

1903
JULY 7.
CRIMINAL
REFERENCE.

30 C. 927=7
C. W. N. 750

but in his official capacity as Administrator General of Bengal in which capacity alone he has any concern with the said premises; and in support of this contention *In re Gulam Muhammad Sharifuddaulah* (1) is cited.

After considering the arguments on both sides, the conclusion we come to is this, that section 197 of the Code of Criminal Procedure is not applicable to a case like the present, and that the sanction of the Government is not necessary for the institution of the prosecution such as the letter of reference contemplates. It is true, the party charged with the offence in this case holds the office of Administrator General of Bengal; but it is only an accident that the holder of that office is in charge of the premises in question. The capacity in which he is charged is his capacity as administrator to the estate of the late Assaram Burmano, a capacity which might have belonged to him even though he had not been the Administrator General of Bengal, for the Court might in certain events have appointed any other person than the Administrator General as administrator to the estate of the late Assaram Burmano; and the Administrator General of Bengal is in charge of the premises in question not by virtue of his office but by virtue of his appointment by the Court as administrator to the estate of the late Assaram Burmano. The requirement of section 197, that the party charged should be accused as a public servant of any offence, is, therefore, in our opinion not satisfied in this case. The view we take is in accordance with that taken in the case of *Nando Lal Basak v. N. N. Mitter* (2).

It is unnecessary for us in this case to express any opinion as to whether section 197 of the Code of Criminal Procedure is absolutely limited to the offences defined in Chapter IX of the Indian Penal Code. All we decide now is that in a case like the present, one of the requirements of the section, namely, the one we have referred to above, that the party charged is accused as a public servant [934] of the offence with which he is charged, has not been satisfied, and that the section, therefore, does not apply to this case.

The reference will be returned with the expression of our opinion embodied in the foregoing observation.

20 C. 934(=7 C. W. N. 806.)

ORIGINAL CIVIL.

KADAMBINI DASSI *v.* KUMUDINI DASSI.*

[15th July, 1903.]

Practice—Evidence on commission—Oaths Act (X of 1873) s. 13—Foreign Territory—Civil Procedure Code (Act XIV of 1882) ss. 387—399.

A commission was issued by the High Court to take the evidence of a witness in Chandernagore (French territory) s. 387 of the Civil Procedure Code; and the provisions of the Code, so far as they applied, were complied with:—

Held, that the commission was rightly issued and executed under ss. 387 and 399 of the Code.

* Original Suit No. 11 of 1902.

(1) (1886) I. L. R. 9 Mad. 439.

(2) (1899) I. L. R. 26 Cal. 852.

Held, also, that an affirmation (as required by the commission) having been administered and the evidence duly recorded, the commission was correctly executed.

1903
JULY 15.

ORIGINAL
CIVIL.

30 C 934—7
C. W. N. 806.

IN July 1902 Kadambini Dassi, the mother of Gopal Lal Seal, deceased, and one Nogendra Nath Mitter applied to the High Court for grant of probate of a will alleged to have been executed by the said Gopal Lal Seal, who died at Chandernagore on the 25th May 1902. A caveat was entered against the grant of probate by Kumudini Dassi and Nayan Manjari Dassi, the two surviving widows of the deceased. Subsequently Kadambini Dassi, the mother of Gopal Lal, died, and the suit was proceeded with on behalf of the sole surviving plaintiff, Nogendra Nath Mitter. During the hearing of this suit it was proposed by counsel for the younger widow, Nayan Manjari, to read the evidence taken on commission at Chandernagore, of one Sadhu Charan Mukerjee.

[935] Mr. B. C. Mitter (the Offg. Advocate-General, Mr. J. G. Woodroffe and Mr. J. N. Banerji with him) for Nayan Manjari. I propose to read the evidence of Sadhu Charan Mukerjee taken on commission at Chandernagore.

Mr. A. Chaudhuri, (Mr. Garth, Mr. Chakravarti, Mr. Knight and Mr. Seal with him) for the plaintiff, Nogendra Nath Mitter. I object to that evidence being read. As the witness resided in French territory, the oath administered to him was not binding on him, being the oath of this Court. This Court should have requested the French Court to execute that commission. I think I protested at the time of the commission. [HENDERSON, J. Not on that ground.] Indian Oaths Act, ss. 6, 13; and Hume-Williams' Evidence on Commission, pp. 53, 55, referred to.

Mr. Jackson (Mr. Sinha and Mr. Falkner with him), for Kumudini Dassi. The word "omission" in s. 13 of the Oaths Act means any omission: see *The Queen v. Sewa Bhogta* (1).

