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the cases of *Chunder Coomar Sen* v. *Queen-Empress* (1) and *Mangobind Muchi* v. *Empress* (2). The last case clearly has no application. In reference to the case of *Chunder Coomar Sen*, we would observe that it was there held, as in the case in the Allahabad Court, that the accused could not be properly convicted under s. 353, when the resistance was to the action of an officer of the Civil Court, who was not acting under any legal authority. One of the accused in that case was, however, convicted of rioting, but his acquittal was on other grounds. The question was not considered in that case, whether any of these persons could properly be convicted of any other offence. That case is, therefore, not opposed to the case in the Allahabad Court.

On the facts found, therefore, we are of opinion that the petitioners should all be convicted of rioting under s. 147 of the Indian Penal Code. Their common object was to commit an offence, that offence being to assault or use criminal force to the Police Officers, and there was no real justification for such proceeding. It was a very dangerous assembly consisting of a very large number of persons, whose object, as was shown by their acts, was clearly to resist any action whatsoever on the part of the police, and it was entirely owing to the forbearance of the police and their withdrawal, that no serious consequences took place.

We think, however, that the sentences of six months' rigorous imprisonment passed are too severe, having regard to the cause of the commission of this offence. Although the accused were, in our opinion, not justified in what they did, we also think that the action of the police was injudicious and without legal authority, and that there was some provocation for the resistance to the arrest of Nawrangi Singh. Under such circumstances, we think that the sentence should be reduced to a sentence of rigorous imprisonment for two months in respect of each of the petitioners. The fines, if paid by Nawrangi Lall, Sewbaran and Gungabissen, must be refunded.

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28 C. 416.

[416] CRIMINAL REFERENCE.

Before Mr. Justice Rampini and Mr. Justice Gupta.

JAGOMOHAN PAL (*2nd Party, Petitioner*) *v.* RAM KUMAR GOPE (*1st Party, Opposite party*).* [16th April, 1901.]

Immoveable property, dispute as to—Order of Magistrate, Contents of—Breach of the peace—Opportunity to produce evidence—Sessions Judge, power of revision or reference—High Court, powers of—Code of Criminal Procedure (Act V of 1898), ss. 145 and 435, Charter Act (24 and 25 Vict.), c. 104, s. 15.

Proceedings under Chapter XII of Code of the Criminal Procedure are not proceedings with regard to which a Sessions Judge has any power of revision or reference, nor has he the power to call for the records in such proceedings. The High Court only can interfere under the power of superintendence conferred upon it by the Charter Act.

The order of a Magistrate instituting proceedings under s. 145 of the Code of Criminal Procedure should set out the grounds on which he is satisfied that a dispute likely to cause a breach of the peace existed, and the parties to the proceedings should be given an opportunity of adducing their evidence.

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* Criminal Reference No. 82 of 1901, made by C. P. Beachcroft, Esq., Sessions Judge of Mymensingh, dated the 20th of March, 1901.

(1) (1899) 3 C. W. N. 605. (2) (1899) 3 C. W. N. 627.

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THE Sub-Divisional Officer of Jamalpur on receipt of a police report drew up proceedings under s. 145 of the Code of Criminal Procedure against the first and second parties on the 4th of January 1901, and ordered the parties to appear on the 16th of January and put in their written statements. On the day fixed the second party appeared, and put in his written statement; he also produced some documentary evidence, and applied for summonses against his witnesses. The Magistrate rejected his application, and, having examined two witnesses for the first party, declared him to be in possession of the disputed land.

The case was referred to the High Court under s. 438 of the Code of Criminal Procedure by the Sessions Judge of Mymensingh.

The letter of reference was as follows :—

Brief analysis.

2. The Sub-Divisional Officer of Jamalpur on receipt of a police report drew up proceedings under s. 145 against Ram Kumar Gope, 1st party, and [417] Jagannath Pal, 2nd party, on 4th January, calling on the parties to appear on 16th January and put in written statements. The case was taken up on the date fixed and two witnesses examined for the 1st party. Judgment was given on the same date, the 1st party being declared entitled to possession.

Order recommended for Revision.

3. The order under s. 145.

4. Error of law (1). The order does not state the grounds on which the Magistrate is satisfied that there is a likelihood of a breach of the peace. (2) The 2nd party has had no opportunities of producing evidence of possession.

5. The Magistrate in his order stated that information had been received from the police of a dispute likely to cause a breach of the peace. The police report states certain facts, which fully support the presumption that a breach of the peace was likely, but a copy of the police report was not sent to the parties. Had a copy been sent there would, I imagine, have been no illegality, but, as it was, the parties did not know the allegations against them. In his explanation the Magistrate meets this objection by saying that he has stated in the order that both parties were claiming the land as their own. But a breach of the peace is not a necessary, though it is a frequent sequel, to adverse claims of right.

