CRIMINAL REVISION.

Before Sir William Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

BASIRADDI AND OTHERS (PETITIONERS) *v.* QUEEN-EMPRESS (OPPOSITE PARTY.)* 1894 *June* 1.

Criminal Procedure Code (Act X of 1882), section 439—Revision, Practice of High Court in—Rioting—Common object, Effect or judgment of not stating in charge—Charge, Defect in—Judgment, Defect in—Penal Code (Act XLV of 1860), section 147.

Where certain accused persons were convicted of rioting, and it appeared that the charge did not specify any common object, and that neither the judgment of the Original Court nor that of the Sessions Judge in appeal found what was the common object which made the assembly of which the prisoners were members an unlawful one:

Held, that these defects did not vitiate the proceedings, there being ample evidence on the record to prove what the common object of the assembly was and to justify the conviction for the offence of which the lower Courts had found the accused guilty.

Held, further, that in such a case a rule to show cause why the conviction should not be quashed under the provisions of section 439 of the Code of Criminal Procedure ought not to be granted unless on the materials which are before the Court when the rule is granted, it would be prepared to make the rule absolute if no cause be shown against it.

THE facts of this case were as follows :—

In the village of Timakati was an old-established *hât*, known as the Kumarkhalli *hât*. Close to it a new *hât*, the Goalkati *hât*, was recently established. Both these *hâts* were held on the same day. Since the establishment of the new *hât*, strained relations had existed between the two parties. The accused belonged to the party of the owner of the old *hât*. As the complainant was going to the new *hât* the accused and several others seized him. He cried out and a number of the new *hât* people came up to the rescue: a free fight then ensued between the two parties, in the course of which several persons were injured.

The accused were convicted of the offence of rioting by the

*Criminal Motion No. 306 of 1894, against the order passed by R. H. Anderson, Esq., Additional Sessions Judge of Backergunge, dated the 12th of May 1894, affirming the order passed by Babu Baroda Kanto Gangooly, Deputy Magistrate of Barrisal, dated the 30th of April 1894.

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Deputy Magistrate of Barrisal, the material portion of whose judgment was as follows :—

"The defendants have been charged with having committed rioting near a *hât* which is known as Goalkati *hât;* there was a counter case to this; the counter case has also been tried by me; the complainant in the counter case was the defendant Rohimuddi Howladar. The complainant in this case, *viz.*, Asman Ali Mira, was a defendant in the counter case; there is no doubt as to the fact that a riot took place on the 27th March. The cause of the rioting was the existence of two rival *hâts*, *viz.*, Kumarkhalli *hât* and Goalkati *hât* at a short distance from each other, on two sides of a *khal;* the Kumarakhalli *hât* is an old *hât*, whereas the Goalkati *hât* appears to have been established a few months ago. Both *hâts* sit on the same days, *viz.*, Saturdays and Tuesdays. The defendants belong to a party of Matilal Banerjee, the owner of the greater portion of the Kumarkhalli *hât*. The complainant is backed by Asmatali Khan; according to the prosecution the new *hât* (*i.e.*, Goalkati *hât*) was established by the Goalkati people, as one of the Goalkati people was ill-treated by the Kumarkhalli people at the Kumarkhalli *hât*. Whatever may be the real circumstances which led to the establishment of the new *hât*, this is certain that strained relations have existed between the two parties owing to the existence of the two *hâts*. The accused party is clearly inimical to the interests of the new *hât*. The defendants are men of Matilal Banerjee; they appear to have formed a combination against Asmatali Khan, who back the Goalkati people. The promoters of the new *hât* are no doubt men of Asmatali. The circumstances stated above show clearly that the accused party, including the defendants who are men of Matilal, are inimical to the new *hât*, while the complainant party who are backed by Asmatali are inimical to the interests of the old *hât*.

"Of the witnesses for the prosecution Faizaddi (who was a defendant in the counter case) was wounded in the riot, but the wound was slight. The defendants, *viz.*, Golam Ali, Naimoudi, Basiraddi and Rohimuddi Howladar, bear injuries. The witnesses for the prosecution said that the defendants and several others, who are men of Matilal, went to the west side of the *khal* over an iron bridge to prevent the complainant from going to the new *hât*. The new *hât* is on the west side of the *khal* and the old *hât* (*i.e.*, Kumarkhalli *hât*) is on the east side of the *khal*. The prosecution says that when the complainant was seized by the accused party he cried out, and a number of the new *hât* people came up, and when the latter came up the accused party let go the complainant, but attacked those who came up from the new *hât*, and that the attack consisted in pelting bricks at the men of the complainant party.