[STEPHEN, J. Do you mean to say that this Court cannot issue any commission to be executed in French territory?]

Mr. Chaudhuri. Except requesting the Court there to execute it, this Court should give such directions for administering the oath to the witness as might be binding on him: see *Queen-Empress v. Shava* (2).

The Offg. Advocate-General (Mr. Pugh) in reply. If the Evidence Act and the Oaths Act are not in force in this matter, then it is governed only by the Civil Procedure Code, and s. 387 of the Code distinctly applies to this case: Ameer Ali and Woodroffe's Evidence Act (1st edition), p. 45, s. 5, referred to.

Mr. Jackson. S. 399 of the Code goes with s. 387.

[HENDERSON, J. In *Aga Mohammed Jaffer Tehrani v. Mirza Nazirullah* (3), Peacock, C. J. observed (where a commission was issued for the examination of a witness in the kingdom of Ava) that if the evidence were given on oath or affirmation, as required by the commission, such evidence would be admissible.]

[936] STEPHEN AND HENDERSON, JJ. An objection has been taken to the reading of the evidence on commission of Sadhu Charan Mukerjee. It appears that the commission was issued by this Court to take the evidence of the witness in Chandernagore which is outside the jurisdiction of this Court and in French territory. The Commission was plainly rightly issued under section 387 of the Code of Civil Procedure, and

(1) (1874) 14 B. L. R. 294.

(3) (1868) 2 B. L. R. (A. C.) 73.

(2) (1891) I. L. R. 16 Bom. 359.

1903
JULY 15.
—
ORIGINAL
CIVIL. —
—
30 C. 934=7
C. W. N. 806.

being issued it became necessary to execute it according to the provisions of section 399 of that Code. The provisions of the Code of Civil Procedure, so far as they apply, appear to have been complied with. The affirmation (required by the commission to be made) has been administered, and the evidence has been duly recorded. Under the circumstances the commission seems to have been correctly executed within the provisions of the Civil Procedure Code, and we cannot see that section 13 of the Oaths Act, which has been mentioned before us, has any application. Under these circumstances we hold that the evidence taken on commission may be read.

Attorney for the plaintiff : *N. C. Bose.*

Attorney for Kumudini Dassi : *Kali Nath Mitter and Sarbadhkari.*

Attorneys for Nayan Manjari Dassi : *S. D. Dutt and Gupta.*

30 C. 937 (=7 C. W. N. 799.)

[937] ORIGINAL CIVIL.

MOHARI BIBI *v.* SHYAMA BIBI.*

[8th May, 1903.]

Creditor, right of suit by—Debt incurred by Receiver—Estate, liability of—Receiver, personal liability of—Executor or Trustee, nature of liability of—Banian lien of—Damages.

A creditor is entitled to proceed against the representative of an estate for recovery of debt incurred by the Receiver during the management of the estate by him: the right to maintain such suit against the representative is founded on the just and equitable principle that as the acts of a Receiver, acting within his authority, are the acts of the Court, the estate cannot be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them. *Burt, Boulton & Hayward v. Bull* (1) referred to and explained.

A Receiver occupies a position towards an estate in his hands different from that of an executor or trustee: the latter not acting through or under directions of the Court do not and cannot under ordinary circumstances create obligations binding on the estate in favour of creditors.

On termination of a banianship agreement, a banian's lien is indivisible and extends over every portion of the goods come into his possession as security for advances made by him, and he has a right to insist upon retaining the entire quantity of goods in his possession until the full amount of his claim is paid, and he is not liable for damages for refusing to deliver certain portions only of those goods on payment of their full value

ORIGINAL SUIT.

One Pokhram, who carried on a business of merchant and commission agent under the name of Sewaram Buldeo Dass, died on the 6th of April 1901, leaving a large estate, which included the said business as one of the assets. On the 26th of April his cousin, Behary Lall, applied to this Court for grant to him of Letters of Administration to the estate of the deceased. A *caveat* was entered by Shyama Bibi, the present defendant. By consent of both parties, Mr. K. Chaudhuri, Barrister-at-Law, was appointed Receiver of the estate of the said deceased with [938] power, *inter alia*, to carry on the business of the said firm of Sewaram Buldeo Dass for the purpose of winding up the business. By an order made on the 5th of July 1901, leave was given to the Receiver to employ a banian for the purposes of carrying on the business

* Original Civil Suit No. 882 of 1902.

(1) [1895] 1. Q. B. 276.