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suppose that sub-section (1) authorises the re-opening of an old debt which comes under that sub-section.

Both the grounds urged before us therefore fail and we dismiss this appeal with costs.

As the learned counsel for the appellant has asked us to pass a decree in the appellant's favour, we order that a decree for the amount due to the appellant be passed in his favour payable by the plaintiff-respondent in four equal six-monthly instalments to be due in November and May beginning from November, 1938. In case of default about any two instalments, the whole will at once be due. A charge over the plaintiff-respondent's immovable property will be declared in favour of the defendant-appellant. The appellant will get costs on the amount decreed in his favour, including the court-fee that he will pay under Act IX of 1937. Defendant will get interest from date of suit up to this day at $6\frac{3}{4}$ per cent. and future interest at $3\frac{1}{4}$ per cent. per annum.

Thomas, C. J. and Ziaul Hasan J.

REVISIONAL CRIMINAL

1938

August, 18

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice R. L. Yorke

GUR DAYAL (ACCUSED-APPLICANT) *v.* SHEO DULAREY (COMPLAINANT-OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), section 350(1) proviso, scope and application of—Second Magistrate deciding to re-summon witnesses and re-commence inquiry—Accused, whether has right to demand that re-trial should be commenced.

The proviso to section 350(1) of the Code of Criminal Procedure has no application in a case in which the second Magistrate decides to re-summon the witnesses and re-commence the inquiry or trial. The proviso gives the accused a right at the time of the commencement of the proceedings before the second Magistrate to demand that the witnesses or any of them be re-summoned and re-heard, and it does not

*Criminal Reference No. 5 of 1938, made by R. B. Pandit Tika Ram, Misra, Sessions Judge of Unao.

give him any other right. If a Magistrate decides to re-summon the witnesses and re-commence the inquiry or trial, the accused cannot object to the examination afresh of any witness. *Manzoor Ali* v. *Abdus Salam* (1) overruled. *Sadari Lal* v. *Emperor* (2) and *Mudda Verappa* v. *Emperor* (3) relied on. *Arulay*, in re (4) *Vadigalapydigadu*, in re (5) and *Emperor* v. *J. B. Sane* (6), referred to.

Mr. *H. N. Misra* for Dr. *J. N. Misra*, for the accused.

Messrs. *H. K. Ghosh* and *S. K. Shukla*, for the opposite-party.

THOMAS, C. J. and YORKE, J.:—This is a reference by the learned Sessions Judge of Unao submitting for the orders of this Court a case under section 408 of the Indian Penal Code and recommending that, in the light of the ruling of this Court reported in the case of *Manzoor Ali* v. *Abdus Salam, K. S.* (1), the order of a Magistrate passed under section 350 of the Code of Criminal Procedure for the re-summoning of the witnesses and the re-commencement of the inquiry or trial be set aside.

What happened in this case was that the opposite-party Sheo Dularey on the 29th of July, 1937, filed a complaint against Gur Dayal in the court of the Sub-Divisional Magistrate of Hasanganj under section 408 of the Indian Penal Code. The Sub-Divisional Magistrate, unwisely as we think, transferred the case for trial to the court of an honorary magistrate of the second class, Pandit Shiam Sundar Nath Kaul. The Magistrate on the 9th of October, 1937, framed a charge with respect to one item only of Rs.200 and the prosecution witnesses were ordered to be re-summoned for further cross-examination after the charge, and they were so re-summoned and cross-examined. On the 28th of October, 1937, the complainant, whose application in regard to the declaration of one witness as hostile had been refused by the honorary magistrate, applied to

(1) (1934) 11 O.W.N., 825.
(2) (1937) A.I.R., Nagpur, 147.
(3) (1935) A.I.R., Mad., 818.
(4) (1925) 94 I.C., 707.
(5) (1924) 85 I.C., 366.
(6) (1930) A.I.R., Nagpur, 59.

