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RAJA SHIVA PRASAD SINGH v. BHUBAN MAHATO.

MACPHERSON, J.

Bengal Act I of 1879 did in almost identical language and it is obvious that the same class of suit was intended, to wit, a possessory suit for the raiyat after illegal or unlawful ejectment by the landlord, and that the provision has no application to a suit for declaration of the plaintiff's title, with consequential relief as to possession.

Upon this view the suit of a raiyat for declaration of title to and recovery of possession of his holding from a landlord lies in the civil court and does not lie in the revenue court and the period of limitation is the ordinary one and not one year as it is in a possessory suit under section 139(5) of the Chota Nagpur Tenancy Act.

The appeal is without merits and is accordingly dismissed with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

J. C.* 1933.

July, 27.

RAS BEHARI LAL

v.

KING-EMPEROR.

On Appeal from the High Court at Patna.

Privy Council Practice—Criminal Matter—Trial by Jury —Juror ignorant of English.

The eight appellants were tried for murder and rioting by a Sessions Judge sitting with a jury of seven. The jury having found them guilty by a majority of six to one the Sessions Judge convicted and sentenced them, some to death. The convictions and sentences were confirmed by the High Court. Upon an application for special leave to appeal an inquiry was ordered to be made by the High Court as to the truth of an allegation made on appeal to the High Court, and by the petition, that one of the jurors did not understand English. The High Court reported that the juror in question

* *Present*: Lord Atkin, Lord Thankerton, and Sir George Lowndes.

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did not know sufficient English to follow the addresses of the pleaders or the judge's charge or so much of the evidence as was given in English :—

Held, that the convictions and sentences should be set aside as there had been a mis-trial, and that any discretion as to any consequential order should be exercised by the High Court, it being left to the representatives of the Crown in India to take such steps as to a re-trial as were open to them.

Rex v. *Thomas*(1), dissented from.

Appeal (no. 21 of 1933) by special leave from an order of the High Court (June 28, 1932) confirming an order of the Sessions Judge of Patna convicting the appellants of penal offences and sentencing them.

The appellants were convicted under section 302 (murder) and section 148 (rioting armed with deadly weapons) of the Indian Penal Code. Appellants nos. 1 to 7 were sentenced to death, and appellant no. 8 to transportation for life. Appeals to the High Court were dismissed. The sentences of death on appellants nos. 2, 3, 6 and 7 had been commuted to transportation for life.

The facts relevant to the present appeal, which was based upon the alleged inability of one of the jury of seven to understand the English language, are stated in the judgment of the Judicial Committee.

The following provisions of the Code of Criminal Procedure were material:

By section 274, sub-section 2, the jury, in the case of the trial in question, was to

" consist of not less than seven persons and, if practicable, of nine persons ".

By section 278—

" Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed.....(*g*) his inability to understand the language in which the evidence is

(1) (1933) 2 K. B. 489.

given, or when such evidence is interpreted, the language in which it is interpreted."

By section 306(*1*)

" When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly ".

1933. *July*, 3. *Pritt, K. C.* and *Sidney Smith* for the appellants. It has been intimated that in view of the report of the High Court the Crown does not oppose the view that the conviction and sentences should not stand. It is submitted that the order on appeal should merely set them aside and should not provide for a new trial. The appellants cannot be proceeded against again there having already been a trial.

[LORD THANKERTON.—The statutory jury being seven was there in the circumstances a jury or a trial?]

The juror in question was qualified to sit, the error was in not ascertaining and providing for his ignorance of English.

[LORD ATKIN.—The result of what you say is that the men have been committed and charged but have not been tried in accordance with the ordinary procedure. The present view of the Board is that there has been a trial *coram non judice*. We might leave it to the Court in India to decide what the proper relief is.]

Counsel for the Crown was called on.

Dunne, K. C. and Wallach for the King-Emperor: It is conceded that the convictions and sentences should not stand. The true view is that the appellants have not been tried. The High Court should be put back into the position in which it was under section 423 of the Code of Criminal Procedure and left to make such order as it thinks right. That is much what was

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done in *Sayyapureddi Chinnayya* v. *The King-Emperor*(1), a case in which the sentence exceeded the legal maximum; it was there contended unsuccessfully that the High Court was functus officio.

[LORD ATKIN.—Setting aside a conviction on the ground of irregularity does not give rise to a plea of res judicata. But if the conviction is set aside can the High Court be re-invested with jurisdiction to deal with the matter?]

It is submitted that the order of the High Court could be set aside and the case remitted to that Court to make the order which it ought to have made.

[LORD THANKERTON.—If the convictions are set aside is there anything to prevent a fresh trial upon the commitment?]

