

has vested in some other heir who was entitled to it before the adoption. It would obviously lead to inconvenience and injustice to allow vested interests to be divested in such cases.

The contention of the appellant is therefore wholly opposed to the authority of decided cases. It is equally repugnant to the spirit of the Hindu law. According to the law of the Bengal school, an adoption by a widow according to the express permission of her husband is a perfectly valid adoption. [See *Dattaka Chandrika* I, 7; *Macnaghten's Principles of Hindu Law*, p. 91—*The Collector of Madura v. Muttu Ramalinga Sathupathy* (1).] Such an adoption, if it is to be of any effect, must lead to the divesting of some vested interest in the property left by the person to whom the adoption is made. It was not denied that if the appellant had joined in the act of adoption, it would have been operative in divesting her estate. Now when a man authorises an adoption by any of his widows, it is clearly the religious duty of all his widows to co-operate in bringing it about; and it would be contrary to reason and justice to allow any one of them to gain an advantage by opposing or withholding her consent from that which it is her duty to accomplish.

The grounds urged on behalf of the appellant, therefore, all fail, and this appeal must consequently be dismissed with costs.

Appeal dismissed.

J. V. W.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

QUEEN-EMPRESS *v.* MANIRUDDIN MUNDUL.*

Magistrate, Power of—District Magistrate, Power of, to order further enquiry—Improper discharge—Sessions case, Further enquiry directed in—Criminal Procedure Code (Act X of 1882), ss. 436, 437.

It is competent to a District Magistrate, who has issued a notice to an accused person who in his opinion has been improperly discharged to show cause under section 436 of the Criminal Procedure Code why he should

* Criminal reference No. 168 of 1890 made by H. Cox, Esq., Officiating Sessions Judge of Faridpur, dated the 30th of June 1890.

(1) 1 B. L. R., P. C. 1; 10 W. R., P. C. 17; 12 Moore's I. A., 397.

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not be committed to the Court of Sessions, on cause being shown to order a further inquiry under the provisions of section 437.

THIS was a reference from the Officiating Sessions Judge of Faridpur, the facts of which were as follows:—

One Maniruddin Mundul preferred a charge of dacoity against certain persons. His complaint was investigated by the police and the Joint-Magistrate, and the latter came to the conclusion that the charge was false, and directed the records of the case to be sent to the District Magistrate under section 476 of the Code of Criminal Procedure, with the view of proceedings being instituted against the complainant under section 211 of the Penal Code for bringing a false charge. The District Magistrate made the case over to a Deputy Magistrate, with a view to committing the accused to the Sessions under section 211, clause 2 of the Penal Code. The Deputy Magistrate heard the case and examined some twenty witnesses on the part of the prosecution, and ultimately came to the conclusion that the charge of making a false charge of dacoity was not satisfactorily established, and discharged the accused under section 209 of the Code of Criminal Procedure. On the record of the case coming before the District Magistrate on the 22nd April 1890, that officer passed the following order:—

“On an examination of the record of the case *Empress v. Maniruddin Mundul*, section 211, Indian Penal Code, in which the accused was discharged by Baboo Raj Mohan Chuckerbutty on the 25th March 1890, under section 209 of the Code of Criminal Procedure, it appears that the accused has been improperly discharged. I therefore direct that a notice be issued on the said Maniruddin to show cause before me, on the 5th May next, why he should not be committed to the Court of Sessions for trial. Let notices also be given to Gool Mahomed and others, accused by Maniruddin, to appear before me on that day.”

On the 5th May the accused through his pleaders presented a petition showing cause against the rule. The District Magistrate did not hear the pleaders, but adjourned the case to the 15th May, on which day the prosecution filed a further list of witnesses whom they desired to be examined. The District Magistrate fixed the 25th May for a further hearing of the case, on which day apparently nothing was done. On the 28th May the District Magistrate made

an order directing a Deputy Magistrate to examine the witnesses and submit the record with his report.

On the case being taken before the Sessions Judge, that officer on the 30th June referred the matter to the High Court under the provisions of section 438 of the Code of Criminal Procedure, being of opinion that the order of the 28th May was illegal. The material portion of the letter of reference was as follows:—

“I am inclined to think that the Magistrate has not acted regularly in writing his order of the 28th ultimo, by which he directs an examination of witnesses by a Deputy Magistrate in a case against the petitioner Maniruddin Mundul, who had been discharged of an offence under section 211, Indian Penal Code, exclusively triable by the Court of Sessions.

