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ever story suits him at the moment without reference to its truth.

For these reasons I am of opinion that the action cannot be maintained, and that this appeal must be allowed and the suit dismissed with costs in both Courts.

GHOSH, J.—I agree with the Chief Justice in thinking that the suit should be dismissed. Upon the evidence, I do not think it has been satisfactorily proved that the decree of the Small Cause Court was obtained by the fraud of the defendant Mahomed Golab.

T. A. P.

Appeal allowed.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Hill.

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 March 31.

MAHMUDI SHEIKH (COMPLAINANT) v. AJI SHEIKH (ACCUSED)*

*Recognizance to keep peace—Criminal Procedure Code, 1882, ss. 106, 349—
 Procedure to be followed by Magistrate trying a case when he is not
 empowered to bind the accused down under 106 of the Criminal Procedure
 Code.*

An Honorary Magistrate exercising third class powers tried an accused on a charge of criminal trespass and convicted and sentenced him to pay a fine of Rs. 10, or in default to suffer seven days' rigorous imprisonment. He further submitted the case to the District Magistrate with a recommendation that the accused should be bound down to keep the peace under section 106 of the Criminal Procedure Code, and the District Magistrate ordered the accused to furnish security.

Held, that the order of the District Magistrate was illegal and must be set aside.

Before an order under section 106 can be properly passed the conviction must be by a Magistrate of the class mentioned in the section and not by a third class Magistrate, and the order must be passed by the Magistrate who convicts and passes the sentence.

THIS was a reference by the Sessions Judge of Mymensingh under section 438 of the Code of Criminal Procedure.

It appeared from the letter of reference that the complainant, on the 20th November 1893, filed a complaint against the accused

* Criminal Reference No. 74 of 1894 made by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 5th March 1894.

Aji Sheikh, charging him with having committed offences under sections 147, 352 and 426 of the Penal Code. The complainant was examined by Mr. Radice, the Assistant Magistrate, before whom the complaint was made over for disposal, and he was directed by him to bring his lease and *kabulyat* in proof of his possession and also adduce evidence of neighbours. It further appeared that in a counter case of Aji Sheikh against Mahmudi Sheikh, which came up on the same date, Mr. Radice recorded an order, stating that it appeared to be true, and directed it to be put up with the other case on the 2nd December.

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On the 2nd December the case was made over to the Bench for disposal by Mr. Earle, the District Magistrate, and on that day it was taken up by Babu Gor Mohan Basak, an Honorary Magistrate, who, it appeared, had power to try cases singly as a third class Magistrate. It did not appear that any process was ever issued against Aji Sheikh, but on the 2nd December he attended the Court as complainant in his own case, and was then ordered as an accused to give bail in the case against him, and was ultimately convicted by the Honorary Magistrate under section 447 of the Penal Code and sentenced to pay a fine of Rs. 10, or in default to suffer rigorous imprisonment for seven days. At the same time the Honorary Magistrate referred the case to the District Magistrate, recommending that the accused should be bound down under section 106 of the Code of Criminal Procedure to keep the peace. The District Magistrate thereupon, without hearing anyone on behalf of the accused, directed him to furnish security to keep the peace.

Upon these facts being brought to the notice of the Sessions Judge, he referred the case to the High Court, giving the following as his reasons :—

“ There have been many irregularities in this case. They are as follows :—

“ 1. The case having been referred to the Bench for disposal the Honorary Magistrate had no jurisdiction to try the case. He could only do so upon its being transferred to him by the Magistrate of the district originally under section 192, Criminal Procedure Code, or referred to him for trial after withdrawal or recall from the Assistant Magistrate, or the Bench under section 528, Criminal Procedure Code. The proceedings of the Honorary

1894 Magistrate would appear to be void under section 530, Criminal Procedure Code.

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" 2. The Honorary Magistrate appears to have acted irregularly in proceeding to convict and sentence the accused when he was of opinion that he ought to be required to execute a bond under section 106, Criminal Procedure Code. Section 349, Criminal Procedure Code, directs that whenever a Magistrate of the second or third class having jurisdiction is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to be required to execute a bond under section 106, Criminal Procedure Code, he may record the opinion and submit his proceedings and forward the accused to the District Magistrate.

" The Honorary Magistrate should not have proceeded to record a conviction and pass sentence, but should have left the whole case open to the Magistrate of the district.

" 3. The District Magistrate acted irregularly : (a) By passing an order on the accused to execute a bond under section 106, Criminal Procedure Code, in a case thus irregularly referred to him. (b) By passing that order without giving the accused an opportunity of being heard by his pleader. An accused has a right to be defended by a pleader (section 340, Criminal Procedure Code.) The accused, in proceedings submitted under section 349, Criminal Procedure Code, has a right to be present at the proceedings taken by the Magistrate on receipt of these proceedings—*Queen v. Gunesli Sircar* (1) ; *Reg. v. Raja Naranji* (2).

