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of directing a fresh inquiry" to order the commitment of the accused, and there is nothing in the terms of section 437 which would prevent a District Magistrate from ordering a further inquiry merely because the case may be one triable exclusively by the Court of Sessions. Section 437 declares that such an inquiry may be ordered into the case of any accused person who has been discharged.

The mere fact that the notice to the accused may have been merely to show cause why he should not be committed would not necessarily prevent the District Magistrate from directing a further inquiry instead of a commitment. The accused cannot possibly be prejudiced by such an order passed in his presence, and could not claim a notice, specially under section 437, to show cause why a further inquiry should not be held. In this case the commitment could have been made, and the further evidence, which the District Magistrate desired to have taken, might be tendered at the Sessions Court, but in order to have the case clearer, the District Magistrate thought proper to have the evidence first taken, and this was certainly in favour of the accused.

We therefore see no sufficient reason to interfere. The case will be dealt with by the Deputy Magistrate in accordance with the order of the District Magistrate, and after taking that evidence, the Deputy Magistrate will proceed according to law.

Order upheld.

H. T. H.

CIVIL REFERENCE.

Before Mr. Justice O'Keenly and Mr. Justice Ameer Ali.

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 September 1. NATABAR PARUE AND OTHERS (PLAINTIFFS) v. KUBIR PARUE AND OTHERS (DEPENDANTS).*

Specific Relief Act (I of 1877), s. 9—Right of Fishery—Suit for possession of right to fish in a khal.

A suit for the possession of a right to fish in a khal, the soil of which belongs to another, does not come within the provisions of section 9 of the Specific Relief Act, 1877.

* Civil Reference No. 15A of 1890, made by Baboo Triguna Prosoono Basu, Munsiff of Bongong, dated the 30th of July 1890.

This was a reference by the Munsiff of Bongong, Jessore, under section 617 of the Code of Civil Procedure. The case was stated as follows in the judgment of the Munsiff:—

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“This is a suit under section 9 of Act I of 1877. The subject-matter of dispute is a jalkar. The case as set forth in the plaint is that the plaintiffs held jointly with the defendants possession of the jalkar up to Kartick last. In that month the defendants acquired by private sale the proprietary interest in the said jalkar, turned the plaintiffs out of possession, and came to hold exclusive possession thereof.

“The defendants traverse the allegation of the plaintiffs. They deny that the plaintiffs ever held jointly with them possession of the jalkar in suit; and aver that the jalkar is their property, and that they are in exclusive possession of it. They further object to the maintenance of the suit in its present form.

“The points then that arise for determination are—

“ (1) Is the suit maintainable?

“ (2) Were the plaintiffs in joint possession of the jalkar with the defendants? and

“ (3) Are they entitled to the relief sought for?

“It is clear from the testimony of the plaintiffs' witnesses (if that testimony is to be believed) that the plaintiffs had nothing whatever to do with the soil, but that they had only a right of fishery in the khal described in the plaint. One of the plaintiffs who has been examined says that the jalkar in question dries up in the hot weather, and that with the setting in of the rains they commence fishing. Witness Benode Mondol says that the jalkar dries up in Cheyt and Bysack, and that the fishermen, evidently meaning thereby the plaintiffs, do not repair to the jalkar then. The evidence then clearly leaves upon me the impression that it is no possession of an immoveable property that is sought to be recovered, but a right to fish in a *khal* when it is full of water and stocked with fishes, or, in other words, a right to enjoy the produce of water within certain prescribed limits is sought to be enforced. That being so, I have grave doubts if the suit can lie under the provisions of section 9 of Act I of 1877. That section distinctly provides for possession of specific *immoveable property*.

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“Now the possession of the jalkar in the case, as we have seen, is quite a distinct and separate thing from possession of immoveable property such as contemplated by the section above referred to. The case of *Parbutty Nath Roy Chowdhury v. Mudho Paroe* (1) has been cited by the plaintiffs to show that jalkar is an interest in immoveable property. I have very carefully gone through the case. It has been held there by the Hon'ble Judges of the High Court that jalkar was not an easement, but an interest in immoveable property within the meaning of the Limitation Act. That being the case, the ruling cited by the plaintiffs cannot help them in any way. The case of *Kalee Chunder Sein v. Adoo Shaik* (2) shows, on the contrary, that section 15 of Act XIV of 1859, which has been replaced by section 9 of Act I of 1877, provided a special remedy for a particular kind of grievance, *e.g.*, to replace in possession a person who had been evicted by a wrongful act from *landed property*, of which he had been in undisturbed possession, and to prevent a powerful person from thus shifting the evidence of proof from himself to another less able to support it. However, as the point is one not free from doubt, I deem it expedient, under the provisions of section 617, to refer it to the High Court for an expression of their Lordships' opinion. Accordingly, the suit is adjourned, pending receipt of the orders of the High Court.”

Baboo *Harendra Nath Mookerjee* for the plaintiffs.

Baboo *Karuna Sindhu Mookerjee* for the defendants.

The opinion of the Court (O'KINEALY and AMBER ALI, JJ.) was as follows:—

This is a question on a reference made by the Munsiff of Bongong, as to whether section 9 of the Specific Relief Act applies to a case now before him. The facts as found by him, and on which the reference is based, are as follows:—Plaintiffs and defendants had jointly obtained the power to fish on another man's land, that is to say, they obtained a benefit out of another man's land; but had no interest in the soil itself. Subsequently one of the defendants bought the *Gyanti* tenure on which this jalkar lies; and he prevented his co-sharers from fishing at certain period of the year,

(1) I. L. R., 3 Calc., 276.

(2) 9 W. R., 602.

when the khal became full. The Munsiff is of opinion that such a suit does not come within the purview of section 9, Act I of 1877, and in that opinion we concur. It is clear that the plaintiffs have no right to the land, nor are they in possession of the land; and all that can be said in their favour is that for a certain part of the year they had power or license to fish. A dispute in regard to that does not, in our opinion, amount to a dispossession from any immoveable property, under section 9 of Act I of 1877 (1).

Let this expression of opinion be communicated to the Munsiff of Bongong.

C. D. P.

CIVIL RULE.

Before Mr. Justice Ghose and Mr. Justice Rampini.

JOGI AHIR (DEFENDANT), PETITIONER, v. BISHEN DAYAL SINGH
(PLAINTIFF), OPPOSITE PARTY.*

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July 25.

Provincial Small Cause Court Act (IX of 1887), s. 17—Application for new trial—Deposit of decretal amount or security for same, condition precedent to the granting of such application.

It is a condition precedent to the granting of a new trial that, in accordance with the provisions of section 17 of the Provincial Small Cause Court Act, 1887, an applicant should at the time of presenting his application for new trial deposit in Court the decretal amount or tender security for payment of the same.

Ramasani v. Kurisu (2) dissented from.

THIS was a rule calling upon the opposite party, Bishen Dayal Singh, to show cause why the order of the Munsiff of Buxar, dated 30th December 1889, refusing to grant the petitioner, Jogi Ahir, a new trial in a Small Cause Court case, should not be set aside.

A suit was instituted against the petitioner in the Court of the Munsiff of Buxar, and decreed *ex parte* against him on the 16th September 1889. An application for a new trial was filed on 16th Kartick 1296 (31st October 1889); but the petitioner did not at

* Civil Rule No. 392 of 1890, against the order of Baboo Purna Chunder De, Additional Munsiff of Buxar, dated the 30th of December 1889.

(1) See the case of *Bhundal Panda v. Pandai Pos Patil*, I. L. R., 12 Bom., 221, (Ed.)

(2) I. L. R., 13 Mad., 178.