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follows:—"A cosharer in landed property has no right to do anything which "alters the condition of the joint property without the consent of his co-"sharers." Here it is quite clear that the use which the defendant proposed to make of the joint property is one which entirely alters its condition as regards the other co-sharers, and under that ruling he has no right to make this alteration.

In respect of the khodkast lands it is prefectly clear that the defendant can have no possible right. It has been objected that the lower Appellate Court should not have remanded the suit. The plaintiff in his plaint has given no details of the lands, and merely comes into Court for a general declaration of the rights of the parties. The respondents' pleader eventually addressed us with a view to sustain that part of the judgment which directs a remand. But looking to the form of the plaint, we think that the remand was unnecessary.

Setting aside, therefore, the order of remand, we think that the order in this case must be that the defendant be restrained from growing or causing to be grown indigo on the ijmali lands of the joint proprietors, without the consent of all the proprietors, or without the consent of the ryots who hold tenures in the ijmali lands, and that in respect of the khodkast lands of the plaintiff, he be restricted from growing or causing to be grown indigo without the consent of the plaintiff.

We think the costs of this appeal should be paid by the special appellant.

Before Mr. Justice Loch and Mr. Justice Ainslie.

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Jany. 13.

THE QUEEN *v.* JUNGLI BELDAR.*

Act XXI of 1856—Abkarri Laws—Criminal Procedure Code (Act XXV of 1861 and Act VIII of 1869 s. 61.—Fine, Realization of.

The provisions of section 61 of the Criminal Procedure Code do not apply to fines imposed under Act XXI of 1856; such fines cannot be levied by distress and sale of the offender's property.

See 1 B.L.R. A. Cr. 17.

THE following case was submitted for the opinion of the High Court by the Magistrate of Monghir. Jungli Beldar was sent in by the Police on a charge under Act XXI of 1856, of illicit distillation of spirits, and he admitted his guilt.

The lower Court sentenced him to pay a fine of Rs. 20, and in default to undergo two months' rigorous imprisonment under section 3 Act XXIII of 1860. The defendant elected to go to jail, yet the Joint Magistrate ordered the issue of a warrant for recovery of the fine by distress and sale.

In referring the case, the Magistrate submitted that section 61 of the Criminal Procedure Code was not applicable.

* Reference to the High Court under section 434 of the Code of Criminal Procedure by the Magistrate of Monghyr.

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The question was whether the provisions of section 61, Act XXV of 1861, apply to fines and forfeitures under Act XXI of 1856.

The judgment of the Court was delivered by

AINSLIE, J. (who, after reciting sections 49,71-74 of Act XXI of 1856, proceeded)—It is to be observed, first, that section 72 makes the rules for the trial of cases before a Magistrate applicable, but leaves the punishment to be adjudged under the Abkarri Act, and, second, that it is only by inference from section 74 that imprisonment, on account of non-payment of a penalty, is warranted. There is no specific provision in the Act authorising such imprisonment. By section 3, Act XXIII of 1860, it was specially provided that imprisonment might br awarded in default of payment of a fine or forfeiture under Act XXI of 1856. At the time when Act XXIII of 1860 was passed, and up to the passing of Act XLV of that year, there was no law under which a fine could be realised, after the person sentenced to such fine had undergone imprisonment in default of payment. Section 3, Regulation XIV of 1797, specifically declares that such imprisonment is to be held as equivalent to the fine, and Act II of 1839 which gave power to levy the amount of a fine by distress and sale of the goods and chattels of the offender found within the jurisdiction of the Magistrate, made imprisonment in default conditional on and therefore subsequent to the non-realization of the fine by such distress and sale. The Indian Penal Code for the first time provided in section 70 for the realization of fines, notwithstanding imprisonment on default, and this was expressly done to take away from an offender a choice (which up to that time he had been able to exercise in most cases) whether he would suffer in person or property, but section 70 only applies to offences under the Code (see section 40), and section 5 declares that nothing in the Act is intended to vary or affect any of the provisions of any special or local law.

