prayer clause in the plaint is not sufficient for the purpose. Having regard to the pleadings in the case, and to the terms of the several bonds that have been put in by the parties, we think the plaintiff has not placed before the Court sufficient materials to enable it to apportion the mortgage debt on the mouza in dispute. There is no sufficient evidence to satisfy us as to how much of the mortgage debt covered by the bond of 1269 remained unpaid on the date of the bond of 1278. Nor is there any clear evidence to show what the relative values of the mouza now in dispute and the remainder of the mortgaged properties are.

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The result, then, is that appeal must be dismissed with costs.

Appeal dismissed.

C. D. P.

CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice O'Kinealy, and Mr. Justice Trevelyan.

DAMU SENAPATI AND SEVEN OTHERS (PETITIONERS) *v.* SRIDHAR RAJWAR (OPPOSITE PARTY).*

1893 *August* 17.

Criminal proceedings—Irregularity—Magistrate passing sentence before finishing his judgment—Criminal Procedure Code (Act X of 1882), ss. 365, 367 and 537.

A Magistrate on a charge of rioting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence.

Held, per PRINSEP and TREVELYAN, JJ., that the judgment of the Magistrate was not one in accordance with the law as laid down in section 366 of the Criminal Procedure Code: but *held* by PRINSEP and O'KINEALY, JJ. (TREVELYAN, J., dissenting) that the irregularity was one contemplated by section 537 of the Code, and not having occasioned any failure of justice, it did not necessitate a retrial of the case.

* Criminal Revision No. 370 of 1893, against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 5th of June 1893, affirming the order passed by Mr. M. A. Kadar, Deputy Magistrate of Midnapore, dated the 12th of May 1893.

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Per TREVELYAN, J.—The case was more than one of mere "error, omission or irregularity" within the meaning of section 537: the judgment having been irregularly arrived at and pronounced, there was no "judgment" in accordance with law, and therefore no fair trial to which every accused person is entitled: the case ought therefore to be re-tried.

THE material facts of this case sufficienlty appear from he petition filed by the petitioners, which showed—

"1. That one Sridhar Rajwar, the complainant, lodged a complaint on the 8th April 1883 in the Chandra outpost, on the allegation that he went with five coolies, under orders of one Prankristo Dey, a gomastha of Messrs. Watson & Company, to impound the cattle which might have entered the indigo fields belonging to the said Company at Bailasal and Moutalah, where they were assaulted by a body of 40 to 60 people, who rescued the cattle.

"2. That your petitioners also laid a complaint on the 8th September 1893, against Prankristo, the gomastha and *tagiddar*, and Arun Pal and others, on the allegations that they forcibly dragged him out of his house by order of Prankristo and assaulted him and his brother.

"3. That both the charges were investigated and eventually sent up by the police.

"4. That the Deputy Magistrate of Midnapore on the 12th May 1893, after recording the evidence of both sides, convicted your petitioners under section 147, Penal Code, without writing any judgment as contemplated by the Criminal Procedure Code, and sentenced them each to two months' rigorous imprisonment and a fine of Rs. 25; in default, further rigorous imprisonment for one month. They were also directed under section 106, Criminal Procedure Code, to execute each a personal recognizance of Rs. 100 to keep the peace for one year, or in default each to be simply imprisoned for one year.

"5. That the counter-charge brought by your petitioner was dismissed under section 253, Criminal Procedure Code, without writing any judgment, the Deputy Magistrate declaring that 'there will be no separate judgment,' though subsequently he delivered one.

"6. That the trial held by the Deputy Magistrate was very irregular and contrary to law, and showed a bias towards Messrs. Watson & Company's people, and ought therefore to have been set aside, as will appear from the affidavits of Damu Senapati filed before the District Magistrate on the 9th May 1893, and the application filed before the Deputy Magistrate, dated the 10th May 1893, attested copies whereof are annexed hereto.

"7. That, dissatisfied with the conviction and sentence passed by the District Magistrate of Midnapore, your petitioners preferred an appeal to the Sessions Judge of that place who, for the reasons recorded in his judgment, dated 5th June 1893, affirmed the said conviction and sentence."

