

raise in special appeal, it is not a matter of discretion with the Court. Our judgment is claimed on this point, and we can neither refuse to decide it in favor of the plaintiff, nor having decided it in his favor, can we refuse to give him the benefit of the decision.

The result is, that the order made for the rehearing of the case, and dated the 25th of June 1874, and all the proceedings subsequent thereto, must be quashed, and the whole of the costs of these proceedings must be paid by the respondents.

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Markby and Mr. Justice Mitter.*

IN THE MATTER OF PURSOORAM BOROOAH, PETITIONER.

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June 10.

*Powers of Magistrates—Summary Jurisdiction—Transfer—Criminal Procedure Code (Act X of 1872), ss. 56 & 222—Furlough.*

The petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under s. 222 of Act X of 1872. This Officer was, in the year 1872, in charge of the Jorehaut Division in the District of Seesaugor, "with first-class powers and powers under s. 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamroop, and invested with the powers of a Magistrate of the first-class.

*Held*, that s. 56 of Act X of 1859 did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop—

*Per* MARKBY, J., on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegy, it had in effect "directed," within the meaning of s. 56 of Act X of 1872, that he should not exercise that jurisdiction anywhere but in Seesaugor.

*Per* MITTER, J., on the ground, that the office to which Mr. Carnegy was appointed in Kamroop was not equal to or higher than that which he had held in Seesaugor.

*Quære per* MARKBY, J., whether the posting of Mr. Carnegy to Kamroop, after his return from furlough, was a transfer from Seesaugor within the meaning of s. 56 of Act X of 1872.

\* Criminal Motion, No. 92 of 1876, against an order of the Assistant Judicial Commissioner of Kamroop, dated the 3rd December 1875.

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Baboos *Rash Behary Ghose* and *Krishna Komul Bhattacharjee*  
for the petitioner.

The *Junior Government Pleader*. (Baboo *Juggodanunã Mookerjee*)  
for the Crown.

THE facts and arguments are sufficiently stated in the judgment of Markby, J., which was as follows:—

In this case an important question is raised as to the powers of a Magistrate in the province of Assam.

It appears that one Pursooram was, in December last, tried summarily and convicted by Mr. Carnegy for the offence of giving false information to a public servant. A reference was made upon the subject to this Court by the Judicial Commissioner of Assam upon other points than those now before us, and this Court, upon that reference, refused to interfere. A petition was then presented on the 5th April on behalf of the prisoner, praying that the conviction and sentence be set aside upon the ground that Mr. Carnegy had not the power to try the prisoner summarily.

The circumstances of the case, so far as they bear upon the power of Mr. Carnegy to try this prisoner summarily, appear to be these:—

Mr. Carnegy, in the year 1872, held the office of Assistant Commissioner in the district of Assam, which was then what is called a Non-regulation District under the Local Government of Bengal. On the 1st of January 1873, a Resolution of the Local Government of Bengal was published in the *Calcutta Gazette*, by which it was directed, under the provisions of the Code of Criminal Procedure, that the officers and others whose names appeared in the schedule therewith published should in each case exercise the powers shown opposite their names in the districts shown in the schedule. In the schedule we find under the heading "Sebsaugor District" the name of Mr. Carnegy, and opposite his name are the words "charge of Jorehaut Division, with first class powers and powers under s. 222." This latter section is the one which relates to summary trials.

No earlier Gazette or appointment of Mr. Carnegy has been produced before us, but I think this is sufficient evidence that

Mr. Carnegy was the Magistrate of the Jorehaut Division of the District of Seebaugor (see s. 28 of the Code of Criminal Procedure) at that time and had the power to try offences summarily in that district.

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On the 6th February 1874, certain territories, including the districts of Seebaugor and Kamroop, were removed from the Government of the Lieutenant-Governor of Bengal and placed under a Chief Commissioner. In April 1874, Mr. Carnegy, having obtained furlough on medical certificate from the Government of India for one year, left India shortly afterwards. Several officers in succession were appointed, whilst Mr. Carnegy was absent, to take charge of the Jorehaut Subdivision. In the month of September 1875, Mr. Carnegy, having obtained leave from the Secretary of State to return to duty, arrived in India. He never returned to the district of Seebaugor, nor up to this time has he resigned or vacated his office as Magistrate in that district, otherwise than he may have done so by reason of the circumstances above mentioned. On the 25th of September there appeared a notification in the *Assam Gazette* that Mr. Carnegy, Assistant Commissioner, was "posted" to the district of Kamroop, and on the same day there appeared a further notice in this *Gazette* that Mr. Carnegy was vested with the powers of a Magistrate of the first class.

Upon these facts it seemed to us, when the matter was before us on a former occasion, that Mr. Carnegy had no power to try prisoners summarily in the district of Kamroop. The exercise of those powers was originally limited to the district of Seebaugor, and when Mr. Carnegy was posted to Kamroop (whatever that may mean), whilst on the one hand he was expressly authorized to exercise the powers of a first class Magistrate in the district of Kamroop, the remaining power which had been formerly conferred upon him of trying prisoners summarily was not re-granted.

