R., 41 All., 60.

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absconded was prior to the taking of the evidence. We do not disagree with him. But the real point is this. The statements of these witnesses were not recorded under section 512 at all. They were called in the ordinary course of the case before the committing Magistrate and before the Sessions, as part of the case against four men who were then under trial. They mentioned the present appellant who is said to have been absconding at the time, but the attention of the court was not directed to the case against that absconding person, nor was the evidence given in any sense as evidence against that absconding person.

The question of law, therefore, is this. When two witnesses who have given evidence at a previous trial against persons then on their trial happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, can their statements be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence? In other words, can evidence given at a trial for another purpose be converted, by an *ex post facto* operation, into an equivalent of what is called a deposition taken under section 512, when at the time they gave their evidence the question of recording a deposition under section 512 was not contemplated?

We think not. The provisions of the statute forbid it. The objection to the evidence is the fundamental objection, that statements made against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to that rule can only be created by statute, and when a statute permits something to be done which a fundamental rule prohibits, it can only be done by compliance with

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the statute which creates the exception. On grounds of ordinary justice there would be great objection to the practice. As my brother has pointed out, the mind of the court, and of the counsel for the prosecution, at the time when such witnesses would be giving their evidence in the box would not be directed to the question of the guilt or otherwise of the absconding person, and many things which ought to be asked might be omitted, and *a fortiori* questions in cross-examination asked by the four persons who are on their trial, with the express purpose of throwing guilt upon the absent party, might extract from such witnesses statements prejudicial to the absent party which could not be permitted if the witnesses were being properly examined under section 512.

We, therefore, hold as a question of law that the evidence of these two witnesses ought to have been excluded from the trial.

Appeal allowed.

APPELLATE CIVIL.

1925
December,
14.

Before Mr. Justice Dalal and Mr. Justice Boys.

NAND LAL SARAN (OBJECTOR) *v.* DHARAM KIRTI SARAN (DECREE-HOLDER).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 182—*Execution of decree—Limitation—Civil Procedure Code, section* 48(*a*)—*Execution only for incidental costs—Step in aid of execution.*

Where a decree is passed jointly against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of explanation (1) to article 182 of the first schedule to the Indian Limitation Act, 1908, will apply to the decrees passed severally and the second portion to the decree or decrees passed jointly. *Subramanya Chettiar* v. *Alagappa Chettiar* (1), dissented from.

* First Appeal No. 176 of 1925, from a decree of Gaur Nath, First Subordinate Judge of Moradabad, dated the 24th of March, 1925.

(1) (1906) I.L.R., 30 Mad., 268.