

Before Mr. Justice Prinsep and Mr. Justice Stephen.

GIRISH CHUNDER GHOSE

v.

EMPEROR.*

1902
Jan. 31.

Complaint—Complaint accusing several persons—Proceedings, institution of against one—Conviction—Refusal by Magistrate to proceed against other persons accused—Dismissal of complaint—Further enquiry—Notice—Criminal Procedure Code (Act V of 1898) ss. 203 and 437.

A complaint was made to a Magistrate charging several persons with the commission of an offence. The Magistrate instituted proceedings only against one of them, and after his conviction refused to issue processes against the others. On application by the complainant the Sessions Judge under s. 437 of the Criminal Procedure Code directed a further inquiry into the matter without notice to the other persons accused.

Held, that the refusal by the Magistrate to issue processes was an order of dismissal of the complaint within the meaning of s. 203 of the Code in regard to which a further inquiry could be made.

Held, further, that it is not necessary that notice should issue to a person accused of an offence before an order can be properly passed under s. 437 of the Criminal Procedure Code directing a further inquiry into a matter which has terminated in the summary dismissal of a complaint under s. 203 of the Code in the absence of any person excepting the complainant.

Hari Dass Sanyal v. Saritulla (1) discussed.

THE petitioners Girish Chunder Ghose and others obtained a Rule calling upon the District Magistrate of Burdwan to show cause why the order of the Sessions Judge, dated the 6th July 1901, directing a further inquiry under s. 437 of the Criminal Procedure Code, should not be set aside on the grounds:—

(1) that before passing the order notice should have been issued to the petitioners:—

(2) that the order of the Magistrate refusing to entertain the complaint was not an order in regard to which a further inquiry should be made.

In this case a certain person was on a complaint made convicted and sentenced under s. 404 of the Penal Code. The complaint also accused other persons, but the Magistrate proceeded

* Criminal Revision No. 783 of 1901, made against the order passed by G. K. Deb, Esq., Sessions Judge of Burdwan, dated the 6th of July 1901.

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only against one. After his conviction the complainant applied to the Magistrate for issue of process against the others. This, however, the Magistrate refused to do. The complainant then applied to the Sessions Judge, and on the 6th July 1901 obtained an order under s. 437 of the Criminal Procedure Code, directing a further inquiry into the matter, without notice to the persons accused.

Mr. K. N. Sen Gupta and Babu Nolini Ranjan Chatterjee for the petitioners.

PRINSEP AND STEPHEN JJ. In this case a certain person not concerned in the matter before us was, on a complaint made, convicted and sentenced under s. 404 of the Indian Penal Code. The complaint accused other persons, but the Magistrate thought proper to proceed only against one. The complainant then appeared before the Magistrate and asked that processes might be issued against the others, but this was refused. He has now obtained an order from the Sessions Judge under s. 437 of the Code of Criminal Procedure, directing a further inquiry. On an objection taken that this order was passed without notice to the petitioners, a rule has been granted to set it aside on the grounds, *first*, that notice should have been issued; *secondly*, that the order of the Magistrate refusing to entertain the complaint is not an order in regard to which a further inquiry should be made; and, *lastly*, that the Magistrate had no authority to take cognizance of the complaint itself. No doubt ordinarily, as laid down in the judgment of the Full Bench in the case of *Hari Dass Sanyal v. Saritulla* (1), a notice should be issued before an order can be properly passed under s. 437, but in the judgment in that case, in which that point was considered and in which the majority of the Judges of the Full Bench agreed, a distinction was drawn between an order issued for further inquiry into a matter which had terminated in dismissal or discharge in the presence of certain persons accused of an offence and a summary order of dismissal of a complaint under s. 203 of the Code of Criminal Procedure in the absence of any person except the

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complainant, and it was pointed out that in such a case a notice would not be necessary (see page 624). The present case is a case of that description. The Magistrate did not think proper to proceed against the petitioners, and subsequently when asked to do so by the complainant he refused, and this to all intents and purposes was an order under section 203. It was therefore an order which the Sessions Judge was competent to consider under section 437 of the Code of Criminal Procedure, and in the view that we take no notice was necessary to the parties before the Sessions Judge could act.

On the second point we think that we cannot properly express an opinion. It affects the merits of the case against the Petitioners. It is said that the petitioners took a less prominent part in the offence than the man who has been convicted. That will be for the Magistrate, who holds the trial, to determine. It is sufficient for us to point out that they have never been tried.

The third ground is sufficiently dealt with by the explanation given by the Magistrate.

The Rule is therefore discharged.

Rule discharged.

D. S.

Before Mr. Justice Pratt and Mr. Justice Geidt.

ABED MOLLAH

v.

DILJAN MOLLAH.*

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*Civil Procedure Code Amendment Act (V of 1894) s. 310A—Immoveable property
—Sale—Whether an under-raiyat is entitled to make an application under that section.*

An under-raiyat is not entitled to make an application under s. 310A of the Civil Procedure Code to set aside the sale of a holding sold in execution of a decree for arrears of rent obtained against the raiyat.

ABED MOLLAH, the auction-purchaser, obtained from the High Court this rule.

In execution of a decree obtained for arrears of rent by one Mohendra Nath Bose against Haran Karikar and others, the *jote*

* Civil Rule No. 3098 of 1901.