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depend upon whether it could satisfactorily decide the matter upon the materials before it, or whether those materials would not be more readily available to the Court which passed the decree so as to require that the objection should be made before and decided by that Court. So again in the case of *Srihariy Mundul v. Murari Chowdhry* (1) the matter was considered. The point there was whether a decree having been transferred for execution to another Court, that Court should stay execution so as to leave the objection of limitation to be decided by the Court which passed the decree, and it was decided that either Court had jurisdiction to decide this matter. We, therefore, have no doubt on the decisions of this Court that the Munsif of Behar had jurisdiction to decide whether the execution of the decree which had been transferred to him by the Munsif of Patna was barred by limitation or not. We have been referred to the case of *Ramu Rai v. Dayal Singh* (2) in which a contrary opinion is expressed. We, however, find ourselves unable to concur in the view expressed by the learned Judges in that case, which is moreover opposed to the judgments of this Court. This case, therefore, must be remanded to the District Judge in order that he may consider whether, on the facts of the case before him, the application is barred by limitation, and whether the judgment of the Munsif under appeal is correct in this respect. The costs will abide the result.

S. C. C.

Appeal allowed: case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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 July 18.

NISTARINI DEBI (PETITIONER) v. A. C. GHOSE, OVERSEER, HOWRAH MUNICIPALITY (OPPOSITE PARTY).^a

Transfer of Criminal Case—Criminal Procedure Code (Act X of 1882), sections 526, 555—Incompetence of Magistrate who is Chairman of Municipality to try municipal cases—“Any case,” Meaning of—Prosecution under Bengal Municipal Act (Bengal Act III of 1884.)

An appeal against a conviction under section 217, clause 5, of the

^a Criminal Miscellaneous Case No. 29 of 1895.

(1) I. L. R., 18 Calc., 257.

(2) I. L. R., 16 All., 390.

Bengal Municipal Act (Bengal Act III of 1884), was preferred to the District Magistrate, who was also Chairman of the Municipality. On an application to the High Court for a transfer to the Court of some other Magistrate,—

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Held, that, apart from the question whether there was a disqualification under section 555 of the Criminal Procedure Code, the case was one which it was expedient should be transferred to another Court.

Per BANERJEE, J.—Section 555 of the Criminal Procedure Code renders a Magistrate incompetent to try a municipal case if he is the Chairman of the Municipality. The words “try any case” in that section are comprehensive enough to include the hearing of an appeal.

THE petitioner was convicted under section 217, clause 5, of the Bengal Municipal Act (Bengal Act III of 1884), by a Bench of Magistrates on the complaint of one A. C. Ghose, Overseer of the Howrah Municipality, for encroaching upon a road. An appeal was preferred to the District Magistrate of Howrah, who was also Chairman of the Municipality. Pending the hearing of the appeal, the High Court was moved to transfer the case to the Court of the Magistrate of the 24-Pergunnahs, and a rule was obtained to show cause why it should not be transferred.

Babu Sarat Chandra Ray Chowdry for the petitioner.—The District Magistrate is, under the provisions of section 555 of the Criminal Procedure Code, incompetent to hear the appeal, as he is personally interested in the case by reason of his being also Chairman of the Municipality. The section no doubt provides that a Magistrate shall not be deemed to be a “party or personally interested,” merely because he is a Municipal Commissioner, but here the Magistrate is more than a Commissioner, he is the Chairman, or executive head, of the Municipality. Ordinarily all municipal prosecutions are instituted under his sanction. The transfer applied for is, under section 526, clause (e), of the Criminal Procedure Code, expedient for the ends of justice. It is very desirable that parties should have the fullest confidence in the tribunal that has to try them. See *Queen-Empress v. Erugadu* (1) and *Kharak Chand Pal v. Tarack Chunder Gupta* (2).

The following judgments were delivered by the Court (MACPHERSON and BANERJEE, JJ.) :—

BANERJEE, J.—The petitioner, who has preferred an appeal to

(1) I. L. R. 15 Mad., 83.

(2) I. L. R., 10 Calc., 1030.

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the Magistrate of Howrah against a conviction and sentence under section 217, clause 5, of the Bengal Act III of 1884, asks us to transfer the appeal from the Court of the Magistrate of Howrah to that of the Magistrate of the 24-Pergunnahs, on two grounds: *First*, that, under section 555 of the Criminal Procedure Code, the District Magistrate of Howrah is not competent to try the appeal, as he is personally interested in the case by reason of his being the Chairman of the Howrah Municipality, at whose instance and under whose sanction the prosecution was instituted; and, *second*, that even if it be held that the Magistrate is not incompetent to hear the appeal, still, under section 526 of the Criminal Procedure Code, clause (e), the transfer applied for is expedient for the ends of justice.

