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We affirm the decree of the court below, so far as the claim on the promissory note of the 23rd of August, 1927, is concerned. As regards the rest of the claim, we remand the case to the court below. The court will allow the plaintiff an opportunity to amend his plaint. After the plaint is amended, the defendants will be given an opportunity to file fresh written statements, proper issues will be struck and then the question of liability as regards the other parts of the claim will be tried.

BAL
KRISHNA
v.
DEBI SINGH

REVISIONAL CRIMINAL

Before Mr. Justice Niamat-ullah

EMPEROR v. BHAGWAN DAS*

1933
October, 3

Criminal Procedure Code, section 436—Order of further inquiry—Failure to give opportunity to accused person to show cause against ordering further inquiry—Illegality—Order of further inquiry should contain reasons therefor.

The proviso to section 436 of the Criminal Procedure Code is imperative and enjoins that an opportunity should be given to the accused to show cause why further inquiry should not be ordered. A disregard of the proviso is an illegality, and, in any case, such an irregularity as seriously prejudices an accused person who is ordered to be proceeded against.

In a case in which the Sessions Judge reverses the order of the Magistrate discharging an accused person the Sessions Judge ought to give reasons for directing further inquiry. It is highly desirable that such order should make it clear that the Magistrate's order discharging an accused person is based on grounds which can not be sustained. It should afford material to a court of revision for determining the question whether the Magistrate was justified in discharging the accused.

Mr. J. Swarup, for the applicant.

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

NIAMAT-ULLAH, J.:—This is an application for revision by one Bhagwan Das against whom a complaint

*Criminal Revision No. 547 of 1933, from an order of P. C. Plowden, Sessions Judge of Agra, dated the 25th of May, 1933.

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was filed by Chander Bhan to the effect that Bhagwan Das had obtained a decree for Rs.150 against Chander Bhan, that the latter had paid part of the decretal amount out of court on the assurance given by Bhagwan Das that he would certify payment to the court executing the decree, but that the latter dishonestly and fraudulently took out execution of the decree for the entire amount. It should be noted that according to the Civil Procedure Code, payment to the decree-holder out of court, if not certified, cannot be recognized by the court executing the decree. The complaint apparently was that the decree-holder committed an offence of cheating under the Indian Penal Code. A Magistrate of the first class before whom the complaint was filed issued a summons to enforce the attendance of the accused. The latter appeared on the 26th of April, 1933, when without recording any evidence the complaint was dismissed. The Magistrate gave some reasons for the order which he passed. I was invited to consider the propriety of his order, but I did not think it necessary to do so for reasons which will presently appear. The complainant applied under section 436 of the Criminal Procedure Code to the learned Sessions Judge of Agra, who passed the following order on the 25th of May, 1933: "Let the Magistrate take the case under chapter XXI or he can ask the District Magistrate to transfer it to another Magistrate." It is not disputed that the learned Sessions Judge issued no notice to the accused Bhagwan Das before passing the aforesaid order. The order is so cryptic as to leave it uncertain whether the learned Judge meant to act in pursuance of his powers under section 436. The surrounding circumstances, however, leave no doubt that though he does not, in so many words, set aside the Magistrate's order dismissing the complaint, he meant to do so and directed the Magistrate to make further inquiry into the case.

It is contended in revision that the Magistrate's order was not one under section 203 of the Criminal Proce-

Code but one discharging an accused person under section 253(2) of that Code. In my opinion this contention has force. The accused was summoned and appeared when the Magistrate dismissed the complaint. Section 203 contemplates a case in which the complaint is dismissed without process being issued to the accused. Under section 253(2) of the Criminal Procedure Code it is open to the Magistrate to discharge the accused at any stage of the proceeding. The Magistrate merely "dismissed" the complaint, but his order cannot, in the circumstances of the case, be considered to be otherwise than an order discharging the accused under section 253(2) of the Criminal Procedure Code. This aspect of the case is material in determining the question whether the learned Sessions Judge was justified in setting aside the order of dismissal passed by the Magistrate without issuing a notice to the accused and affording him an opportunity to show cause why the Magistrate's order of dismissal should not be reversed. Section 436, or rather the proviso to that section, is imperative and enjoins that an opportunity should be given to the accused to show cause why further inquiry should not be ordered. This proviso was introduced by the amending Act (Act XVIII of 1923) and therefore cases decided before 1923 can have no bearing on the question which arises in the present case. In my opinion a disregard of the proviso to section 436 is an illegality, and, in any case, such irregularity as seriously prejudices an accused person who is ordered to be proceeded against.

The learned Magistrate has given some reasons for the order dismissing the complaint. The learned Sessions Judge might have considered those reasons and found them inadequate for dismissing the complaint, but his order does not show that he applied his mind to the merits of the case. In a case in which the Sessions Judge reverses the order of the Magistrate discharging an accused person the Sessions Judge ought to give reasons for directing further inquiry. As to what an order of this character should contain, the Criminal

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Procedure Code has not made express provision, but it is highly desirable that such order should make it clear that the Magistrate's order discharging an accused person is based on grounds which cannot be sustained. In the case before me all that the Sessions Judge has stated in his order is that the Magistrate should proceed under chapter XXI of the Criminal Procedure Code which relates to trial of warrant cases. It affords no material to a court of revision for determining the important question whether the Magistrate was justified in dismissing the complaint.

For the reasons stated above I set aside the order of the learned Sessions Judge and send back the case to him with a direction to dispose of the complainant's application for revision after affording sufficient opportunity to the accused to show cause why the Magistrate's order dismissing the complaint should not be set aside and a fresh inquiry ordered.

MISCELLANEOUS CRIMINAL

Before Mr. Justice Iqbal Ahmad

EMPEROR v. MATHURA*

1933

October, 4

Criminal Procedure Code, section 339(3)—Approver resiling from his previous statement and making a contradictory statement—Prosecution for perjury—Sanction of High Court—Discretion of court—Considerations guiding the exercise of such discretion.

The fact that the legislature has, in section 339(3) of the Criminal Procedure Code, prohibited the prosecution of an approver, who has resiled from his previous incriminatory statement and made a directly contradictory statement, for perjury without the previous sanction of the High Court demonstrates that the mere fact that the two statements are contradictory can not in every case be a warrant for directing the prosecution of the approver. The discretion vested in the High Court by section 339(3) must be exercised with extreme caution, and the cardinal question for consideration by the Court is whether the confession and the incriminating statement made

*Criminal Miscellaneous No. 526 of 1933.