REVISIONAL CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

LACHHMI NARAIN AND ANOTHER (APPLICANTS) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY).*

1928 *November,* 30.

Criminal Procedure Code (Act V of 1898), section 190(c)—District Magistrate sending a matter to the Sub-divisional Magistrate for inquiry and report and after his report that an offence of theft had been committed ordering the Sub-divisional Magistrate to try the case himself—Sub-divisional Magistrate's omission to give the accused an opportunity to be tried by a different Magistrate, effect of—Trial by the Sub-divisional Magistrate, legality of.

Where a matter was brought to the notice of a District Magistrate who sent the matter to the Sub-divisional Magistrate for inquiry and report and the result was that the Sub-divisional Magistrate reported that an offence of theft had been committed, whereupon the District Magistrate ordered the Sub-divisional Magistrate to try the case himself, the Sub-divisional Magistrate, taking cognizance of the case under section 190(*c*) of the Code of Criminal Procedure, should have given the accused an opportunity to be tried by a different Magistrate and his omission to do so rendered the trial illegal.

Mr. *J. Jackson*, for the applicant.

The Government Pleader (Mr. *H. K. Ghose*), for the Crown.

PULLAN, J. :—This is a reference made by the Sessions Judge of Rae Bareli for setting aside the conviction in a case of petty theft. The learned Sessions Judge has expressed at length his opinion that the proceedings were illegal. The matter was brought to the notice of the District Magistrate by the Settlement Officer who, as such, was not using magisterial powers. The District Magistrate then sent the matter to the Sub-divisional Magistrate for an inquiry and report. The latter made

* Criminal Reference No. 42 of 1928.

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an inquiry and reported that a certain tree had been cut by one Jadunath and that a case should be instituted. Thereupon the District Magistrate ordered the Sub-divisional Magistrate to try the case himself. The view taken by the Sessions Judge is that, as the Sub-divisional Magistrate took cognizance of the case under section 190(*c*) of the Code of Criminal Procedure, he should have given the accused an opportunity to be tried by a different Magistrate. Not only did the Sub-divisional Magistrate not do this, but he refused the application of the accused to have the matter transferred to another court and the District Magistrate confirmed this view on the erroneous finding that he himself had taken cognizance of the case and not the Sub-divisional Magistrate. I cannot understand what case it was of which the District Magistrate took cognizance. It cannot have been any case set up by the letter of the Settlement Officer because, if it be held that that letter was a complaint at all, it was a complaint against another person, not Jadunath whose trial was ordered. It appears to me that when the matter was given over to the Sub-divisional Officer for inquiry and he after inquiry decided that the case should proceed, it was he, and nobody else, who took cognizance of the case. That being so I agree with the learned Sessions Judge that the case should have been tried in another court and I cannot hold, as I have been requested to hold by the Crown, that the accused were not prejudiced by the fact that the case was tried by the Magistrate who had made an inquiry into it. Apart from this there were several other irregularities, in particular the failure of the Magistrate to summon the Settlement Officer as a witness for the defence. If, as he said, the complainant told him that the tree was cut by one Lachhmi Narain it would be a strong point in the defence of Jadunath who has now been accused of this offence. The reasons given by the Magistrate for not calling the Settlement

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Officer are quite inadequate and his suggestion that the Settlement Officer did not understand Hindi is gratuitous. In any case it was a matter which the Settlement Officer should have been able to depose to himself. The learned Sessions Judge has suggested a re-trial, but considering that the subject of the dispute is a single *babul* tree I am of opinion that the matter has gone far enough, and that no good object would be served by having this petty case tried again by another Magistrate. I, therefore, accept the reference and order that the conviction be quashed and the sentence set aside.

Pullan, J.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

MUSAMMAT CHILHA AND OTHERS (DEFENDANT-APPELLANTS) *v.* CHHEDI (PLAINTIFF-RESPONDENTS).*

1928 *December*, 5.

Restitution of conjugal rights, suit for—"Legal cruelty" in suits for restitution of conjugal rights, meaning of—Suit for restitution of conjugal rights may be barred even where legal cruelty is not strictly established—Caste, whether affects the principles applicable in the case.

A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights.

Cruelty in the legal sense need not necessarily be physical violence. A course of conduct which, if persisted in, would undermine the health of the wife is a sufficient justification for refusing to the husband a decree for restitution of conjugal rights. There may be a case in which legal cruelty may not have been strictly established, but circumstances short of that will also bar a suit for restitution.

* Second Civil Appeal No. 363 of 1928, against the decree of S. Ali Hamid, Subordinate Judge of Bara Banki, dated the 28th of August, 1928, reversing the decree of Sheo Charan, Munsif Ramsanehighat, dated the 15th of May, 1928, dismissing the plaintiff's suit.