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the District Magistrate for transfer of the case, and the District Magistrate passed an *ex parte* order transferring the case to the court of an honorary magistrate of the first class, Saiyid Mohammad Raza. On the case coming up before this Magistrate on the 30th of October, 1937, in the absence of the accused, the Magistrate passed an order that he would re-summon the witnesses and re-commence the trial. On the next date fixed for the hearing of the case, 10th of November, 1937, the accused made an application purporting to be an application under the proviso to section 350, sub-clause (1), of the Code of Criminal Procedure that he did not want the witnesses to be re-summoned. The court heard arguments, and on the 20th of November, 1937, passed a fresh order stating in full the grounds on which he considered it necessary to begin the case afresh and record all the evidence himself. Thereupon the accused Gur Dayal filed an application in revision to the Sessions Judge of Unao with the result that the learned Sessions Judge has submitted the record to this court for orders.

Learned counsel for Gur Dayal has mentioned to us that the honorary magistrate, who passed the order of the 20th of November, 1937, has ceased to function as such and implies that in the circumstances it is not necessary for this Court to pass any order. We are, however, of opinion that as the Magistrate has passed this order, it would not be legitimate for any court before whom the case might come in future to pass an order inconsistent with this order unless he could found his change of procedure on an order of this Court. Secondly in view of the fact that the matter has been referred to us for orders and the matter is of some importance and one which frequently comes before the courts, we think that it is essential to pass orders on the reference, and not merely to treat it as no longer requiring any decision.

The proposition put forward on behalf of Gur Dayal is that proviso (*a*) to section 350 (1), of the Code of

Criminal Procedure is to be read as controlling the discretion of the Magistrate not only in cases where he has decided to act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, but also in cases in which he has decided to re-summon the witnesses and re-commence the inquiry or trial. The relevant portion of section 350 runs as follows:

> "(1) Whenever any magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial:
>
> Provided as follows:
>
> (*a*) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard."

The learned Sessions Judge who has submitted the reference was bound to do so in the light of the ruling of this Court mentioned above. In that case NANAVUTTY J., held with reference to the circumstances of that case that an order by the Magistrate to whom a case had been transferred that the accused was to be tried *de novo* under the provisions of section 350 of the Code of Criminal Procedure in spite of the protests of the accused that the trial should proceed from the stage at which it had been left unfinished by the original Magistrate and that he would be prejudiced by recommencing the trial, was arbitrary and could not be upheld. In the course of the ruling at page 827, after referring to certain rulings of other courts and holding that they had no application to the matter which was before him, the learned Judge remarked:

> "It is true that section 350 of the Code of Criminal Procedure does enable a magistrate to re-summon the witnesses and re-commence the inquiry or trial, but that

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right of the magistrate is subject to the proviso that the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard. It follows, therefore, as a corollary from this that if the accused does not wish to have a fresh trial, he can insist upon his case being decided upon the evidence already recorded by the first magistrate."

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With respect we are unable to agree that the corollary stated by the learned Judge follows from the premises

The learned Judge went on to refer to three rulings, two of the Madras High Court and one of the Judicial Commissioner's Court at Nagpur. He remarks that *in re Arulay* (1), it was held by Mr. Justice JACKSON of the Madras High Court that "the privilege under section 350 of the Code of Criminal Procedure was that of the accused and not of the complainant and that if the accused declined to act under sub-clause (1) (*a*) of section 350, Criminal Procedure Code, the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded." That is a proposition about which there is no room for doubt. The case was one in which the Magistrate elected to proceed upon the evidence already recorded. The accused did not put forward any demand under the proviso and the complainant had no *locus standi* in the matter at all. The ruling has no applicability to the present case.

He next referred to *in re Vadigalapydigadu* (2) another Madras case, in which it was held that "under proviso (*a*) to section 350, Criminal Procedure Code, the right given to an accused person was the right of demanding that the prosecution witnesses or any of them be re-summoned and re-heard and it rested on the accused to say who should be re-summoned and re-heard and that the complainant had no such right and could not claim a *de novo* trial from the beginning." The proposition stated in this case also is of no assistance in the present case. The complainant can, of course, put before the

(1) (1925) 94 I.C., 707. (2) (1924) 85 I.C., 366.

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Magistrate reasons why it is desirable that the witnesses should be re-summoned and the inquiry or trial re-commenced, but he has no right to demand that the witnesses be re-summoned or to claim a *de novo* trial from the beginning.

The learned Judge referred thirdly to the case of *Emperor* v. *J. B. Sane and others* (1), in the course of which it was said:

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> "It is, however, clear that the discretion given to a Magistrate by section 350(1), Criminal Procedure Code, to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso (*a*) to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate re-called and re-examined by the succeeding Magistrate."

