

CRIMINAL REVISION.

1897
March 17.

Before Mr. Justice Ghose and Mr. Justice Gordon.

GRISH CHUNDER ROY (PETITIONER) v. DWARKA DASS AGARWALLAH
(OPPOSITE PARTY). *

Complaint, Dismissal of—Revival of proceedings—Right of appeal—Criminal Procedure Code (Act X of 1882), sections 423, 439.

Where a complaint was dismissed by an Honorary Magistrate and an application was made to a Presidency Magistrate on the same facts and materials for a fresh summons :

Held, that as a Presidency Magistrate has co-ordinate jurisdiction with an Honorary Magistrate, there was no right of appeal to the Presidency Magistrate from the order of the Honorary Magistrate.

The proper course would be to apply to the High Court under sections 423 and 439 of the Criminal Procedure Code to set aside the order and direct a retrial.

Nibratan Sen v. Jogesh Chandra Bhattacharjee (1), approved. *Virankutti v. Chigamu* (2), and *Opoorba Kumar Sett v. Probod Kumary Dass* (3), discussed.

A COMPLAINT was instituted on 27th August 1896 before the Presidency Magistrate of the Northern Division of the Town of Calcutta against the petitioner for cheating under section 417 of the Penal Code.

The case was transferred for trial to an Honorary Magistrate, Mr. Farr. On 19th December 1896 the case was taken up after several postponements. On the complainant, who was present in Court, stating that his attorney was not present and applying for a postponement, the Magistrate adjourned the case for half an hour to enable the complainant to bring his attorney or instruct somebody else. On the case being again called on, an attorney appeared for the complainant, and applied for the transfer of the case to the Magistrate of the Northern Division on the ground that the complainant had been informed that the accused was a client of, and personally known to, the Honorary Magistrate.

* Criminal Revision No. 93 of 1897 made against the order passed by Nawab Syud Ameer Hossein, Presidency Magistrate of Calcutta, Northern Division, dated the 5th day of January 1897.

(1) I. L. R., 23 Calc., 983.

(2) I. L. R., 7 Mad., 557.

(3) 1 Calc., W. N., 49.

On the Magistrate declining to accede to this request, the attorney applied for a postponement upon the ground that the attorney who had been instructed in the case could not attend, and that the complainant's witnesses had left the Court. This application was opposed by the Counsel for the accused, and the Magistrate ordered the case to be proceeded with. The attorney appearing for the complainant stated that he was not acquainted with the facts of the case, and no evidence being offered for the prosecution, the summons was dismissed and the accused discharged. Subsequently, on 5th January 1897, the complainant, through another attorney, verbally applied to the Magistrate of the Northern Division on the same facts and materials that were before Mr. Farr, the Honorary Magistrate, for the issue of a fresh summons in the same case, putting in a charge under section 420 of the Penal Code in place of section 417. This application was granted. The accused appeared and contended that the Magistrate had no authority in law to issue fresh process in the case, he having been once discharged by another competent magistrate. The Magistrate, being of a contrary opinion, on 19th January allowed the matter to stand over to enable the accused to move the High Court against this order. A rule was thereupon issued by the High Court upon the complainant to show cause why the order of the Magistrate granting process against him should not be set aside, on the ground that he had no jurisdiction to make the order.

Mr. *P. L. Roy* for the complainant *Dwarkan Dass Agurwallah*.—The complaint in this case is that the petitioner under a misrepresentation that he was of age induced us to lend him money. He knew he was not, because only a few months before he had had a guardian appointed for him. On 29th August the attorney for the complainant laid a complaint before the Presidency Magistrate of the Northern Division, stating the facts of the case. After several adjournments the case was transferred to the Honorary Magistrate Mr. Farr, who discharged the summons. The complainant then asked the Presidency Magistrate to issue a fresh summons, which, it is submitted, he had power to do. The subsequent proceedings in this case came before the same magistrate, and on a petition for a transfer the Presidency

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Magistrate recorded an order that, if Mr. Farr did not object, the case should be retransferred to him. We thus have the order of the Honorary Magistrate dismissing the summons and the order of the Presidency Magistrate granting a fresh summons. It is submitted that the Presidency Magistrate had power to revive the case. *Opoorba Kumar Sett v. Probod Kumary Dass* (1).

Mr. Hyde (Mr. Watkins with him) for the petitioner.—The Magistrate had no power to revive the summons. The case has been disposed of by a competent magistrate, and there is, therefore, no power left for another magistrate to issue a fresh summons. The case of *Opoorba Kumar Sett v. Probod Kumary Dass* is no authority. Under section 435 of the Criminal Procedure Code this Court has power to call for the proceedings of any Court. *Queen-Empress v. Donnelly* (2). That case was under the Code of 1892, but the revision powers are the same. *Nilratan Sen v. Jogesh Chundra Bhattacharjee* (3). There is no allegation of any fresh materials. What the Magistrate did was merely to issue a fresh summons on the same materials, but under a different section. He had no jurisdiction to do so.

The judgment of the High Court (GHOSH and GORDON, JJ.) was as follows :—

The facts, out of which the questions before us have arisen, are shortly these :—

A complaint was instituted before the Presidency Magistrate of the Northern Division of the Town of Calcutta against the petitioner for cheating under section 417 of the Penal Code. The case was transferred for trial to an Honorary Presidency Magistrate, Mr. Farr. After several postponements, the case was taken up on the 19th December last. The complainant, who was then present in Court, stated that his attorney was not there, and that he was not in a position to proceed with the case, and applied for a postponement. The Magistrate adjourned the case for half an hour to enable the complainant to bring his attorney or instruct somebody else. When the case was afterwards called on, an attorney appeared for the complainant, and applied for the transfer of the case to the Northern

(1) 1 Calc., W. N., 49.