" I submit to the Hon'ble Court that the accused has been prejudiced throughout. He has been prejudiced by having been tried by a non-stipendiary sitting alone instead of by the Bench, and he has been prejudiced in his appeal. To what Court can he now appeal against the order of the third class Magistrate ?

" I submit that for the above reasons the proceedings of the District and Honorary Magistrates should be set aside."

No one appeared on the hearing of the reference.

The opinion of the High Court (PRINSEP and HILL, JJ.) was as follows :—

A Magistrate exercising powers of the third class convicted Aji Sheikh of criminal trespass under section 447, Indian Penal Code, and sentenced him to a fine of Rs. 10, or, in default, to rigorous imprisonment for seven days. He further submitted the case to the District Magistrate, with a recommendation that the accused should, under section 106 of the Code of Criminal Procedure, be bound over to keep the peace. The District Magistrate

(1) 7 W. R., Cr., 38.

(2) 7 Bom. H. C., Cr. Ca., 31.

has required Aji Sheikh to furnish security to keep the peace, and the matter is now before us in revision on a reference by the Sessions Judge.

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We are of opinion that the order of the District Magistrate is illegal and must be set aside. The order of the District Magistrate professes to have been made under section 349 of the Code of Criminal Procedure. That section, however, contemplates that when the Magistrate having jurisdiction over the offence under trial finds the accused guilty of that offence, but considers that he is not competent to pass punishment of an appropriate description or sufficiently severe to meet the ends of justice, he should submit the entire proceedings for the orders of the District Magistrate or the Sub-Divisional Magistrate to whom he may be subordinate; and the section is further extended so as to enable him to deal in the same way with a case in which he is of opinion that the accused ought to be required to execute a bond under section 106. But we observe that in such a case the order directing the particular punishment to be awarded, that is to say, the conviction and sentence, should be passed by a superior Magistrate. In this particular instance, the sentence was passed by an inferior Magistrate, that is, by a Magistrate of the third class, and the proceedings were then submitted to the District Magistrate to be dealt with under section 106. Consequently the case is not within the terms of section 349. If we next consider the terms of section 106 they contemplate that, before an order requiring security to keep the peace can be passed under it, the accused shall have been convicted by some Court or Magistrate specified, not being of a class inferior to that of a Magistrate of the first class. Reading these two sections together, therefore, we have no doubt that it was the intention of the Legislature that, before an order under section 106 can be properly passed, the conviction of the accused shall have been by an order made by a Magistrate of a superior class, and not, as in the present case, by a Magistrate of the third class. The terms of section 106, which enable any of the Courts or Magistrates specified to require the execution of a bond to keep the peace, direct that such an order may be passed at the time of passing sentence on such person. This also shews that the intention of the Legislature

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was that the conviction and order under section 106 shall be passed by one and the same officer. For these reasons we are of opinion that the order under section 106 must be set aside. There are other objections taken to the proceedings in this case which it is unnecessary to mention.

H. T. H.

Order set aside.

APPELLATE CIVIL.

*Before Mr. Justice Trevelyan and Mr. Justice Kempini.*1894
March 5.

BEJOY CHAND MAHATAB BAHADUR, MINOR, REPRESENTED BY HIS NEXT FRIEND AND GUARDIAN LALA BUN BEHARI KAPUR, MANAGER (PLAINTIFF) v. KRISTO MOHINI DASI AND ANOTHER (DEFENDANTS).⁹

Limitation Act (XV of 1877), Schedule II, Article 14—Suit to set aside an act or order of an officer of Government—“Ultra vires”—Bengal Act VI of 1870, ss. 43, 64—Chaukidari Chakran Land, Settlement of.

Under section of 48 of Bengal Act VI of 1870 a Collector can only settle lands with the zemindar within whose estate the lands lie. Section 64 of that Act does not empower the Commissioner to set aside an order passed by the Collector under section 48.

Art. 14 of Schedule II of the Limitation Act does not apply to a case where the order is an absolute nullity.

THE plaintiff, who was a minor and the Maharajah of Burdwan, through his next friend and guardian instituted this suit for a declaration that certain *chaukidari chakran* land situate within *mouzah* Kowarpur, of which the Maharajah of Burdwan was the owner, and which was at the time of suit in possession of the principal defendant Kristo Mohini Dasi, and her adopted son, had been settled with the plaintiff's predecessor in title; that the Collector had no power to settle it with any one else; and that a *pottah* granted by him to defendant No. 1 was inoperative; and he prayed for possession of the land to be given him with mesne profits.

It appeared that in 1882 proceedings were taken under the provisions of Bengal Act VI of 1870 by the Collector with a view

⁹ Appeal from Appellate Decree No. 1374 of 1892 against the decree of Babu Kadar Nath Chatterji, Subordinate Judge of Beerbhoom, dated 12th of September 1892, reversing the decree of Babu Behari Lal Mookerjee, Munsif of Suri, dated 17th of August 1891.