By section 5, Act I of 1868, the provisions of sections 63 to 70, both inclusive, of the Penal Code, and of section 61 of the Criminal Procedure Code, were declared to apply to all fines imposed under the authority of any Act thereafter to be passed, unless such Act shall contain an express provision to the contrary. Section 61, as amended by Act VIII of 1869, is as follows:—"Whenever an offender is sentenced to pay a fine, the Court which sentences him, whether or not the offence be punishable with fine only, and whether or not the sentence direct that in default of payment of the fine, the offender shall suffer imprisonment, may issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender * * * *." The first words of this section are apparently very wide, but I am of opinion that they cannot operate to give a Magistrate any extended power of punishment. This section is part of a Code of Procedure, and we must look, not to the rules of Procedure, but to the law which declares an act to be an offence and prescribes the penalty for it, to ascertain the extent of punishment that can legally

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be awarded. As regards offences under the Penal Code this section, however read, gives no extended power, for all that may be done under it, may be done under that Code. As regards offences under special or local laws, it seems to me clear from section 5 of the Penal Code and sections 9 and 21 of the Procedure Code that it does not give such extended power. Section 5 of the Penal Code expressly excepts special and local laws from being in any way affected by its enactments. Section 9 of the Procedure Code shows that "trial" does not include punishment—the words are "and the word 'determined' (shall be deemed) to comprise trial and every subsequent proceeding including the punishment of the offender," and section 21 declares that "the Criminal Courts shall have jurisdiction in respect of offences punishable under any special or local law (*exceptis excipiendis*), and in the investigation and trial of the offences hereby declared to be within their jurisdiction, shall be guided by the provisions of this Act"; therefore reading this last section with section 9, I hold that the procedure Code was not intended to give any power of punishment as a result of trial beyond what is given by the special or local law. A different construction would be inconsistent with section 72, Act XXI of 1856, which certainly does not contemplate that any rule of procedure should operate to modify the substantive law.

The true construction of section 61 of the Criminal Procedure Code appears to me to be this ; that directly on passing a sentence which includes a fine leviable by distress, whether that be the only punishment or not, and whether any provision be made for imprisonment on default of payment or not, it shall be lawful for the Magistrate to issue his warrant, for the levy of the fine by distress and sale of the goods of the offender ; or in other words, that the provisions of Act II of 1839, which postponed imprisonment till the distress and sale of goods had failed to realize the fine, are modified so that imprisonment and distress may be simultaneously ordered, and that imprisonment, whether as a part of the original punishment or as a contingency arising out of it, shall not be allowed to stop the process for levy of the fine so as to give the offender time to remove his goods beyond the reach of the law, when the law under which the fine is imposed authorises such levy by distress and sale of the goods.

The fact that the general clauses of Act I of 1868, section 5, and the similar Bengal Act V of 1867, section 4, extend the provisions of sections 63 to 70 of the Indian Penal Code and section 61 of the Criminal Procedure Code to all fines imposed under laws enacted subsequently to the passing of those Acts, without any direct recital of those sections in such laws, shows that those provisions could only be previously applied by direct reference thereto.

Moreover, on general principles, I think, we are bound to hold that an enhanced punishment for any offence must be based on positive enactment and not on inference.

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Consequently, I am of opinion that the order of the Joint Magistrate of Monghir, directing the levy of the fine imposed on Jungli Beldar, notwithstanding his having undergone imprisonment in default of payment of that fine, is without authority in law and must be quashed, and that the fine or any part of it that may have been levied must be refunded.

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August 15.

Before Mr. Justice Loch and Mr. Justice Ainslie,

IN THE MATTER OF THE PETITION OF KOWLBAS KOER.*

Court of Wards—Act IV of 1870*(B. C.)—Sanction of Commissioner to Proceedings.*

UPON the application of Kowlbas Koer, the mother of Baboo Chaker Sami Narayan, requesting that the estate of her son might be placed under charge of the Court of Wards, as he was incapable of managing his affairs, owing to his disordered intellect, the Collector of Sarun held a preliminary enquiry and forwarded the proceedings to the Judge with an unverified petition for an order that the estate might be placed under the management of the Court of Wards. The petition of Kowlbas Koer was not verified.