That was a case in which there was a difference of opinion between some of the accused who wanted that only some of the witnesses examined by the first Magistrate should be re-summoned and examined afresh before the new Magistrate and others who wanted the whole of the trial to be conducted *de novo* [we are quoting from the ruling but it may perhaps be noted that proviso (*a*) does not entitle the accused to demand that the Magistrate should re-commence the trial but only that the witnesses or any of them be re-summoned and re-heard], and in that case the Magistrate had originally decided to examine all the prosecution witnesses afresh, but on a subsequent application had overridden his first order and accepted the request made by the second lot of accused. The question which is for decision by us now did not at all arise in that case, and it is not in any sense an authority for the proposition that the accused has by virtue of proviso (*a*) to section 350(1), Criminal Procedure Code, any right to demand that a trial shall not be re-commenced by the Magistrate if the Magistrate decides to exercise his option so to order.

NANAVUTTY, J. remarked that on the strength of the rulings cited, the order of the learned Deputy Magistrate

(1) (1930) A.I.R., Nagpur, 59(2).

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was arbitrary and could not be upheld, and he therefore set aside the order directing a *de novo* trial and directed the Magistrate to proceed with the trial of the case from the stage at which it was left unfinished by his predecessor.

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It does not appear to us on a consideration of the wording of section 350, sub-clause (1) that the proviso has any application in a case in which the second Magistrate decides to re-summon the witnesses and recommence the inquiry or trial. The proviso gives the accused a right at the time of the commencement of the proceedings before the second Magistrate to demand that the witnesses or any of them be re-summoned and re-heard, and it does not give him any other right. It would be difficult to say that there can in any judicial sense be prejudice to the interest of the accused by the Magistrate, who is to try the case, re-summoning the witnesses and re-commencing the trial. It may be that the effect of such an order will be that the trial will be protracted somewhat longer than it might otherwise have been, and it may be that the Magistrate may decide to frame further charges in addition to the charge or charges, if any, framed by the first Magistrate, but that is a matter which would have been within his competence in any case under the provisions of section 227, Criminal Procedure Code. We are therefore unable to hold that any question of prejudice really arises.

We are confirmed in the view we take of the interpretation of section 350, clause (1), Criminal Procedure Code, by a later Nagpur ruling reported in *Sadari Lal* v. *Emperor* (1), in which it was held, dissenting from the view of this Court in the case referred to above, that "the accused has no right to insist that there shall not be a *de novo* trial or inquiry. The Magistrate beginning the proceedings anew against the wishes of the accused is not acting without jurisdiction. There is no provision in the Code which enables the

(1) (1937) A.I.R., Nagpur, 147.

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accused to demand that witnesses examined by the Magistrate, who has ceased to exercise jurisdiction, shall not be re-summoned and re-heard." The learned Judge was of opinion that had the proposition now put forward before us and accepted by NANAVUTTY, J. in the reported ruling been correct and had the accused a right both to demand that witnesses be re-summoned and that they should not be re-summoned, section 350 would have been differently worded. He went on to point out that "It is clearly desirable for the proper administration of justice that normally the Magistrate who passes the final order should be the Magistrate who has heard all the evidence, and in order that there should be no prejudice to the accused it is expressly provided that, in cases where the Magistrate does not propose to follow this procedure, the accused is entitled to demand that this procedure shall be followed." The same view was taken in *Mudda Verrappa* v. *Emperor* (1), in which it was held that "the Magistrate, as well as the accused, has a privilege under section 350, Criminal Procedure Code. If he does not like the idea of giving judgment on evidence partly or wholly recorded by his predecessor, he may decide to re-summon the witnesses and re-commence the inquiry or trial. If he exercises that option, it is clear that the accused cannot object to the examination afresh of any witness." That is a proposition with which we are in entire agreement.

In these circumstances we reject the reference, and as it appears that the Magistrate concerned has ceased to function as such, we direct that the record be returned through the Sessions Judge to the District Magistrate with a direction to make it over for trial to a stipendiary Magistrate who should, in view of the circumstances of the case, re-summon the witnesses and re-commence the trial.

Reference rejected.

(1) (1935) A.I.R., Mad., 318(2).