(2) I. L. R., 2 Calc., 405.

(3) I. L. R., 23 Calc., 983.

Division Magistrate on the ground that the complainant had been informed that the accused was a client of, and personally known to, the Magistrate (Mr. Farr). The Magistrate, for reasons given by him, declined to accede to this request. Thereupon, the attorney again applied for postponement of the case upon the ground that the attorney, who had been duly instructed in the case, could not attend, and that the complainant's witnesses had left Court upon an assurance given by a person, who was managing the case of the accused, that he would agree to the case standing over. This application was opposed by the Counsel for the accused, who represented (and the representation was found to be true) that there were at least two witnesses for the prosecution present in Court. The Magistrate then ordered the case to be proceeded with. The attorney of the complainant stated that he was not acquainted with the facts of the case, and, no evidence being offered for the prosecution, the Magistrate dismissed the summons and discharged the accused.

Subsequently, on the 5th January last, the complainant, through another attorney, verbally applied to the Magistrate of the Northern Division, apparently upon the same facts and materials that were before Mr. Farr, for the issue of a fresh summons in the same case, putting in simply what is described as a "charge" under section 420 in place of section 417 of the Penal Code. The Magistrate granted this application. Upon a summons being then served on the accused, he appeared and contended that the Magistrate had no authority in law to issue fresh process in the case, he having been once discharged by another competent Magistrate. The Magistrate, however, on the 19th January last, was of a contrary opinion, but he allowed the matter to stand over for a time to enable the accused to move this Court against his order. The accused accordingly applied to us and obtained a rule upon the complainant to shew cause why the said order of the Magistrate granting process against him should not be set aside, upon the ground that he had no jurisdiction to do so.

The order of discharge made by Mr. Farr does not, certainly, operate as an acquittal, the case being a warrant case. And it may well be gathered from the terms of section 403 of the Code of Criminal Procedure that it is no bar to the re-trial of any person

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so discharged. But then the question is whether the stipendiary Magistrate of the Northern Division had the authority to sit, as it were, on appeal from the order of the Honorary Magistrate, and direct the issue of a process, notwithstanding that upon consideration of the same materials Mr. Farr, a Magistrate of co-ordinate jurisdiction, held that the summons should be dismissed and the accused discharged.

We cannot discover anything in the Code giving a stipendiary Presidency Magistrate or any other magistrate of co-ordinate jurisdiction such an authority. Under section 439 (read with section 423), and possibly also under the charter of this Court, it is open to this Court to set aside the order of Mr. Farr and direct a retrial or further inquiry. And *that* apparently is the only mode indicated in the Code by which in a case like this an order of discharge may be interfered with.

A somewhat similar question arose in a case of dismissal of a complaint under section 203 before another Divisional Bench of this Court in the case of *Niratan Sen v. Jogesh Chundra Bhattacharjee* (1); and it was held, among other matters, that the practice of the Courts has always been to debar such fresh proceedings, and Banerjee, J., observed "that it would be anomalous if, notwithstanding the dismissal of a complaint, and the discharge of an accused person, after an elaborate inquiry, by one magistrate, another magistrate may, merely upon a fresh complaint being filed, take proceedings against the accused again for the same offence, and on the same evidence, though he has no authority as a Court of Appeal or Revision to examine the correctness of the previous order made in the case." These remarks well fit in here, though the present case is a warrant case, in which the accused was discharged under section 253.

The view that we have just expressed may at first sight seem somewhat opposed to that adopted by the Madras High Court in the case of *Virankutti v. Chiyamu* (2); but upon examination of the facts of that case, and the true ground upon which the judgment proceeded, it will be found that our view does not at all clash with the decision in that case.

(1) I. L. R., 23 Cal., 983.

(2) I. L. R., 7 Mad., 557.

As to the case of *Opoorba Kumar Sett v. Probod Koomary Dassi* (1), to which our attention has been drawn, it will be observed that the application to revive the proceedings was presented to, and the order for issue of fresh process made by, the same Magistrate who had discharged the accused.

We are not called upon here to determine whether the order of discharge made by Mr. Farr was a proper one. All that we are at present concerned with is, whether the Magistrate of the Northern Division was competent to order the revival of proceedings and issue a fresh process against the accused after the order of discharge by another magistrate of co-ordinate jurisdiction in precisely the same case, as we understand this to be. We are of opinion that he was not so competent.

Upon this ground we set aside the order complained against and direct that the rule be made absolute.

C. B. G.

Rule made absolute.

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ORIGINAL CIVIL.

*Before Mr. Justice Sale.*BABOO LALL AND OTHERS v. JOY LALL AND OTHERS. ^o

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Hundi—Money advanced on fraudulent misrepresentation—*Suit before due date of Hundi.* February 18.

The defendants obtained advances of money on *hundis* by making untrue representations, knowing them to be untrue, and knowing that without them they could not have got the money. *Held* that the plaintiffs were entitled to rescind the contract and claim immediate repayment before the due date of the *hundis*.

There is no reason why the principle that fraud vitiates all agreements should not be applied to debts evidenced by *hundis*, promissory notes, or other negotiable instruments, if the facts show that the loans were contracted on the faith of fraudulent misrepresentations made by a debtor to a creditor.

THE facts of the case appear sufficiently from the judgment.

Mr. Garth and Mr. Chaudhuri appeared for the plaintiffs.

Mr. Avetoom appeared for the defendants.

SALE, J.—This is a suit by the plaintiffs who carry on business under the name of Sanker Lall Augurwallah to recover Rs. 5,000

^o Original Civil Suit No. 829 of 1896.

(1) 1 Calc., W. N., 49.