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The petitioners submitted that the conviction and sentence ought to be set aside, and the High Court (PRINSEP and TREVELYAN, JJ.) made an order in the following terms:—

"Let the record be sent for and a rule issue on the District Magistrate to show cause why the conviction and sentence should not be set aside and such other order passed as to this Court may seem fit, on the ground that no judgment has been recorded in accordance with the law, and that in binding down petitioners to keep the peace, the Magistrate has not exercised a proper discretion in respect of the term for which such recognizances have been required. Pending further orders of this Court, the petitioners will be enlarged on bail.

Mr. *Jackson*, Mr. *K. B. Dutt*, Baboo *Debendra Nath Ghose*, and Baboo *Jogesh Chunder Dey* for petitioners.

Mr. *Garth* and Baboo *Bhowany Churn Dutt* for the opposite party.

Mr. *Jackson*:—Our allegation is that the Magistrate never listened to the arguments of Counsel who appeared for the accused; whilst Counsel was arguing, the Magistrate was writing out his judgment, and he actually pronounced judgment and sentenced the accused to various terms of imprisonment before he had finished writing the judgment, and before he had signed and dated the judgment, as required by law: this is abundantly made out, not only by our affidavit, but also from the explanation submitted to this Court by the Magistrate. Section 366 of the Criminal Procedure Code lays down the mode of delivering judgment, and section 367 of the same Code states what the contents of a judgment are to be. The provisions of these two sections are imperative, and non-compliance with those provisions makes the whole trial irregular and absolutely illegal. [PRINSEP, J.—Was this objection taken on appeal?] The objection is taken in one of our grounds of appeal to the Judge. [PRINSEP, J.—The Judge on appeal deals fully with all the facts of the case; how, then, are you prejudiced by the irregularities you allege on the part of the Magistrate?] If the original trial is vitiated by the irregularities of which we complain, the appeal cannot put the matter *in statu quo*. We are entitled to a fair trial before the Court of first instance. [TREVELYAN, J.—I agree with you. If the Magistrate had heard

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the arguments of Counsel who appeared for the accused, and had pronounced judgment after he had fully written it out, he might have acquitted the accused.]

Mr. *Garth*, *contra*:—It is not stated that these objections were urged before the Judge. The fact that the objections were taken in one of the grounds of appeal does not necessarily mean that they were pressed at the hearing. The Magistrate does not admit the allegations of the petitioners. [TREVELYAN, J.—It is pretty clear that the allegations are correct.] In any case, section 537 of the Criminal Procedure Code covers such a case.

Mr. *Jackson* in reply:—Section 537 does not cover all defects; certainly not defects in the procedure. It does not cover a case where there has been absolute illegality. See *Queen-Empress* v. *Chandi Singh* (1). It is clear there is a difference between acts of commission and acts of omission. Section 537 might extend to the latter class of cases, but by no means to the former, where there has been an intentional disregard of the provisions of the law. See *Queen-Empress* v. *Viraperumal* (2).

The Court (PRINSEP and TREVELYAN, JJ.) differed in opinion, and the case was referred to a third Judge (O'KINEALY, J.), who agreed with PRINSEP, J.

The following judgments were delivered:—

PRINSEP, J.:—In this case the rule was granted on the ground that *primâ facie* no proper judgment had been recorded in accordance with law by the Magistrate, raising the question whether in such a case a retrial should be had.

It appears that a retrial on a charge of rioting was conducted by the Magistrate at a somewhat unusual length, the prisoners being represented by Mr. K. B. Dutt, an advocate of this Court. Late in the day, the trial being completed, the Magistrate proceeded to deliver judgment. It is beyond doubt that at the time that he passed sentence on the accused he had not, in accordance with law, delivered his judgment by pronouncing it in open Court. When Mr. K. B. Dutt asked leave to read it, it was refused, but the judgment was read out to him by the Court Head-Constable under

(1) I. L. R., 14 Calc., 395. (2) I. L. R., 16 Mad., 105 (112, 113).