6. The second objection, however, does not rest on a technicality, but a real injustice to the 2nd party. The notice was served on him on the 18th January. He put in his written statement on the 16th as ordered and applied for summonses to his witnesses, giving reasons for being unable to bring his witnesses with him. The Magistrate rejected his application and decided the case on the evidence brought by the 1st party. The Magistrate in his explanation considers it is optional for the Magistrate to allow an adjournment for evidence, if the parties do not bring their witnesses with them. He adds that he would have given an adjournment, had he not been in a position to decide the question on the evidence before him. That evidence was oral evidence for the 1st party and documentary evidence for the second. The view taken by the Magistrate practically amounts to this that, if any evidence at all is produced, the Magistrate is at liberty to dispose of the case notwithstanding the fact that one party may, through no fault of his own, have been unable to produce any evidence. The Magistrate, as I understand, considers that, because the 2nd party produced documentary evidence no further opportunities should be given him. I suppose on the theory that his oral evidence could not go further than the documentary. But the documents could be no evidence, until proved, and even if proved, could be no evidence of possession. And the hardship in this case is accentuated by the fact that the order only calls upon the parties to put in written statements. There is no order to produce evidence.

7. The law, as I understand it, is that the parties are to put in written statements of the fact of actual possession. It may be that the written [418] statements alone will show, which party is in possession, in which case evidence is unnecessary. But, if the written statements do not show this, the Magistrate is to receive the evidence produced by the parties and for him to be able to do this, he must give the parties a reasonable chance to produce their evidence. Then, if he is not satisfied with the evidence, he may take further evidence. It appears to me to be an untenable position to state that the law (1) compels the Magistrate to take the evidence of the parties, but (2) authorises him so to arrange the proceedings of his Court, that

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the parties cannot produce evidence. I quite agree in the view that the proceedings should be as summary as possible, but they must be consistent with justice to both parties.

8. If I am wrong in my view that it was absolutely necessary for the Magistrate to give the party an opportunity to produce evidence, I would submit that he has not exercised a proper discretion in refusing an opportunity to the party to bring evidence. I, therefore, recommend that the proceedings be quashed, leaving the Magistrate liberty to institute fresh proceedings, if necessary.

No one appeared on the reference.

The judgment of the Court (RAMPINI and GUPTA, JJ.) was as follows:—

The Magistrate's order should no doubt have set out the grounds on which he was satisfied that a dispute likely to cause a breach of the peace existed. Further, it would have been better, if he had given the 2nd party an opportunity of adducing his evidence.

But the proceedings are under Chapter XII of the Code and are, therefore, not proceedings with regard to which the Judge had any powers of revision or reference.—S. 435 (3).

We have no power to interfere except under the powers of "superintendence" conferred upon by s. 15 of 24 and 25 Vict., C. 104.

There is no provision in the law, which gives the Judge power to call for the record in such a case or to advise us, how we are to exercise our powers of superintendence. In the circumstances we are not disposed to interfere.

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28 C. 419.

[419] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Banerjee.

A. B. MILLER, OFFICIAL ASSIGNEE OF BENGAL AND ASSIGNEE TO THE ESTATE OF AMBICA CHARAN DUTT, INSOLVENT (*Judgment-debtor*) v. LUKHIMANI DEBI (*Decree-holder*).* [28th March, 1901.]

Insolvency Act (11 and 12 *Vic., c.* 21)—*Decree, attachment in execution of—Vesting order—Official Assignee—Priority of claim—Civil Procedure Code* (*Act* (*XIV of* 1882), *s.* 244—*Whether Official Assignee is the representative of the judgment debtor.*

A vesting order made under the Insolvency Act (11 and 12 Vic., c. 21) has not the effect of giving the Official Assignee priority over the claim of a judgment-creditor in respect of property attached, at his instance, previous to the passing of such order.

Anund Chundar Pal v. *Punchoo Lall Soobalah* (1) followed.

Semble: The Official Assignee is the representative of an insolvent judgment-debtor within the meaning of s. 244 of the Civil Procedure Code.

THIS appeal arose out of an application for execution of a mortgage-decree. A decree was made on the 7th July 1885 under a mortgage bond in favour of one Nobin Kristo Roy Chowdhry and on the 11th June 1895, Lukhimani Debi, as administratrix to the estate of Nobin Kristo, attached certain immoveable properties of the judgment-debtors. In 1898 one of the judgment-debtors Ambika Churn Dutt was declared an insolvent, and on the 6th May 1893 a vesting order was

* Appeal from Order No. 102 of 1899, against the order of Babu Karuna Dass Bose, Subordinate Judge of 24-Pergunnahs, dated the 18th of February 1899.

(1) (1870) 14 W. R. (F. B.) 88.