1901

KUNJA BEHARI DAS v. KHETRA PAL SING.

We agree in the view herein expressed.

We think that in the circumstances of this case, the Deputy Magistrate had no authority to make the order, which he has made in this case, an order which had the effect of nullifying the decree of the Civil Court.

The rule will accordingly be made absolute.

D. S. *Rule made absolute.*

APPELLATE CRIMINAL.

Before Mr. Justice Stevens and Mr. Justice Harington.

SURAT LALL CHOWDHRY

v.

EMPEROR.*

1902
Jany. 21.

Transfer—Application for adjournment of trial before hearing—Duty of Court to grant reasonable adjournment—Refusal to adjourn trial, effect of on subsequent proceedings—Code of Criminal Procedure (Act V of 1898), s. 526, cl. (8).

The law does not require that an application for postponement under sub-s. (8) of s. 526 of the Code of Criminal Procedure, or an application to the High Court for transfer, should be made within any particular period before the date fixed for the hearing. It requires only that the party should notify to the Court before which the case is pending before the commencement of the hearing, his intention to make an application for the transfer of the case. If such an intention is notified at however short a time before the commencement of the hearing, the Court before which the case is pending is bound to exercise its powers of postponement or adjournment without reference to any opportunity that the party might have had of making an application at some earlier time.

The refusal to grant such an application for postponement is illegal, and the whole of the proceedings that follow cannot be supported.

Queen-Empress v. *Gayitri Prosunno Ghosal* (1) followed. *Queen-Empress* v. *Virasami* (2) distinguished.

THE accused, Surat Lall Chowdhry and others, appealed to the High Court.

* Criminal Appeal No. 671 of 1901.

(1) (1888) I. L. R. 15 Calc. 455. (2) (1896) I. L. R. 19 Mad. 375.

1902

SURAT LALL CHOWDHRY v. EMPEROR.

The appellants were committed on the 13th July 1901 by the Sub-Divisional Officer of Begusarai on a charge of dacoity under s. 395 read with s. 149 of the Penal Code to the Sessions Court at Monghyr.

On the 18th July 1901, before the commencement of the trial, the appellants applied to the Sessions Judge at Monghyr for time to enable them to arrange for production of their evidence and to instruct pleaders to move the High Court for a transfer of the case under s. 526 of the Code of Criminal Procedure. The Sessions Judge rejected their application on the ground that he did not think it proper to postpone the trial at such a stage, as a large number of witnesses were in attendance and a postponement would have caused inconvenience to the Court and to the public and expense to the Government; that, if the appellants really wished to move the High Court, they had had ample time before they made their application to do so. He thereupon on the same day proceeded with the trial, and the appellants were convicted under s. 395 of the Penal Code.

Mr. Donogh and *Babu Nogendra Nath Mitter* for the appellants.

The Deputy Legal Remembrancer (Mr. Leith) for the Crown.

STEVENS and HARINGTON JJ. The appellants in this case have been convicted of dacoity under s. 395 of the Indian Penal Code and have been sentenced to various terms of imprisonment and amounts of fine.

The appeal was admitted on the ground that there appeared to have been a non-compliance on the part of the Sessions Judge with the provisions of sub-s. (8) of s. 526 of the Criminal Procedure Code, inasmuch as before the commencement of the trial the appellants, who then occupied the position of accused persons, notified to the Court of Session their intention to make an application for the transfer of the case under the provisions of s. 526 and applied to the Court to exercise its powers of postponement in order to afford them a reasonable time for the application being made and an order being made thereon, and the Court refused to exercise these powers. The learned

Sessions Judge was called upon for an explanation with reference to the allegations made in the petition of appeal with regard to this matter, and it appears from the explanation which he has submitted, that in fact an application was made by the appellants on the 18th July 1901, which was the date fixed for the trial, for the postponement of the case, amongst other reasons, to enable the appellants to apply to this Court for the transfer of the case. The learned Sessions Judge says that he did not think it proper to postpone the trial at such a stage, as a large number of witnesses were in attendance and a postponement would have caused inconvenience to the Court and to the public and expense to the Government. The learned Judge observes that, if the appellants really wished to move the High Court, they had ample time to do so. As we understand, he refers to the time preceding the date on which the application was made.

It is contended for the appellants that under the provisions of sub-s. (8) of s. 526 the Court had no option to grant or to refuse postponement, but was bound to postpone the case for a reasonable time. In support of that contention the case of *Queen-Empress* v. *Gayitri Prosunno Ghosal* (1) has been cited. We think that there is no doubt that the learned Sessions Judge was bound to grant the application for postponement for a reasonable time.

For the Crown the learned *Deputy Legal Remembrancer* has referred us to the case of the *Queen-Empress* v. *Virasami* (2) as authority for the proposition that an order for postponement need not as a matter of course be granted when there is sufficient time for the application for transfer being made and an order being obtained thereon. We observe, however, that there is an essential difference between the Madras case and the case now before us. In the Madras case it was held that on the date when the application for postponement was made the interval between that date and the date fixed for the trial was sufficient to admit of making an application to the High Court and for obtaining an order thereon. In the present case when the application was made, there was obviously not time for applying to the High Court and still less for obtaining an order of transfer

(1) (1888) I. L. R. 15 Calc. 455. (2) (1896) I. L. R. 19 Mad. 375

1902

SURAT LALL CHOWDHRY v. EMPEROR.

before the commencement of the trial, for the application was not made until the very date fixed for the trial. The law does not require that an application for postponement under sub-s. (8) of s. 526, or an application to the High Court for transfer, should be made within any particular period before the date fixed for the hearing. It requires only that the party should notify to the Court before which the case is pending before the commencement of the hearing his intention to make an application for the transfer of the case; and it seems clear to us, that if such an intention is notified at however short a time before the commencement of the hearing, the Court before which the case is pending is bound to exercise its powers of postponement or adjournment without reference to any opportunity that the party might have had of making an application at some earlier time. We must, therefore, hold, as was held in the case of *Queen-Empress* v. *Gayitri Prosunno Ghosal* (1), to which we have referred, that the refusal to grant the application for postponement was illegal and that the whole of the proceedings that followed cannot be supported.

We therefore set aside the convictions and sentences in this case, and we direct that the case be re-tried. We think it is desirable that the case should be tried by another Court and we therefore direct that it be transferred for trial to the Sessions Judge of Tirhoot.

D. S.

CRIMINAL REVISION.

Before Mr. Justice Ameer Ali and Mr. Justice Stevens.

1901
Dec. 12.

RAM LOCHAN SARCAR
v.
QUEEN-EMPRESS.*

Hiring and harbouring persons hired for an unlawful assembly, ingredients of offences of—Proof of unlawful assembly—Penal Code (Act XLV of 1860) ss. 141, 150 and 157.

* Criminal Revision Nos. 848 and 849 of 1900.

(1) (1888) I. L. R. 15 Calc. 455.