After receipt of the proceedings from the Collector, the Judge examined several witnesses, and being of opinion that Chaker Sami Narayan was of weak intellect, addicted to taking bhang and other intoxicating drugs, and incapable of managing his estate, passed an order for placing the estate in the hands of the Court of Wards.

Chaker Sami Narayan appealed to the High Court.

Baboos *Gopal Chandra Mookerjee* and *Mahes Chandra Chowdhry* for the petitioner.

Baboo *Annada Prasad Banerjee* for the Court of Wards.

The judgment of the Court was delivered by

LOCH, J.—This is a proceeding under Act XXXV of 1858. It is observable at the outset that it is clear that no application was regularly before the Judge. Mussamat Kowlbas Koer, the mother of the alleged lunatic, presented a petition to the Collector, who, after certain enquiries, forwarded it to the Judge for orders thereon, but the Collector was not the duly constituted agent of the lady for the purposes of this application, and he did not himself formally move the Court, as he was entitled to do under section 3 of the Act, assuming that that section is not modified by Act IV of 1870 (B.C.). If the application was one by the lady, it would be bad for want of verification, as has been ruled in other cases. These rulings probably do not apply to the Collector acting on behalf of the Court of Wards, as it is admitted that it would be impossible to impute any improper

* Miscellaneous Regular Appeal, No. 318 of 1871, from an order of the Judge of Sarun, dated the 24th July 1871.

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or malicious motive in this matter to that officer; but then there is this difficulty that, under Bengal Act IV of 1870, the Commissioner of the Division is the Court of Wards; and under section 19, the Collecto· was bound to make a report to the Court of Wards; and that Court under section 24 can order the Collector to apply to the Civil Court under the provisions of Act XXXV of 1858; but there was no report to the Commissioner, and no authority given to the Collector to set the Civil Court in motion, and consequently the proceedings are informal *ab initio*. It has been contended that the proceedings taken were under section 27, Act IV of 1870 (B. C.); but if so (and certainly it does not appear that they were under this section), they equally required the order of the Court of Wards, before any steps could be taken in the Civil Court.

Under these circumstances we are unable to express any opinion upon the merits of the finding recorded by the Judge below. The proceedings are null and void, and the finding of the 24th July 1871 is set aside.

Before Mr. Justice Bayley and Mr. Justice Paul.

1872
Aug 21

BRAJA NATH KUNDU CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* A. STEWART (DEFENDANT). *

Enhancement of Rent, suit for—Act VIII of 1869 (B. C.)—Jurisdiction—Lands occupied by Buildings.

A suit for enhancement of rent under Act VIII of 1869 (B. C.) will not lie in respect of lands occupied by buildings. A landlord who allows his lessee to invest capital in erecting buildings on land let for cultivation, and raises no objection for a considerable number of years, will not be allowed to disturb the holding. The fact of buildings having been permitted without objection to stand on lands for a considerable number of years is *primâ facie* proof that the land had been originally leased for building purposes.

Baboos *Kali Prasana Dutt* and *Mahendra Lar Seal* for the appellants.

Baboos *Sham Lal Mitter* and *Amarendra Nath Chatterjee* for the respondent.

THE facts of this case and the arguments of the pleaders are sufficiently set forth in the judgment delivered by

PAUL, J.—These cases have taken unusual time in argument, but in fact there is very little to be said in them. The facts are shortly these :—

The plaintiff who is not the original zemindar, but the representative of the original zemindar, and who has recently come into possession of the zemindari within which the lands in dispute are situated, has chosen to institute this highly speculative suit, without making due and proper enquiry, and he has attempted to support it by false allegations and false suggestions. It

*Special Appeals, Nos. 534, 535, and 536 of 1871, from the decrees of the Judge of Hooghly, dated the 14th February 1871, affirming the decrees of the Moonsiff of that district, dated the 28th November 1870.