

profits. It is well established that an application for mesne profits is an application in the suit itself and that the law of limitation has no application to it so long as the suit is a pending suit.

Mr. Sultan Ahmed ingeniously argued before us that a distinction should be drawn between a suit and a claim which may be involved in the suit. He admits that the suit having been decreed it was not in the power of the learned Subordinate Judge to dismiss the suit; but he contended before us that the claim for mesne profits stood on a different footing. I am unable to agree with this contention. The only part of the suit that remained was that dealing with the question of mesne profits payable to the plaintiff and in any view the claim for mesne profits had in distinct terms been decreed by the Calcutta High Court and that being so that claim could not be dismissed by the learned Subordinate Judge.

I would accordingly dismiss this appeal. There will be no order as to costs.

It was brought to our notice that the lease does not provide for the payment of any interest. That being so, the plaintiffs will be only entitled to mesne profits at the rate of rent fixed in the lease up to the date of the decree.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mullick and Kulwant Sahay, J.J.

MUHAMMAD SHARIF

v.

RAI HARI PRASAD LAI.*

1925.

Nov., 3.

Code of Criminal Procedure, 1898 (Act V of 1898), section 526(8) and section 528(A)—“enquiry” meaning of—omission to record reasons for transferring a case, whether vitiates the order—jurisdiction.

* In re. an application, from an order of J. C. Dutt, Esq., Officiating District Magistrate of Gaya, dated the 15th October, 1925.

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Under section 526(8), Code of Criminal Procedure, 1898, "If in the course of any enquiry or trial", the complainant or accused notifies to the Court before which the case is pending his intention to make an application for transfer of the case, "the Court shall adjourn the case.....".

Held, that the words "enquiry or trial" in this section are intended to apply to those enquiries and trials which are specially referred to in the earlier portion of the Code. Therefore, a District Magistrate taking cognizance of an application for transfer is not holding an enquiry within the meaning of section 526(8).

Section 528(2) empowers any Presidency Magistrate, District Magistrate or Subdivisional Magistrate to withdraw any case from any Magistrate subordinate to him. Sub-section (5) provides: "A Magistrate making an order under this section shall record in writing his reasons for making the same". *Held*, that although it is a sound rule of practice that there should be something on the record showing why an order under section 528 is made, the mere omission on the part of the Magistrate to record reasons for his order is not fatal to the order.

This was an application against an order of transfer made on the 15th October, 1925, by Mr. J. C. Dutt, Officiating District Magistrate of Gaya in a case instituted against Rai Hari Prasad Lal and others by one Muhammad Sharif. It appeared that Muhammad Sharif lodged a complaint before Mr. N. N. Singh, the Sadr Subdivisional Magistrate, who, after recording the complaint, sent it to Mr. Nawab, a Deputy Magistrate at the Sadr station, for inquiry and disposal. Mr. Nawab after making an inquiry under section 202 of the Criminal Procedure Code, issued processes against the accused. Thereupon the accused made an application before the District Magistrate for the transfer of the case from the file of Mr. Nawab to that of some other Magistrate. The District Magistrate was of opinion that without the least reflection on the integrity of Mr. Nawab there were good reasons for transferring the case to some other magistrate and as no European Magistrate was available he transferred the case back again to the file of the Subdivisional Officer.

It appeared that before the District Magistrate made this order the complainant had filed an application before him praying that he should under section 526 of the Criminal Procedure Code stay his hand and allow the complainant to move the High Court in order that the High Court might restrain the District Magistrate from hearing the application. The District Magistrate declined to allow this prayer and disposed of the transfer application.

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The present application in revision was made against the transfer of the case on the ground that the District Magistrate had no jurisdiction to refuse to grant a postponement and that his proceedings subsequent to such refusal were void.

Md. Yunus, for the petitioner.

MULLICK, J. (after stating the facts set out above, proceeded as follows): It is urged by the learned Counsel for the petitioner that section 526 of the Criminal Procedure Code applies because the hearing of the transfer application was an inquiry within the meaning of clause (8) of the section.

Apart from the difference between jurisdiction and power and the respective results of the illegal exercise thereof I do not think section 526 has any application at all. The reference in clause (8) to inquiry or trial is clearly intended to apply to those inquiries or trials which are specially referred to in the earlier portion of the Code and if the argument of the learned Counsel is accepted, then the recording of a complaint might also be restrained under this clause. That obviously cannot have been the intention of the law.

It has been held that section 526 applies to certain cases of a quasi civil nature such as inquiries into disputes about immoveable property, but that does not in any way touch the question now before us.

Nor does principle require us to accept the learned Counsel's interpretation. As a magistrate taking cognizance of an application for transfer is not

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holding any inquiry into the guilt or innocence or into the rights and liabilities of any party it is not clear what urgent necessity can arise at this stage for restraining the magistrate from exercising jurisdiction. And to take a concrete case the inconvenience of accepting the petitioner's contention becomes clear when the facts of the present case are examined. The object of the learned Counsel is to get the order of transfer vacated. For this the law gives him the power to apply under section 526 to the High Court to have the case transferred to some other court or retransferred to the file of Mr. Nawab and pending the orders of the High Court Mr. N. N. Singh is required by clause (8) to stay the trial. In support of that application under section 526 it would be open to the petitioner to take the very ground on which he now attacks the District Magistrate's order—namely that he was not competent to hear the transfer application. What then would be the object of giving the petitioner two chances of moving the High Court when one chance is sufficient?

In point of fact no reason has been shown to-day why the District Magistrate was incompetent to hear the transfer application, and if the District Magistrate had allowed the petitioner's prayer and given an adjournment pending an application to the High Court the result would have been nothing short of a wholly vexatious delay. The High Court would have rejected the application, the case would have gone back to the District Magistrate and he would in the end have passed the same order that he passed on the 15th October. The present law even at the risk of having its solicitude abused provides parties with ample opportunities for staying cases and unless compelled by express words I do not think it would be right to add to those opportunities by accepting the interpretation sought to be put upon section 526 by the petitioner.

The substantial question therefore only remains whether the District Magistrate's order will lead to injustice.

It is urged that the District Magistrate should have recorded his reasons for transferring the case. Now section 528 of the Criminal Procedure Code does not require in terms that the Magistrate should give any reason, but it is a sound rule of practice that there should be something on the record showing why the order was made. In the present case it is possible that the fact that Mr. Nawab had held a preliminary inquiry into the case before the issue of process may have had some weight with the District Magistrate. He may also have thought that there were other grounds but the omission to record these ought not to be fatal to the order. The learned District Magistrate has exercised a jurisdiction vested in him and unless strong grounds for so doing are shown we are not prepared to vacate the order. If Mr. Singh had not transferred the case to Mr. Nawab he himself would have disposed of it. Matters have now been restored to the state in which they were when the complaint was filed and as it has not been shown that Mr. Singh is disqualified in any way from trying the case we ought not to interfere.

The application fails both on the point of jurisdiction and the merits and is dismissed.

KULWANT SAHAY, J.—I agree.

Application rejected.

APPELLATE CIVIL.

Before Das and Adami, J.J.

MAHARAJA KESHO PRASAD SINGH

v.

SHAMNANDAN RAI.*

Rent Decree against a dead tenant—whether the rest of the decree is a nullity—tenant, joint and several liability of, to pay rent.

* Appeal from Appellate Decree no. 1013 of 1922, from a decision of J. F. W. James, Esq., i.c.s., District Judge of Shahabad, dated the 26th June, 1923, confirming a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 2nd September, 1921.

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