It is submitted not. But we ask merely that there should be substituted for the order of the High Court an order setting aside the convictions and sending the cases back to that Court to deal with according to the law in India.

In *Jannokee Doss* v. *The King*(2) a new trial was ordered in a criminal matter, but that was in 1836 before the Acts and Orders which now vest in the High Courts appropriate powers.

Pritt, K. C. replied.

July 27. The judgment of their Lordships was delivered by—

LORD ATKIN.—This is an appeal by special leave. The appellants were tried by the Sessions Judge of Patna, sitting with a jury of seven. They were found guilty by a majority verdict of six to one on charges of murder and rioting. Appellants nos. 1—7 were sentenced to death and no. 8 to transportation for life They appealed to the High Court, but their appeal was dismissed. The sentences on appellants nos. 2, 3, 6

(1) (1920) I. L. R. 44 Mad. 297; L. R. 48 I. A. 35.
(2) (1836) 1 Moo. I. A. 67.

and 7 were subsequently commuted by the Local Government to transportation for life.

On their application for leave to appeal to His Majesty in Council it was asserted that one of the seven jurors did not understand English, the language in which some of the evidence appears to have been given, and in which the addresses of counsel were made and the charge of the Sessions Judge was delivered. This contention had been put forward on their behalf in their appeal to the High Court. It was originally supported by an affidavit upon which the learned Judges of that Court properly refused to rely. A second affidavit to the same effect of a more reliable character was tendered on the last day of the hearing, but was rejected as too late, and the appeal was (as already stated) dismissed.

Under these circumstances an enquiry was by order of His Majesty in Council directed to be held by the High Court as to the truth of the allegations so made The High Court reported that the juror in question did not know sufficient English to follow the address of the lawyers and the Judge's charge or the English evidence. It was after consideration of this report and upon this ground that special leave to appeal was granted.

On the appeal coming on for hearing before the Board counsel for the Crown has not impugned the correctness of the report and has admitted that on this finding the convictions cannot be maintained. In their Lordships' opinion, this is necessarily the correct view. They think that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection accorded to him by law and that the result of the trial in the present case was a clear miscarriage of justice. They have no doubt that in these circumstances the conviction and sentence should not be allowed to stand. They think it was most unfortunate that this matter was not fully enquired into

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by the High Court when the appeal was before it. Had the learned Judges been satisfied then of the truth of the facts now established, it would have been open to them under the provisions of section 423 of the Criminal Procedure Code, if they so thought fit, to have reversed the findings and sentences of the Sessions Judge and ordered the appellants to be re-tried, a course which, in their Lordships' opinion, would have fully met the ends of justice.

Since the hearing of the case their Lordships have had their attention directed to the case of *R.* v. *Thomas*(1), a decision of the Court of Criminal Appeal given on the very date upon which this present case was before their Lordships. Owing to the remarkable fact that there is no official shorthand note of judgments delivered by the Court of Criminal Appeal their Lordships might have been in a difficulty if they had not had the advantage of seeing an advance copy of the report to be published in the Criminal Appeal reports. In that case the appellant had been convicted at the Merioneth Quarter Sessions of sheepstealing. He appealed on the ground amongst others, that two of the jurors had not sufficient knowledge of the English language to enable them to follow the proceedings. His counsel sought to use affidavits by the jurors in question to that effect. The Court refused to receive the evidence and dismissed the appeal against the conviction, although on other grounds they reduced the sentence. It would appear from the report that the judgment was based in part upon the well established ground that for the purpose of setting aside the verdict evidence is not admissible by jurors to prove what discussions took place in the jury box or in the jury room. It was further based upon the proposition that when a verdict is delivered in the sight and hearing of all the jury without protest their assent is conclusively inferred. The suggestion was made *arguendo*, but does not seem to have been decided that if a juror was

(1) (1933) 2 K. B. 489.

disqualified by law the objection could not be entertained after verdict. If their Lordships agreed with all the grounds of this decision they would have had to consider whether, notwithstanding the lack of opposition by the prosecution they would have interfered with the decision of the High Court at Patna. But with the greatest respect for the learned members of the Court of Criminal Appeal they are unable to accept the reasons given for this decision. The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict. If the alleged defect of the juror could be proved at all *aliunde* there seems to be no reason why the evidence of the juror himself should not be available either for or against the allegation. It would seem remarkable that if evidence of neighbours could be given that a juror did not understand English, it should not be open to the prosecution to produce the strongest evidence possible by calling the juror himself to show that he fully understood the proceedings. Similarly their Lordships are unable to accept the view that any presumption of assent by all the jurors to a verdict given in their presence is decisive of or indeed relevant to the question. The problem is whether the assent so given or inferred is of a competent juror, *i.e.*, in such a case as the present not so incapacitated from understanding the proceedings as to be unable to give a true verdict according to the evidence. The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent.