“The Magistrate has submitted an explanation as required by my order of the 23rd instant. Having read his remarks, I am still of opinion that the papers of the case should be submitted to the High Court for orders. The ruling of 1888 referred to by the Magistrate had indeed escaped my notice, and in that case no doubt the whole procedure in such cases of revision as the present has been pretty fully dealt with. My order of the 23rd instant therefore requires to be read with what I now submit for the orders of the High Court. It will be seen from the District Magistrate’s order of the 22nd April that he considered that Maniruddin, accused, had been ‘improperly discharged;’ and he directed a notice to be issued on Maniruddin to show cause under section 436, Criminal Procedure Code. I believe the only regular and consistent course of procedure for the Magistrate to have then pursued was to have considered any cause shown, and then, if he still maintained that the accused Maniruddin should be committed for trial, he should have ordered the committal, there being nothing, as I understand, to prevent his also requiring the examination of further witnesses, on his subsequently hearing of their existence and importance, to strengthen the case in the trial by the Court of Sessions. In short, the Magistrate’s order of the 22nd April must mean that he thought a case was made out for a trial by the Court of Sessions. That being so, his not considering cause under section 436 (a), Criminal Procedure Code, but instead, proceeding under section 437 and ordering the examination of further evidence, seems to argue a want of

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consistency of judgment and lack of sound discretion which are calculated to needlessly harass the accused and prejudice his position.

“Under the circumstances, I would recommend that the orders of the Magistrate be quashed. The explanation of the Magistrate and my order of the 23rd instant will be found in the record.”

The reference came on to be heard on the 15th July before a Bench consisting of NORRIS and GORDON, JJ. No one appeared at the hearing, and the following judgment was delivered :—

“This case comes before us upon a reference from the Officiating Sessions Judge of Faridpur. The facts are as follows”—[Their Lordships then proceeded to state the facts as set out above and continued—]

“The order of the District Magistrate of the 22nd April was one which it was clearly competent for him to make under the provisions of section 436 of the Code of Criminal Procedure. His order of the 28th of May was one made under the provisions of section 437 of the Code. It is not necessary in our opinion to express any opinion as to whether the District Magistrate, having once determined to exercise the powers vested in him under section 436, could legally change his method of procedure and direct a further inquiry under section 437, without having finally disposed of the proceedings under section 436. In his letter of explanation to the Sessions Judge, the District Magistrate pointed out that, as only the question of the legality of the proceedings is called in question by the Sessions Judge, he confines himself to dealing with that question, and offers no observations upon the question as to whether or no he exercised a sound discretion in the course he pursued. Apparently the District Magistrate has some observations to make upon this question of his discretion; and before making any final order upon this reference, we think it would be well that the District Magistrate should favour us with any observations he may have to make as to his reasons for abandoning, or holding in suspense, the proceedings under section 436, and adopting the procedure under section 437.

“As the matter is somewhat urgent, we direct a copy of this order together with the record to be sent direct to the District Magistrate, with a request that he will return the record, with any observations

that he may have to make, at his earliest possible convenience. A copy of this order will also be sent to the Sessions Judge.

“All proceedings against the accused will of course be stayed until our final order is made.”

Upon this the Magistrate submitted an explanation, dealing fully with the facts of the case, which is immaterial for the purpose of this report.

The reference again came on to be heard before a Bench consisting of PRINSEP and HILL, JJ.

No one appeared on the reference.

The following judgment was delivered :—

The District Magistrate having reason to believe that the accused in this case had been improperly discharged by a Subordinate Magistrate, issued a notice under section 436, Code of Criminal Procedure, on the accused to show cause why he should not be committed for trial by the Court of Sessions. On the day on which the matter was considered, the District Magistrate thought that certain evidence should be taken before any order of commitment should be passed. He accordingly directed the Subordinate Magistrate to take that evidence. The Sessions Judge has referred this case that this order should be set aside because on the notice under section 436 the District Magistrate was not competent to order anything short of a commitment. We observe that, in the petition to the Sessions Judge, it was amongst other matters represented that the accused was not heard on the notice. But this has not been made the subject of reference to us, and we must take it that it was either abandoned or overruled by the Sessions Judge.

The matter for consideration therefore is simply whether on a notice under section 436 the District Magistrate could order a further inquiry in supersession of the order of discharge, or whether he could only either order commitment or abstain from interference. We have no doubt that from the terms of section 436 a District Magistrate, in a case triable exclusively by a Court of Sessions, is not restricted to ordering the commitment of the accused who may have been discharged by a Subordinate Magistrate. He is not prevented from dealing with such a case under section 437. Section 436 contemplates a fresh or a further inquiry being held, for it empowers a District Magistrate “instead

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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'Kinealy and Mr. Justice Ameer Ali.

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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.