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HAZARI MULL NAHATTA v. SOBAGH MULL DUDDHA.

bills to the extent of Rs. 12,000. The total amount which they received from the plaintiffs (including the two hundis now sued for) was Rs. 11,400; so that they paid Rs. 600 more than the value of the other hundis sent. That being so, they had a lien on these two bills for Rs. 600. I think it is clear from the evidence, and it is almost admitted by the plaintiffs, that, when Suratram Rybhun stopped payment, they had a lien on these bills to the extent of Rs. 600.

So far I deal with the case as between Suratram Rybhun and the plaintiffs.

Mr. Marindin, however, contends that the bills were endorsed over for a good consideration (to provide for the body of the creditors of Suratram Rybhun), and that the defendant is entitled to hold them, even if Suratram Rybhun themselves could not have done so. But the defendant took no higher title than Suratram Rybhun had; for the endorsement was after due date, and the circumstances under which Suratram Rybhun held the hundis were known.

The plaintiffs are entitled to recover the bills, subject to the lien for Rs. 600, and to costs on scale No. 2.

Attorneys for the plaintiffs: Messrs. *Beeby* and *Rutter*.

Attorney for the defendant: Mr. *Linton*.

[APPELLATE CRIMINAL.]

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

QUEEN *v.* CHANDRA JUGI (APPELLANT).*

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April 9.

Power of a single Judge of the High Court—Appeals in Criminal Cases.

A Judge of the High Court, sitting alone on the Appellate Side, has the power to hear and dispose of appeals in criminal cases.

THE Sessions Judge of Jessore, not concurring with the assessors, found the prisoner Chandra Jugi guilty of an attempt to commit murder, and sentenced him to rigorous imprisonment

* Criminal Appeal, No. 143 of 1872, from an order of the Sessions Judge of Jessore, dated the 18th December 1871.

for the term of seven years. The prisoner, on the 18th December 1871, presented a petition of appeal from the conviction, which petition was heard and rejected on the 27th January 1872 by Glover, J., sitting alone.

On the 15th February 1872, Baboo *Bhairab Chandra Banerjee* for the prisoner presented another petition of appeal from the said order. This appeal came on for hearing before a Division Bench of the High Court (Couch, C.J., and Ainslie, J.)

Baboo *Bhairab Chandra Banerjee,* for the prisoner contended that there was nothing in the Criminal Procedure Code expressly authorizing a single Judge of the High Court to try and reject criminal appeals, but the practice had been for a single Judge to hear criminal appeals in the first instance, and to refer them to another Judge if it was necessary either to modify or reverse the sentence of the lower Court. This practice was adopted by the High Court, and continued to be in force *till* 1867 or 1868, since which time all such appeals have been heard by a Division Bench consisting of two Judges. In 1869 Peacock, C. J., questioned the authority of a single Judge to decide criminal appeals, and re-tried certain cases which had been so decided. Under 24 & 25 Vict., c. 104, s. 13, the High Court has the power by its own Rules to provide for the exercise of appellate criminal jurisdiction by a single Judge ; but as no rule seems to have been made by the High Court since 1869 conferring upon a single Judge the power of exercising criminal appellate jurisdiction, the order passed by Glover, J., rejecting the appeal, was passed without jurisdiction. Cl. 36 of the letters Patent of 1865 does not confer any authority upon a single Judge to dispose of such cases, unless there be a Rule of Court authorizing the same, and a single Judge be appointed under such Rule to dispose of such cases. As a matter of practice, however, it must be admitted that, since November 1870, single Judges have tried criminal appeals ; but such a practice does not confer any authority, and the decisions passed by Judges sitting singly might be questioned.

COUCH, C. J.—In this case the prisoner presented a petition of appeal to this Court from a conviction by the Sessions Judge,

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which was disposed of on the 27th of January by Glover, J., sitting alone. The learned Judge rejected the petition. The petitioner has now his pleader presented another petition, which was filed on the 15th of February, within the time allowed by law; and therefore the question arises whether the first petition was properly disposed of. If it was, the Court will not allow the matter to be re-opened.

Now the 13th section of the 24 & 25 Vict., c. 104, for constituting the High Court, enacted that the exercise of the original and appellate jurisdiction vested in the Court by one or more Judges, or by Division Courts constituted by two or more Judges, was to be provided for by rules of the Court. I have not found that any formal Rules under this section were passed until the 1st of January 1865; but the practice of disposing of some business by one Judge and of other business by a Division Court existed from the time of the institution of the High Court, which on the Appellate Side, for the most part adopted the practice of the Sudder Court. But, on the 1st of January 1865, a Rule was made by which it was declared that all Rules, which at the time of the abolition of the Sudder Court were in force in that Court, were to extend, so far as they were applicable, and as nearly as might be, to all proceedings of appellate jurisdiction in the High Court, not being cases of appeal from the ordinary original civil jurisdiction of the Court except so far as such Rules were contrary to the said 24, & 25 Vict., c. 104, or to the Letters Patent, or as the same might have been or should thereafter be altered or modified by the Court. Those words are very important; the Rules of the Sudder Court were to be in force, except so far as the same might have been altered or modified by the Court before that time. Now it appears that there was a Rule of the Sudder Court of the 27th of April 1854, which required that all criminal cases, whether appeals or referred cases, should be tried before a Bench of at least two Judges. But on the 14th of June 1854, a modification of that Rule was made, and it was then provided that, "if, by accident or indisposition, one of the Judges, forming a double Bench for the trial of Nizamut cases, is prevented from attending the Court, it shall

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be competent to his colleague, sitting alone, to take up and dispose of any appeals or referred criminal trials, in which the opinion of the Sessions Judge agrees with the fatwas of the Law Officer, or the verdict of the jury or assessors who tried the case, reserving for the consideration of his colleague any case in which he may entertain doubt, or may be inclined to differ from the Sessions Court."