"It is admitted by the complainants' witnesses that the men of the complainants' party also pelted bricks at the accused party.

There is no doubt whatever that there was a fight between the two parties. The accused party showed a determination to fight, and so did the complainant party. The evidence of the Sub-Inspector shows that he saw

bricks on the road on both sides of the bridge. The witnesses for the prosecution stated before the police officer that the accused party were on the east side of the bridge, and the complainant party were on the west side of the bridge. The reason for changing the story a little by adding that the accused party went to the west side of the bridge is apparent, the men of the complainant were accused in the counter case, and so it was natural for them to attempt to throw all the blame on the accused party. In a case where both parties are to blame it is but natural that each party should try to throw as much blame as possible on the other party.

The fact that bricks were found on both sides of the bridge shows that the two parties were on opposite sides of the bridge when they pelted bricks at each other; there was undoubtedly a determination to fight on the part of each party: the fight took place, as appears from the Sub-Inspector's evidence, at the iron bridge, which is not far from the two *hâts*; the two parties must have advanced as far as the iron bridge when the fight began; the circumstances disclosed in the evidence do not support the theory that any of the accused party had a right of private defence. The defence is that the complainant party were coming over the bridge towards the old *hât*, but I do not believe that the complainant party came to the east side of the bridge, for the first information lodged by the defendant Rohimuddi Howladar in the counter case clearly shews that the complainant party did not go to the east side of the bridge, and thus it is clear that the accused party had no right of private defence.

"The evidence on the record shows beyond doubt that there was a free fight between the two parties, who pelted bricks and brick-bats at each other; besides the witnesses who were defendants in the counter case, other witnesses, *viz.*, Kali Churn Kumar, Sonamddi, Govindo Chand Kundo, Reazaddi and Uddabkha were examined by the prosecution.

"Of the five defendants there is no doubt whatever as to the guilt of Basiraddi, Rohimuddi Howladar, Naimoudi and Golam Ali. The fact that they all bear injuries which were admittedly received by them in the riot shows that they took part in the fight. They appear to have been hurt by the bricks which were pelted at them when they were pelting bricks, &c., at the complainant party."

The Deputy Magistrate then proceeded to deal with the evidence called by one of the accused to prove an *alibi* and having found that proved acquitted him.

He found all the other accused guilty and convicted them under section 147 of the Penal Code, and sentenced them to rigorous imprisonment for four months, and directed that each be bound over under section 106 of the Code of Criminal Procedure in the sum of Rs. 100 to keep the peace for a period of one year, from the date of the expiry of the sentence of imprisonment.

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The accused then appealed to the Sessions Judge, who delivered the following judgment :—

"On a consideration of all the evidence I think this conviction is right. I do not believe an attack was made originally on the Kurmarkhalli *hât*. It was too late for that, and it is evident that the case before the Police for the Kumarkhalli men was, that the fighting was all on the west and not the east of the bridge. There is no doubt I think that Asman Ali was siezed by the Kumarkhalli men, possibly for a different reason than he gives, but of the seizure on the west side of the bridge I am satisfied. Then his side turned out and the Kumarkhalli men were driven back. There was a stand at the iron bridge, and when a few men were hurt the fight ceased. Now each of the appellants is shown either to have been concerned in the attack on Asman Ali or to have been one of the second party that came to assist the first party when Asman's side came to his rescue. So that all were members of the unlawful assembly, and were guilty of rioting. I dismiss the appeal."

The accused now moved the High Court to send for the record and quash the conviction under the provisions of section 439 of the Code of Criminal Procedure. The grounds on which the interference of the High Court was sought were—(1), that the facts found did not make out an offence under section 147 ; (2), that both the lower Courts erred in convicting under that section without finding what was the common object of the assembly alleged to be unlawful ; (3), that the order under section 106 of the Code of Criminal Procedure was bad in law ; and, (4), that the sentence was too severe.