It was at this juncture that we released the prisoner upon bail, but we abstained from quashing the conviction, because the matter being one which affected the jurisdiction of a judicial officer and possibly of many judicial officers, we thought the Local Government ought to be represented.

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Baboo Juggodanund Mookerjee has now appeared for the Local Government. He has not given us any additional information, but he relies entirely upon the provisions of s. 56 of the Code of Criminal Procedure, by virtue of which he contends that all the powers conferred upon Mr. Carnegy in Seeb-saugor are extended to Kamroop.

That section provides as follows:—"Whenever any person holding an office in the service of Government, who has been invested with any powers under this Act or any enactment hereby repealed in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred."

Upon this section two questions have been raised: 1st—Was Mr. Carnegy "transferred" within the meaning of the section; 2nd—Is the operation of the section prevented because the Local Government has "otherwise directed."

Neither of these questions is free from difficulty. With regard to the first it is said, that by going on furlough Mr. Carnegy vacated his former appointment, and could not therefore on his return be transferred; that no order transferring him has been made, and that the term "posted" indicates not a transfer, but a fresh appointment. But that word is ambiguous, and, before deciding the question upon this ground, it would be necessary to see whether Mr. Carnegy ever really vacated his former appointment. Upon this matter there is, as far as I am aware of, no rule laid down by authority. Prior to 1868 it was, I believe, always understood that any officer going on furlough vacated his appointment, and under an order of the Government of India of the 16th December 1861, it is expressly declared that "Civil Servants taking furlough will vacate their offices." Mr. Carnegy was not a Covenanted Civil Servant, and to what furlough rules he may have been subject prior to 1868 I am not quite sure, but I believe the rule that officers going on furlough vacated their appointments was universal.

On the 16th June 1868, however, an order was published, which directs that, except as hereinafter provided, "an officer, when on furlough, shall retain a lien on his substantive appoint-

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ment, or on an appointment of similar character and not less salary." This is applicable to all officers, whether covenanted or uncovenanted. It seems to me extremely doubtful whether the effect of this last rule is that the officer taking furlough retains his appointment. To my mind it rather indicates the contrary. The matter, however, may not depend entirely upon those rules, which are furlough rules only issued by Government in the Financial Department. It may be that what really vacates an office is not the going on furlough, but the appointment of another person to the office; and, as far as I have seen, no person was especially appointed to succeed Mr. Carnegy in his office as Magistrate in the district of Sebsaugor. The number of Subordinate Magistrates in a district being unlimited, there was no necessity for doing so. And this seems to be the view of the Local Government of Assam: for whilst Mr. Carnegy's powers were conferred afresh, it does not appear that he ever received any fresh appointment as Magistrate. He is, no doubt, treated as having ceased to be Magistrate of a division of a district, but he is apparently treated as being still, on his return, a Subordinate Magistrate *in or of* a district, which district could have been no other than the district of Sebsaugor.

I should, therefore, desire further consideration before holding that Mr. Carnegy vacated his former appointment by going on furlough, and that on this ground he was not transferred to the district of Kamroop within the meaning of s. 56; I desire to be understood as expressing no opinion upon this point.

But there remains the second question, whether the operation of the section is prevented, because the Local Government has otherwise directed.

If we take s. 56 quite literally, it would seem to indicate that the "direction otherwise" there alluded to was a direction contemporaneous with the transfer. This would render a special direction necessary in every case of transfer where the powers had already been locally restricted under s. 38. But when the Local Government had already declared its intention on this subject, this would seem to me to be superfluous. And it does not appear to me necessary to put this construction on s. 56. I think that the words, "unless the Local Government

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otherwise directs" reasonably construed will include a previous restriction under s. 38, as well as one imposed when the transfer is made. This accords with the view taken by the Local Government of Assam, which (as before pointed out) clearly treated the powers conferred upon Mr. Carnegy as having come to an end.

Upon this last ground, therefore, I hold that Mr. Carnegy has no summary powers under s. 222 in the district of Kamroop; and I, therefore, think that we ought to quash the conviction and discharge the sureties.

MITTER, J.—I am also of the same opinion. It seems to me that the effect of the Government Resolution, dated 1st of January 1873, was to confer upon Mr. Carnegy powers under s. 222 of the Criminal Procedure Code within the Subdivision of Jorehaut only. That being so, it cannot be said that he was "transferred to an equal or higher office" of the nature of that which he held in the district of Sebsaugor; because, supposing he was transferred within the meaning of that section and that he never vacated his appointment, the office to which he was transferred in the district of Kamroop is neither equal to nor higher than that he held in the district of Sebsaugor. A reference to ss. 27 and 28 of the Code will show that the powers of a Magistrate of a division of a district are higher than those of a Magistrate of the first class not in charge of any subdivision. I am, therefore, of opinion that, under the section (56) referred to above, Mr. Carnegy did not continue to exercise the same power which he had while in charge of the Subdivision of Jorehaut.

*Conviction quashed.*