In the Rules made on the 1st of January 1865, which were continued in force by a Rule made on the 2nd of January 1866, after the issuing of the Letters Patent now in force, there is another Rule (No. 30) which says that "appeal on the criminal side of the appellate branch of the Court, which are in the first instance heard before one Judge, may, if he think fit, be referred to such Division Court." And the previous Rule (No. 29) is that "a Division Court for the hearing of criminal appeals may consist of two or more Judges." This Rule, 30, shows that, either in the time of the Sudder Court or of the High Court, a practice had existed of criminal appeals being in the first instance heard before one Judge. The language of the Rule clearly shows this. It recognizes it as a practice, which was then in existence, and provides that the Judge may, if he think fit, refer the appeal to the Division Court. Therefore, whatever might have been the Rule of the Sudder Court, it had, before the passing of the Rules of the 1st of January 1865, been altered or modified so as to allow of criminal appeals being heard in the first instance before one Judge. Even if that were not so, this Rule, 30, might be considered as implied by allowing appeals so to be heard, although it does not in terms say that they shall be. By providing that the Judge may refer appeals to a Division Bench, it impliedly authorizes him to hear them in the first instance.

There is really, then, a Rule of this Court made under the authority conferred upon it by the 13th section of the Act constituting the Court, allowing a single Judge in the first instance to hear criminal appeals; and the papers which we have got showing what took place in the matter when it came before Sir Barnes Peacock, confirm the view of what was the practice of the High Court at the time the Rules of 1865 were made.

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There is a minute of Sir Barnes Peacock dated the 8th of February 1869, in which, speaking of what the practice had been, he says:—"As criminal appeals were formerly heard and determined by one Judge of the Sudder Court, except in cases in which the order had to be signed by two Judges under s. 420 of the Code of Criminal Procedure, I have thought it right to appoint each of the Judges of the 3rd and 5th Benches, sitting alone, to hear and determine criminal appeals."

The appointment of four of the Judges to sit singly to hear criminal cases was made by an order of the same date. That appears to have been objected to as being an exercise of a power which did not belong to the Chief Justice under the Act of Parliament. The power of the Chief Justice was not to make a Rule that criminal appeals should be tried by a single Judge; but that if there was Rule of the Court to that effect, he was to determine what Judges should sit to hear them. And his attention having been called to that, Sir Barnes Peacock, in a minute dated the 12th of February 1869, says:—"I find that there was a Rule of the late Sudder Court under which all appeals in criminal cases and cases for revision were required to be heard before two Judges. I do not find that that Rule was ever revoked. Under these circumstances, I doubt whether the Rule of this Court which provides that all such business, as was formerly heard and determined by one Judge of the Sudder Court, may be heard and determined by one Judge of the High Court, authorizes the appointment of one Judge to hear criminal appeals or revisions." And he revoked the order which he had made on the 8th of February.

Now it is to be observed that the learned Chief Justice appears not to have had present to his mind the Rule 30 at all. He does not refer to it, and he assumes that the matter was governed by the Rule of the Sudder Court which required that criminal appeals should be heard before two Judges. And that Rule never having been revoked, he considered that every criminal appeal must be heard by two Judges. But there was the circumstance which appears in his own minute, that it had been the practice in the Sudder Court for one Judge to hear criminal appeals; and there was the Rule 30 showing that the

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High Court had adopted that practice. I think that Sir Barnes Peacock if he had had his attention called to Rule 30, and the undoubted practice for one Judge to hear criminal appeals, would not have considered that a single Judge sitting alone had no power to try criminal appeals. He had exceeded the power of the Chief Justice in making the Rule that single Judges should sit alone to hear criminal appeals. But these papers do not show that the Rules of the Court did not and have not allowed criminal appeals to be disposed of by single Judges. And it appears that from November 1870, if not from the constitution of the Court, single Judges have constantly heard appeals in criminal cases, and disposed of them, as was done by Glover, J., in this case. I think the learned Judge had power to reject the former petition, and therefore we cannot allow the second petition to be considered.

Appeal dismissed.

[ORIGINAL CIVIL.]

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

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April 3

S. M. NISTARINI DASI (PLAINTIFF) *v.* MAKHANLAL DUTT AND ANOTHER (DEFENDANTS).

Hindu Law—Maintenance of Widow—Declaratory Decree—Raising Issues not raised by Pleadings—Relief—Security for Costs of Appeal—Act VIII of 1859, *s.* 342.

I. L. R.
1 Cal. 371.
2 Cal. 315.

In a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate which had been mortgaged to the defendant by the heir, the plaint prayed "that the rights of the plaintiff over the estate of her husband by way of maintenance, and for the expenses attendant on the marriage of her daughters, might be ascertained and declared; that it might be declared that the defendant took the mortgage subject to the plaintiff's right to maintenance and right to such expenes as aforesaid; that for such purpose all proper accounts might be taken; for an injunction; and for such further or other relief as might be necessary." No specific sum was asked for maintenance, nor was it stated on what portion of the estate the maintenance was sought to be charged, nor that the defendant took with notice of the plaintiff's assertion of her rights. The lower Court held that the suit ought to be dismissed as praying only for a declaration of right. No alteration in the form of the suit or in the issues in this respect was