Mr. *J. G. Apcar* on these grounds applied to the High Court for a rule.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by—

PETHERAM, C.J. (RAMPINI, J., concurring.)—On the 17th of April last the Deputy Magistrate of Barrisal framed a charge against five persons, by which he charged them with having committed rioting on the 27th of March at Naratham, by forming an unlawful assembly, and assaulting Faisuddi and Mofizuddi, by throwing brickbats in prosecution of that common object. Witnesses were called and examined for the prosecution on the 17th and 18th, for the defence on the 25th, and on the 30th the Deputy Magistrate gave his judgment, by which he convicted four out of the five accused, and sentenced them to four months'

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rigorous imprisonment, and to execute bonds to keep the peace for one year. The judgment is long, rather rambling, and, undoubtedly, does not, as it should have done, find what was the common object which made the assembly, of which the prisoners were members, an unlawful one, and after reading it carefully several times, I am by no means sure that I understand now what he thinks the common object was, and I must add that for this reason the judgment is extremely defective. The prisoners appealed to the Judge, who on the 12th of May gave his judgment affirming the conviction and sentences, and I am compelled to say that his judgment is even more defective than that of the Deputy Magistrate, as he not only does not himself find what was the common object of the assembly, but throws doubts on what the Deputy Magistrate may have intended as a finding on the question. In this state of things Mr. Apcar has applied to us for a rule to show cause why the conviction and sentence should not be set aside by this Court, under the powers created by section 439 of the Code of Criminal Procedure, on the ground that the charge does not specify any common object, and that neither of the judgments finds that any common object existed, or what it was, if it did exist. We think that we ought not to grant a rule for such a purpose, unless we should be prepared, on the materials on which we grant it, to make it absolute, or, in other words, to acquit the prisoners, if no cause were shown against it, and we certainly should not be prepared to acquit these persons, merely in consequence of the defects which I have pointed out in the charge, and in both the judgments; because it must be evident that notwithstanding them there may be ample material, in the evidence on this record, on which we should ourselves be prepared to convict the prisoners of the offence of rioting, and to inflict the same punishment, which has been inflicted upon them by the Deputy Magistrate. We accordingly invited Mr. Apcar to place the evidence before us with the object of showing us that, upon it, the prisoners ought not to be convicted of rioting. He has done so, to some extent, and we have ourselves since examined it, and so far from thinking that we ought to acquit the prisoners, we think that there is ample evidence here, which we see no

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reason to disbelieve, that they were members of an assembly, the common object of which was to prevent, by force, traders from resorting to the new *hât*, that the assembly in pursuance of that object did make an attack upon the complainant, who was going to the new *hât*, and afterwards engaged in a battle with the partizans of the owners of the new *hât* who came up to assist him, and moreover that two of the accused actually took part in the first assault on the complainant, and that they all took part in the fight which followed.

This being the state of the evidence, we think that notwithstanding the defects in the charge, and in the judgments, which are very grave, and which call for a distinct expression of disapproval on our part, there is no necessity in the interests of justice for our interference, and there will be no rule.

H. T. H. *Application refused.*

ORIGINAL CIVIL.

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June 4.

Before Mr. Justice Sale.

IN THE GOODS OF PREMCHAND MOONSHEE, DECEASED.

BIDHATREE DASSEE *v.* MUTTY LALL GHOSE AND ANOTHER.*

Security for costs—Civil Procedure Code, 1882, section 380—Suit for amount of legacy under will—Suit in nature of administration suit—Discretion of Court under section 380—Interpretation of Acts—"May"—"Shall."

The power given to the Court under section 380 of the Civil Procedure Code to order security for costs is discretionary, and one which the Court ought or ought not to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. *Degumbari Dabi v. Aushotosh Banerjee* (1), approved of.

Where the plaintiff in a suit against the executors of a will for the amount of a legacy had, on account of the conduct of the defendants, no alternative but to seek the assistance of the Court, and the defendants stated that the assets were not sufficient to pay all the legacies in full, and it was therefore clear that the suit would have to proceed as an administration suit in which the plaintiff could in no event be liable for the defendant's costs: *Held*, that the Court would not order the plaintiff, although she was not in possession of any immoveable property within British India, to give security for the costs of the suit.

* Application in Original Civil Suit No. 277 of 1894.

(1) I. L. R., 17 Calc., 613.