

1894 the accused must be tried under the English law, or whether he can be tried under the Indian Penal Code.

QUEEN-
EMPRESS
v.
GUNNING.

It would appear from the case of *Queen v. Anderson* (1), if Captain Gunning is guilty of any offence, it is because of the general Admiralty Jurisdiction or under 17 and 18 Vic., cap. 104, section 267, or 18 and 19 Vic., cap. 91, section 21. In each case the offence of which he must be tried is an offence under English law. In the case of *Reg. v. Mount* (2), a question arose not as to the nature of the offence but as to the amount of punishment that should be inflicted. All doubts on that point are now settled by 37 and 38 Vic., cap. 27. The answer, therefore, is that the trial must be conducted under the Code of Criminal Procedure, though the offence charged must be an offence under English law.

H. T. H.

PRIVY COUNCIL.

P. C.
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Feb. 28.

KISHORE BUN MOHUNT (OBJECTOR) v. DWARKANATH ADHIKARI AND OTHERS (PETITIONERS).

KISHORE BUN MOHUNT v. PROSONNOCOOMAR ADHIKARI.

[On appeal from the High Court at Calcutta.]

Execution of decree—Execution under section 260, Civil Procedure Code, Act XIV of 1882—Refusal of execution where opportunity to obey the decree had not been afforded by the decree-holders—Effect of such refusal—Subsequent order for execution.

An order of a Court dismissed a petition for execution under section 260 of the Civil Procedure Code because the petitioning decree-holders had not then afforded to the judgment-debtor an opportunity of obeying the decree, which directed him to do specific acts. *Held*, (1), that another application, made after such opportunity had been afforded to him, was not barred as having been matter of prior adjudication within section 13 of the Civil Procedure Code; (2) that the decree which also declared rights on the part of the decree-holders against him was not incapable of being executed under section 260, on the objection that it was only declaratory.

Two appeals upon petitions for execution of a decree, dated 31st March 1881. The first appeal from an order (5th September 1890) of the High Court, reversing an order (30th March

* *Present*: LORDS MACNAGHTEN and MORRIS, and SIR R. COUCH.

(1) L. R., 1 C. C. R., 161.

(2) L. R. 6 P. C., 283.

1889) of the District Judge of Chittagong, who had affirmed an order (25th May 1886) of the Munsif of Sitakund. The second appeal from an order (3rd December 1890) of the High Court, affirming an order (8th November 1889) of the Judge of the same district, varying an order (23rd March 1889) of the Munsif of the same place.

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Two questions were raised on these appeals: In the first, whether the respondents were not precluded from asserting their right, as they did, to execute a decree under the 260th section, Civil Procedure Code, by a previous adjudication, within section 13; in the second, whether the decree, of which execution was sought, was not merely declaratory of a right, so that it was, therefore, incapable of being executed in the manner applied for under section 260.

The appellant was the *mohunt* of a religious institution, established in a temple, at which the respondents were *adhikara pandas*, or officiating priests. The latter claimed the right denied by the appellant to perform the religious service at the temple for a period in each year, and to receive a share of the offerings, *darshani*. On the 31st March 1881, a decree was made in their favour, and it was to the execution of this decree that both the appeals related. The respondents in the first appeal had, when this decree was obtained, joined with them as one of the co-plaintiffs, the father, Akhilchunder Adhikari, deceased in 1887, of the respondent in the second of these appeals, Prosonnocomar Adhikari. This decree, made by the Munsif in Chittagong, declared the right of the plaintiffs as against Kishore Bun Mohunt, the defendant, now appellant, to have, for the purposes of performing the ceremonies, which they were entitled to perform, certain articles supplied to them by him, and a proportionate part of the offerings made over to them by him; and costs of the suit, with interest, were decreed. Execution of this decree was first applied for on the 10th August 1885, by arrest of the defendant, under section 260, Civil Procedure Code. The result was a refusal of the execution, by an order made on the 19th December 1887.

The orders made on appeal from this order, both in the District Court and on a second appeal to the High Court, appear, in their series, in their Lordships' judgment. While those proceedings were

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pending, Akhilechunder died in June 1867, leaving his only heir Prosonnocoomar Adhikari, the respondent in the second appeal. The latter filed his own petition under section 260 for execution of the decree of 31st March 1860, on the 25th November 1887; the defendant, now appellant, objecting among other objections that the decree being merely declaratory could not be executed in the manner provided by section 260. These objections were disallowed, and the execution under that section was ordered by the Munsif on the 1st March 1888. The District Judge affirmed substantially this order, with a slight alteration as to the articles to be supplied. But on the 24th August 1888, on a second appeal, preferred to the High Court, a Divisional Bench ordered execution to issue in the usual way.

Afterwards, on the 13th February 1889, the respondent Prosonnocoomar made the application for execution, which, after proceeding to the High Court on appeal, and being then disposed of in his favour, led to the present appeal. The execution ordered was under section 260 of the Civil Procedure Code.

On these appeals—

Mr. *R. V. Doyme* for the appellant argued that, on the first of the two appeals, the High Court had not given due effect to the order of the 19th December 1887, which, as a prior adjudication, had barred the subsequent order. In reference to the other appeal, he relied on the declaratory nature of the decree of the 31st March 1881.

The respondents did not appear.

Their Lordships' judgment was delivered by :—

LORD MORRIS.—Both these appeals have been argued before their Lordships *ex parte*.