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the orders of the Magistrate. At the end of the judgment, under the signature of the Magistrate, there is a note recorded in the following terms:—"At the request of the accused's Counsel, the judgment has been read over to him, by order of the Court, by the Head-Constable, Babu Lal Sukul, as it was being written out. M. A. Kadar, Deputy Magistrate." The explanation given by the Magistrate after the issue of the rule is not altogether consistent with this statement; but the terms of this note leave no doubt that when sentence was pronounced and the judgment was being read over by the Head-Constable under the direction of the Magistrate, it had not been completed. There can be no doubt that the judgment so pronounced is one not in accordance with sections 366 and 367 of the Criminal Procedure Code, and if the case had remained here, I should have been in favour of directing a fresh trial. It is impossible for any judicial officer, before a judgment has been finished, to be quite certain whether on a further consideration he will not arrive at a conclusion different from that originally formed, and it would be most dangerous to allow a sentence to be passed and a judgment setting out the reasons for the conviction and sentence to be afterwards written out. But the case did not remain in the Magistrate's Court.

An appeal was preferred to the Sessions Court.

No objection can fairly be raised against the judgment of that Court, which is full and complete, and deals thoroughly with the whole of the evidence taken at the trial as well as with the objections taken to the proceedings of the Magistrate. It does not appear, however, from that judgment that objection was taken to the manner in which judgment was recorded by the Magistrate. Whether such objection was or was not taken in the course of the argument is not certain. It is pointed out that this objection was taken in the petition of appeal presented to the Sessions Judge. I am not prepared to hold that because any objection may be set out in a petition of appeal, it was necessarily taken in the course of the argument before the Appellate Court; nor am I inclined to hold that it is the duty of an Appellate Court when the persons before it are properly represented, to do more than to consider the arguments raised at the hearing of the appeal; or that it is necessary for an Appellate Court, in addition to those arguments, to consider

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what is also set out in the petition of appeal, so as to enable any party affected by its judgment to take advantage of any ground raised in the petition of appeal which is not referred to in the judgment delivered, and without showing to the satisfaction of the Superior Court that the particular objection was taken at the hearing of the appeal.

It appears from the judgment of the Sessions Judge on appeal that serious objections were taken by the learned Counsel for the appellants to the manner in which the trial was conducted, referring generally to the conduct of the Magistrate while evidence was being recorded. All those objections have been considered and disallowed by the Sessions Judge, who has expressed his regret that "allegations of unfairness and partiality should have been seriously made upon such trivial materials in respect of a Magistrate of long experience and unblemished reputation." Nothing has been said before us in respect of these remarks.

The question now remains for me to consider on this rule, whether, the case having been fairly tried out on the evidence on the record in the course of appeal, and the opinion of the Sessions Judge properly recorded in favour of the conviction of the appellants by order of the Magistrate, any irregularity in the manner of recording or delivering his judgment by the District Magistrate should be regarded as fatal to the trial so as to require a retrial. It seems to me that such an irregularity is one contemplated by section 537 of the Code of Criminal Procedure, and that in this case it has not occasioned any failure of justice. It is a matter of regret that such an irregularity on the part of the Magistrate should have occurred at all. Having regard to the lateness of the hour (which is stated to be 6-30 P.M.) at which the proceedings were concluded, the Magistrate would have exercised a better discretion if he had postponed the delivery of judgment until the following day. The irregularity having, in my opinion, occasioned no failure of justice, I would discharge the rule.

The other point raised in the rule was not made the subject of argument.

As I do not agree with TREVELYAN, J., the case must go to a third Judge to be appointed by the Chief Justice.

TREVELYAN, J. :—I agree with Mr. Justice Prinsep in thinking that the judgment of the Deputy Magistrate was not pronounced in accordance with the law. There can be no doubt from the note appended by the Deputy Magistrate to his judgment that sentence was given before the judgment was completed. There is also no doubt, from the explanation of the Deputy Magistrate, that he was writing his judgment when the argument was going on. It follows from this that he did not, as was his duty, attend to the argument of Counsel. The so-called judgment was therefore arrived at in the way provided by law, and, as the learned Deputy Magistrate came to the conclusion without attending to the arguments of Counsel, it follows that the trial before him was not a fair one.