In support of the first ground, the learned Vakil for the petitioner contends that though, by the explanation to section 555 of the Criminal Procedure Code, a Magistrate shall not be deemed to be a "party or personally interested," merely because he is a Municipal Commissioner, in the present case the Magistrate is something more than merely a Municipal Commissioner. He is the Chairman, or executive head, of the Municipality; and, ordinarily, municipal prosecutions are to be instituted under his sanction, as will be seen from sections 353 and 44 of Bengal Act III of 1884. It is true that by section 45 of the Act, the Chairman may, by a written order, delegate to the Vice-Chairman all or any of the powers or duties of a Chairman as defined in the Act, and the learned Magistrate in his explanation says that the power of sanctioning municipal prosecutions has been so delegated: but that does not, in my opinion, materially alter the case. Although the power has been delegated, the office to which the power appertains still continues to be held by the Magistrate. The Chairman's connection with and his interest in a Municipality are very different from those of an ordinary Municipal Commissioner. That being so, and having regard to the restricted form in which the explanation to section 555 of the Criminal Procedure Code, excepts the case of a Magistrate who is a Municipal Commissioner from the rule disqualifying a Judge or Magistrate from trying a case in which he is personally interested, I think section 555 renders a Magistrate incompetent to try a

municipal case where he is the Chairman of the Municipality. This view is fully supported by the case of *Queen-Empress v. Erugadu* (1); and the case of *Kharak Chand Pal v. Tarack Chunder Gupta* (2), though not exactly on all fours with the present one, lends considerable support to the view I take. The case of *Queen-Empress v. Pherozshu Pestonji* (3) appears to be in conflict with this view; but the conflict, I think, is only apparent and not real, for the facts of that case were different from those of the present one. The position of the Magistrate so far as can be judged from the report, was not the same as that of the Magistrate in the present case, and the learned Judges who decided that case observe that the cases of *Queen-Empress v. Erugadu* (1) and *Kharak Chand Pal v. Tarack Chunder Gupta* (2) are distinguishable from the one that they had before them.

A question might be raised as to whether section 555 disqualifies a Magistrate from hearing an appeal merely by reason of personal interest, when it only provides that "no Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself." I am of opinion that the words "try any case" are comprehensive enough to include the hearing of an appeal. The reason of the rule is quite as applicable to the hearing of an appeal as to the trying of a case in the first instance, and the express provision in regard to an appeal is made for a different purpose altogether.

Upon the first ground, therefore, I think the petitioner ought to succeed, and the transfer applied for ought to be granted. But even if the first ground had failed, I should have thought that the petitioner was entitled to have the transfer applied for upon the second ground, as it is desirable that parties should have the fullest confidence in the tribunal that has to try them. Next only to the importance of a fair and impartial administration of justice,

(1) I. L. R., 15 Mad., 83.

(2) I. L. R., 10 Calc., 1030.

(3) I. L. R., 18 Bom., 442.

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is the importance of the confidence of parties in the fairness and impartiality of the tribunal which has to try their case.

For these reasons, I would transfer the appeal to the Court of the Magistrate of the 24-Pergunnahs for trial.

MACPHERSON, J.—I do not think it necessary to decide in this case the broad question, whether a Magistrate, who is also the Chairman of a Municipality, is incapacitated under the provisions of section 555 of the Code of Criminal Procedure from trying a case or hearing an appeal in which the prosecution has been sanctioned by the Municipality. I think it is unnecessary, because I have no doubt that even if the Magistrate is qualified to hear the appeal, he ought not to do so. As Chairman, he is the executive head of the Municipality, and, under the law, he is vested in many matters with the power of the Commissioners

The question which is practically raised in this case is, whether the petitioner before us has encroached upon land which the Municipality claim to be a road, but which he claims as his own property, free from any right of way over it. That is a question in which the Municipality as a body is undoubtedly interested, and without making any reflection on the Magistrate before whom the case would, in the ordinary course, come in appeal, it may very well be that the appellant may not regard the tribunal as one which is independent and unconcerned in the results.

For these reasons, I think that the order of transfer ought to be made apart altogether from the question whether there is a disqualification under section 555 of the Code of Criminal Procedure. On that point I should prefer to reserve my opinion rather than decide it in the present case. We agree, therefore, in making the rule absolute, and the appeal will be transferred for trial to the District Magistrate of Alipore.

S. C. B.

Rule made absolute.