In the appeal of *Kishore Bun Mohunt v. Dwarkanath Adhikari* and others a judgment of the High Court at Calcutta is impeached, which reversed a judgment of the District Judge of Chittagong, who had upheld, with a variation, a judgment of the Munsif of Sitakund.

The facts of the case are shortly as follows: In the year 1880 the respondents, who are officiating priests in the temple of a deity called Sumbhu Nath Deb, instituted a suit in the Munsif's Court against the appellant for the purpose of establishing their right

to perform certain offices at the shrine and to receive certain offerings from the votaries. On the 31st March 1881 a decree was made by the Munsif, by which the claim of the respondents was allowed, and the appellant was ordered to deliver to the respondents certain articles necessary for the performance of the offices in question, and the right of the respondents to the offerings claimed was decreed. This decree was not complied with, and in the year 1885 respondents applied to the Munsif for leave to execute it under section 260 of the Civil Procedure Code. The appellant contended that the decree was merely declaratory and was not capable of execution as prayed.

Section 260 provides as follows: "When the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for the performance of or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both."

The Munsif gave judgment on the 25th May 1886, ordering the decree to be executed. There was an appeal from the Munsif to the District Judge of Chittagong, who, on the 24th March 1887, modified the Munsif's judgment, and directed the decree to be executed in part only. Both parties appealed to the High Court, and the High Court, on the 19th December 1887, delivered judgment in these terms: "The order of the lower Court appealed against in the appeal from Appellate Order No. 112 of 1887 will be set aside, and that appealed against in the appeal from Appellate Order No. 194 of 1887 will stand confirmed. We express no opinion as to whether or not the decree is capable of execution."

On the 1st February 1888 the respondents again petitioned the Munsif for execution of the decree, stating in their petition that they had, since their first action, served the appellant with notice, and had presented themselves at the temple at certain times specified in the notice, in order that they might be allowed the opportunity of performing a certain ceremony, and receiving certain articles necessary for its performance, and so afford the appellant an opportunity of complying with the decree.

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The appellant did not supply the articles in question, and objected to the petition on the ground that it was barred as being *res judicata*. The Munsif held that the matter was *res judicata* and dismissed the petition. The respondents appealed to the District Judge of Chittagong, who affirmed the decision of the Munsif on the question of *res judicata*, while reversing it in another respect. Both sides appealed to the High Court, who reversed the decision of the District Judge, and declared that the respondents were entitled to enforce their decree under section 260 of the Civil Procedure Code, and ordered execution to issue accordingly.

The High Court pointed out in their judgment that their decree in the first suit was only intended to determine that the particular application for execution, then the subject of appeal, could not be allowed. The respondent had not at that time placed themselves in the position of having the right to have their decree executed, inasmuch as they had not given notice to the appellant, and so afforded him an opportunity of complying with it. They had not gone to the temple so as to be ready to receive the articles necessary for the performance of the ceremony if they were offered to them. That matter of fact distinguished the second suit entirely from the first.

It is therefore quite plain, in their Lordships' opinion, that the question was not *res judicata*. The Lordships think that the respondents were properly non-suited in the first action, because they had not then shown that there was a demand made by them on the appellant, and an opportunity thus given him of complying with the decree. In the second action they remedied this defect, and stated in their petition that they had given the appellant notice of their demand, and had duly presented themselves at the temple. The appellant in his petition of objection does not deny this, merely taking the formal objection that the notice was illegal and improper; but the fact of the notice having been given, and of the respondents having presented themselves at the temple in pursuance of it, was never denied, and was, in fact, taken for granted throughout the trial. Indeed, those fresh facts constituted the difference between the two actions.

An objection was taken on the part of the appellant before their Lordships that the notice was not properly before the High Court, and that the High Court was not warranted in assuming its existence. But it is necessary, in considering such an objection, taken at so late a stage, to look carefully at the proceedings in the Courts below ; and it is clear to their Lordships that throughout the whole course of the trial the fact of the notice having been given was admitted.

On these grounds their Lordships are clearly of opinion that the judgment of the High Court should be affirmed, and they will humbly advise Her Majesty accordingly.

In the appeal of *Kishore Bun Mohunt v. Prosonnoocomar Adhikari*, the question of *res judicata* does not arise at all ; but it is said that the decree was merely a declaratory one, which could not be executed under section 260 of the Civil Procedure Code. Their Lordships have no doubt that it is a decree which can be executed, and that the High Court were right in dismissing the appeal from the District Judge who had directed the execution to issue. Indeed, it has not been substantially argued that if the first appeal fails this appeal can succeed.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant : Messrs. T. L. Wilson & Co.

C. B.

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APPELLATE CIVIL.

Before Mr. Justice Ameer Ali and Mr. Justice Rampini.

BHAGBUT LALL (DECREE-HOLDER, AUCTION-PURCHASER) v. NARKU ROY (JUDGMENT-DEBTOR).^a

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April 2.

Second appeal—Order setting aside sale under section 294, Civil Procedure Code, 1882—Purchase by decree-holder without permission to bid at sale in execution of his decree—Civil Procedure Code, 1882, sections 244, 588.

No second appeal lies from an order made by a District Judge, on appeal, setting aside a sale under section 294 of the Civil Procedure Code, notwithstanding that section 244 bars a separate suit in such a case ; that section (244), whilst it precludes a right of suit, does not enlarge the right of appeal, which is limited strictly by section 588.

^a Appeal from order No. 201 of 1893, against the order of J. Kelleher, Esq., District Judge of Sarun, dated 11th of April 1893, reversing the order of Babu Upendro Nath Bose, Munsif of Chupra, dated the 21st of January 1893.