The question remains whether the action of the Deputy Magistrate was set right by the fact that the Appellate Court did its duty. I regret that on this question I am unable to agree in the conclusion arrived at by my learned colleague. I think that the terms of section 537, Criminal Procedure Code, are inapplicable to the present case. This is more than a case of a mere "error, omission or irregularity" in the judgment or proceedings. In my opinion there has been no judgment in accordance with the law. As I understand a "judgment," it means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments. As the Magistrate was doing other things at the time, there can have been no due consideration of the arguments, and the sentence seems to have been passed before, and not after, the consideration of the evidence. This course must in every case be unfair to an accused person. If it be unfair, it seems to me that he must be prejudiced by it. In my opinion there is not in substance much, if any, difference between the circumstances of this case and a case where the Magistrate declines to hear evidence or argument and sentences an accused person. As I understand the law laid down in the Criminal Procedure Code, every accused person is entitled to a fair and impartial trial and a judgment given in the way I have above suggested. A judgment ought to be given by a Magistrate who has had the witnesses before him. It is not sufficient that there be a judgment on paper evidence. In this case, as there pretends

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to be a judgment of the first Court dealing with the facts, the mischief is, I think, greater than if there had been no judgment at all. An Appellate Court naturally, to a great extent, relies upon conclusions formed by Judges who have had the witnesses before them. Where the judgment of the first Court is arrived at in a way which the law does not recognize, the Appellate Court is misled, and the appellant is the more prejudiced.

If the fact that the Appellate Court has tried the case rightly, gets rid of a defect in the trial by the Court of first instance, it might equally be that a fair trial by the first Court would cure an unfair trial by the Appellate Court. I think that the accused is entitled to a fair trial by each Court.

In my opinion the conviction and sentence should be set aside and a new trial ordered.

O'KINEALY, J. :—In this case the petitioners were convicted by the Deputy Magistrate of Midnapore and sentenced; and in addition to that, they were bound down to keep the peace.

The petitioners appealed to the Sessions Judge; and he, on the 5th of June 1893, confirmed the conviction and sentence of the Deputy Magistrate.

On the 15th of June they applied to this Court, as a Court of Revision, and obtained the following rule. [After reading the rule (see *ante*, page 123) His Lordship continued] :—

In order to understand this rule, it must be borne in mind that the petitioners asserted that the Deputy Magistrate had convicted the prisoners before hearing the whole argument of the accused, and was writing his judgment during a portion of the argument. The rule, neither in terms nor in purport, refers to the trial which took place before the Court of Sessions. There would be some difficulty in setting aside the whole trial on the ground of irregularity in the Deputy Magistrate's Court, without setting aside the order of the Court of Sessions; but for this no rule was obtained. But apart from this, I think that the view taken of the case by Mr. Justice Prinsep is correct. I admit the great force in the view put forward by Mr. Justice Trevelyan in regard to the necessities of the Code being complied with; but, on the other hand, I am clearly of opinion that the irregularity in this case falls within

Chapter 95 of the Code of Criminal Procedure, and that this Court is precluded, by the terms of sections 537, from interfering with the orders of the Sessions Judge.

The rule is therefore discharged.

Rule discharged.

J. V. W.

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APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

HURRY RAM AND ANOTHER (DEFENDANTS) *v.* NURSINGH LAL AND OTHERS (PLAINTIFFS).*

1893 *May* 10.

Bengal Tenancy Act (VIII of 1885), s. 19—Ryot, definition of—Right of occupancy—Occupancy for horticultural purposes—Statutory right, effect on, of repeal of Act which gives it.

Where a right of occupancy had been acquired under the old Tenancy Act (VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885), *Held*, that apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired.

Semble.—The definition of "ryot" in the Bengal Tenancy Act (VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes.

THE facts of this case were as follows :—

The plaintiffs and their ancestors were the tenure-holders of 3 bighas 10 cottahs of land in mouzah Madubun, pergunnah Arrah, and had been in possession for upwards of fifty years. The land had always been used for horticultural purposes. On the 11th of June 1884 the plaintiffs leased the land on *shikmi* tenure to two under-tenants, and they held it under the plaintiffs till 1889. The defendants Nos. 2 and 3, the proprietors of the mouzah, endeavoured to enhance the rent, but without success. Eventually they got up a collusive pottah in the name of defendant No. 1, who instituted criminal proceedings against the plaintiffs'

* Appeal from Appellate Decree No. 1039 of 1891, against the decree of Babu Aubinash Chandra Mittra, Subordinate Judge of Shahabad, dated the 9th of April 1891, affirming the decree of Moulvie Ameer Ali, Munsiff of Arrah, dated the 30th of June 1890.