It is noteworthy that in the case of *Ellis* v. *Deheer*(1) evidence was permitted to be given that some of the jurors though present in Court were not able to see or hear the foreman give their verdict, and that the evidence of the fact was the evidence of the jurors

(1) (1922) 2 K. B. 113.

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themselves. The judgments draw pointed attention to the distinction between evidence of what takes place in the jury box and jury room, and evidence of what takes place in open Court. Accepting the evidence the Court of Appeal granted a new trial. There is an interesting case of *Ex parte Morris*(1) where a rule for a *certiorari* was applied for to quash a conviction at quarter sessions on the ground that one of the jurors was intoxicated. The only evidence was that of a solicitor based on information. The Court, Phillimore and Walton, JJ., refused the rule on the ground that the evidence was insufficient, but gave leave to renew it, and said that if renewed there should be an affidavit as to the circumstances from one of the other jurymen.

So far as *R.* v. *Thomas* is a decision as to the admissibility of evidence of the juror himself it is true that it does not cover the present case, for in India there was evidence other than that of the jurors concerned, though at the inquiry some of the jurors impugned were in fact, called. Their Lordships have already stated their difficulty in accepting the view that the evidence even of the jurors was inadmissible. But so far as *R.* v. *Thomas* decides that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings their Lordships definitely disagree with it. A valuable contribution to the discussion is made in the case of *Mansell* v. *The Queen*(2) by Lord Campbell delivering the judgment of the Court of Queen's Bench on a writ of error. The plaintiff in error had been convicted of murder, and one cause of error assigned was that the presiding Judge at the trial had directed a juror not to be sworn who had declared himself to have a conscientious objection to capital punishment; holding this to be no error Lord Campbell said:—

"We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a juryman were completely

(1) (1907) 72 J. P. 5.
(2) (1857) 120 E. R. 8, 30; 8 E. & B. 54, 81, 82.

deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from their being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow creature."

This duty has later been held to be a continuous duty throughout the trial. It would be remarkable indeed, if what may be " a scandal and perversion of justice " may be prevented during the trial, but after it has taken effect the Courts are powerless to interfere. Finality is a good thing, but justice is a better. According to ordinary procedure in criminal trials the accused has a right of challenge either peremptory, or for cause; and it may very well be that if knowing the alleged defect he stands by and takes his chance of a verdict he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there appears to be no reason why the Court in a proper case should not give effect to it.

The result of upholding the objection is that there has been a mis-trial. In England the ordinary order would be in such circumstances to award a *venire de novo* as in the case of *R.* v. *Wakefield*(1) where a person not qualified and not summoned, personated on the jury a man who was qualified and had been summoned. Their Lordships, however, think it desirable that any discretion as to any consequential order should be exercised by the High Court, and they content themselves, therefore, with humbly advising His Majesty that the appeal should be allowed, that the dismissal of the appeal by the High Court should be reversed, and the convictions and sentences set aside, leaving the representatives of the Crown in India to take such steps in the matter of a re-trial as may be open to them there.

(1) (1918) 1 K. B. 216.

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RAS BEHARI LAL v. KING-EMPEROR.

LORD ATKIN.

Solicitors for appellants: *Hy. S. L. Polak and Co.*

Solicitor for respondent: *Solicitor, India Office.*

APPELLATE CIVIL.

Before Macpherson and Agarwala, JJ.

1933.

July, 25, 26.
August, 8.

JUGESWAR PRASAD

v.

RAMDHARI MAHTO.*

Revenue Sales Act, 1859 (*Act XI of* 1859), *section* 37—*proviso, significance and scope of—circumstances protecting raiyat having occupancy right at a fixed rent.*

Section 37 of the Revenue Sales Act, 1859, provides :—

"The purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants with the following exceptions :.....

.....

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any raiyat, having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such raiyat otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

Held, (*i*) that the important circumstance which distinguishes the right of the new proprietor to enhancement from that of the previous defaulting proprietor is that the new proprietor is entitled to enhance "irrespectively of all engagements made since the time of settlement" and the expression

* Appeal from Appellate Decree no. 291 of 1930, from a decision of Babu Radha Krishna Prasad, Subordinate Judge of Patna, dated the 28th June 1929, confirming a decision of Babu Jugal Kishore Narayan, Munsif of Patna, dated the 16th July, 1928.