

1872

In making the reference, the Judge cited Broom's Commentaries on the Common Law, 3rd edition, page 270, and *Collins v. Blantern* (1).

GAURINATH
MOOKERJEE
v.
MADHUMANI
PESHAKAR.

The following was the judgment of the High Court :—

We are of opinion that the principles which governed the English cases cited by the Judge are applicable to this country, and that his decision was correct.

1872
Sept. 9.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie

PROTIMA AURAT (PLAINTIFF) v. DUKHIA SIRKAR AND OTHERS (DEFENDANTS).*

Illegal Contract—Money paid under an illegal Contract.

THE following case was submitted by the Judge of the Small Cause Court of Serajunge :—

"The plaintiff alleges that her husband was in *hajāt* in a case of *bad-maashi*, and while there, the defendants took from her Rs. 50, on condition of causing the release of her husband, but they failed to perform the contract: the defendants deny the receipt of any money from the plaintiff or the entering into any contract with her for the purpose of causing the release of her husband. The plaintiff, in her plaint, has not stated anything as to how the money that she paid to the defendants was to be spent, and to whom it was to be paid. From the evidence of two of the plaintiff's witnesses, it appears that the defendants received the money from the plaintiff to pay the same as a bribe to the darogah, under whose custody [her husband] was; this fact elicited from the plaintiff's own evidence renders it quite clear that the contract on which the money was paid was an illegal one; it was in fact a contract which was against public policy, and intended to evade the course of law; such a contract cannot be enforced in a Court of Justice, and money paid under such an illegal and immoral contract cannot be recovered by suit. I am of opinion, therefore, that the plaintiff's case must fall down on her own evidence. . . . But as her pleader has pressed it upon me that the case may be referred to the High Court for opinion, I deem it proper to refer this case under s. 22 of Act XI of 1865. I, therefore, dismiss the plaintiff's claim with costs and interests, subject to the opinion of the High Court as to whether money paid for an illegal purpose, as bribing a darogah, can be recovered by a suit in Court."

The judgment of the High Court was delivered by

COUCH, C. J.—The Judge's view of the law is right.

* Reference, No. 14, dated the 18th July 1872, from the Judge of the Small Cause Court at Serajunge.

(1) 1 Smith's L. C., 325.

Before Mr. Justice Macpherson.

WARDEN v. WARDEN AND ANOTHER.

Divorce—Inability to serve Decree nisi on Respondent.

1872
Nov. 18.

Mr. Branson moved on behalf of the petitioner to make absolute a decree nisi dated 28th March 1872, for the dissolution of his marriage with the respondent. The petitioner had tried in vain to discover the whereabouts of the respondent and co-respondent, and had been unable to serve them with copies of the decree nisi. Mr. Branson submitted that the Court could, under the circumstances, make the decree absolute without such service—*Willis v. Willis* (1).

His Lordship made the decree absolute.

Before Mr. Justice Glover and Mr. Justice Mitter.

IN THE MATTER OF THE PETITIONS OF GABINDA CHANDRA GHOSE AND ANOTHER.

1872
Sept. 17.

Code of Criminal Procedure (Act XXV of 1861), s. 318—Parties to Proceedings under s. 318—Who are to be served with Notices under s. 318—Right of a Party in proceedings under s. 318 to summon Witnesses—Discretion of the Magistrate.

The Deputy Magistrate of Khoorna had instituted proceedings under s. 318 of the Code of Criminal Procedure, with respect to 350 bigas of land called Ghineerabad, possession of which was claimed by Ananda Chandra Sirkar and Benimohan Biswas on one side, and Gabinda Chandra Ghose and Shamasundari Dasi on the other. Upon the complaint of one Tamizuddin, gomasta of Ananda Chandra Sirkar and Benimohan Biswas, notice was ordered to be served on Gabinda Chandra Ghose. After the Deputy Magistrate had taken evidence as to actual possession from both parties, Shamasundari Dasi presented a petition at the last moment, praying to be made a party, as she was a co-sharer with Gabinda Chandra Ghose and others and was in possession, and for summonses against certain persons to appear to give evidence in support of her claim. The Deputy Magistrate examined one witness, who was present in Court, on her behalf, and refused to postpone the case for the examination of the other witnesses named in her petition. The Deputy Magistrate held that Ananda Chandra Sirkar and Benimohan Biswas were in possession, and passed an order retaining them in possession.

Gabinda Chandra Ghose and Shamasundari Dasi moved the Sessions Judge to refer the proceedings of the Deputy Magistrate to the High Court, under s. 434 of the Code of Criminal procedure, to have the order passed by the Deputy Magistrate quashed for various reasons. The Sessions Judge, however, referred the proceedings to the High Court on only two points. He was of opinion that, as Ananda Chandra Sirkar and Benimohan Biswas claimed to

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Jessore.

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held the land under a lease from several parties as co-proprietors, one of whom was Gabinda Chandra Ghose, who had appeared and denied the genuineness of such lease, and of possession under it, the Deputy Magistrate was wrong in passing a decision in the matter without giving notice to the other co-proprietors, as required by s. 318 of the Code. He was also of opinion that the Deputy Magistrate ought not to have refused to summon the witnesses named by Shamasundari, on the ground that her application was made at the last moment.

Mr. *Rochfort* for Gabinda Chandra Ghose and Shamasundari Dasi in support of the reference.

Mr. *Sandel* and Baboo *Jaigabind Shaw* for Ananda Chandra Sirkar and Benimohan Biswas were not called upon.

The judgment of the High Court was delivered by—

GLOVER, J.—This is a reference made by the Sessions Judge of Jessore to have a certain order passed under s. 213 of Act XXV of 1861 by the Deputy Magistrate of that district quashed.

The only substantial ground on which the Judge thinks the Deputy Magistrate's order illegal is that, whereas the *patta* under which one of the parties in this case claims was signed by a great number of co-sharers of the land in question, and all of those co-sharers have not been served with notice, but only one of them, this is a sufficient ground for invalidating the whole of the Deputy Magistrate's proceedings.

There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may, in some shape or other, form the subject of a litigation under s. 318. That section says, that, after a Magistrate is satisfied that a dispute likely to induce a breach of the peace is about to take place within his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to give in written statements of their respective claims. It is quite clear that the other co-sharers who, Mr. Rochfort contends, have not been served, were not concerned in the dispute, for in that case they would have undoubtedly appeared in the Court below and taken steps to support the reference made by the Judge. The only parties concerned were those who did appear before the Deputy Magistrate: and although it may be technically said that Shamasundari got no notice, it is clear that she was all along aware as to what was going on for she appeared in Court and prayed to have witnesses examined on her behalf. That her case was not thoroughly gone into was her own fault, for the petition asking for the examination of the witnesses was made, as the Deputy Magistrate says, at the last moment; and in the exercise of the discretion allowed him by the law, he refused to grant any further postponement of the case.

Under the circumstances it appears to us that there is no ground on which to support the Judge's recommendation, and we accordingly decline to interfere with the order of the Deputy Magistrate.