1880

NOBO-COOMAR MOOKHO-PADHYA v. SIRU MULLICK.

period of limitation would begin to run against a suit brought on a similar contract not registered." Having regard to the words, "a similar contract not registered," it seems to me that a suit for compensation for the breach of the condition of a contract of the nature described in art. 66 would fall under art. 116 or 66, respectively, according as the contract is registered or unregistered.

It seems to me that, when a party to a contract commits a breach of its conditions, the aggrieved party has either of the two alternative civil remedies: he may either bring a suit for specific performance or for compensation. A suit for specific performance, by reason of the specified time for payment having already elapsed, has become impossible in this case.

This suit, therefore, falls under art. 116, and is not barred.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
June 24.

HOSSEIN BUKSH AND OTHERS *v.* THE EMPRESS.*

Charges, distinct and separate, tried simultaneously by a Jury—Parties opposed in rioting—Consent by Pleaders on behalf of Accused to irregular Procedure—Examination of Accused by Sessions Judge—Code of Criminal Procedure (Act X of 1872), *ss.* 243, 250, 264, 265.

Members of two opposing parties in a riot were, under two distinct committals, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge, with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same Jury. The Court then took the evidence of the witnesses for the defence in the first, and in the counter-case in the order named, and after hearing the address of the various pleaders for the defence and the reply of the Government Pleader, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. *Held*, that the procedure resorted to by the Judge was a practi-

* Criminal Appeals, Nos. 266 and 324 of 1880, against the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 30th February 1880.

cal violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate, and that its adoption having materially prejudiced the interests of the accused, the convictions should be set aside.

Queen v. *Sheikh Bazu* (1) distinguished.

Held further, that the defect in the procedure could not be cured by the consent of the pleaders for the defence to the arrangement suggested by the Court.

The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged.

Baboo *Gopee Nath Mookerjee* and Mr. *Sandel* for the accused.

THE facts of this case sufficiently appear in the judgment of the Court (MORRIS and PRINSEP, JJ.), which was delivered by

PRINSEP, J.—In an attempt made by certain villagers of Juggernathpore to remove an obstruction to the flow of water erected by the villagers of Sikundarpore, a riot took place, in which Shariutoollah, one of the Juggernathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Session in separate cases.

The case against the Sikundarpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records), by arrangement with "the pleaders, the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter-trial,"—*i. e.*, the case against the Juggernathpore villagers. The

(1) B. L. R., Sup. Vol., 750; S. C., 8 W. R., Cr. Rul., 47.

1880

HOSSEIN BUKSH v. THE EMPRESS.

trial of the case last mentioned then commenced. "The Judge required the same jury, as were then sitting on the counter-case, —*i. e.*, the case against the Sikundarpore villagers,—to sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions Judge returned to the first case, and took the evidence for the defence. He then took the evidence for the defence in the second case. The pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing up in both cases simultaneously, and then received and recorded the verdict of the jury, convicting all the prisoners in both cases. The prisoners were, accordingly, sentenced, and they have now appealed to this Court.

The objection taken in both appeals is the same, that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which, for many years past, has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that in such cases each party should be tried separately has here been practically violated by the procedure adopted by the Sessions Judge. It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defences of the accused person in each case; but, looking at the procedure which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same jury, but they proceeded almost in parallel lines, until they united in the addresses of the pleaders engaged and in the Session Judge's summing up. There is no authority of law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion, and with the consent, of the pleaders engaged. We cannot, however, accept this suggestion, for, as pointed out

by Macpherson, J., in the case of *Queen* v. *Bholanath Sen* (1), when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused or (we would add in the present cases), of the pleaders for the accused. The arrangement, as the Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves, and from a narrow, but we think a mistaken, view on their part that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

We will now proceed to consider the effect of the procedure adopted in the several stages of each case, as regards the position of the several prisoners.

The law (s. 265, Code of Criminal Procedure) declares, that the "same jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other,—that is, that, on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried and the evidence bearing upon those issues should be laid before the jury, and that the minds of the jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the arrangement to which the Judge refers. But, as already pointed out, this consent on their part cannot prevent the prisoners showing on appeal that they have been materially prejudiced by the course adopted. It is apparent

(1) I. L. R., 2 Calc., 23.

1880

HOSSEIN BUKSH v. THE EMPRESS.

that the prisoners accused in the second case had not the full benefit of s. 243,—that is, of challenging the jurors who were to try them. Who can doubt that, if the first case, which was that of the Sikundarpore accused, had been tried out and resulted in an acquittal, the Juggernathpore accused would have at once challenged all the jurors on the ground that they were not likely to address themselves to the case, as it affected them, with impartial and unbiased minds? So also, the Sikundarpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case criminating them behind their backs, and without their having an opportunity of cross-examination.

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that, consequently, it was not illegal on his part to commence the second trial before the conclusion of the first. But, according to s. 264, the Court can only adjourn the trial if it "considers that such adjournment is proper and will promote the ends of justice." No reason for the adjournment in turn of each trial has been stated. From the terms of the Sessions Judge's summing up, it would seem that the "arrangement" was suggested by himself, or by the Government Prosecutor, for he states that it was acquiesced in by the pleaders for the defence in both the cases. In our opinion the adjournments were neither proper, nor likely to promote the ends of justice. But even admitting that, under some circumstances, a second case may be tried by the same jury during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the jury that "the evidence for the prosecution in one case is practically that for the defence in the other, though a special defence has been made in each case." The Judge, no doubt, felt the difficulty in which the jury were placed, for he

states, "I proceed to sum up the evidence in both cases on this single charge, in which, however, I will do my best to keep each case and the evidence proper to it singly before you." We recognize the Sessions Judge's endeavours to do his duty in this respect, but he seems to have lost sight of the fact that some of the prisoners in each case were examined as witnesses in the other; and that, under such circumstances, it was impossible to expect that the jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness, under s. 132 of the Evidence Act, cannot excuse himself from answering any relevant question upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate him; but the law also provides that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners,—three (1) on one side, and four (2) on the other,—when under examination as witnesses; but several criminating statements have been made by them, especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, in considering the evidence of both these cases together, the jury could not separate the evidence in each, and, even in spite of the strongest precautions both on their own part and on that of the Judge, must unconsciously have been influenced in one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners who were also examined as witnesses in the two cases are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the case of these accused and that of their fellows, though from the position that the former occupied as witnesses we have less

(1) Nehal Sheikh, Bungshi Dass, and Rhedoy Chowkidar.

(2) Natak Sheikh, Moslem Sheikh, Hakeemoollah, and Itahar Sheikh.

1880

HOSSEIN BUKSH v. THE EMPRESS.

hesitation in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench—*Queen* v. *Sheikh Bazu* (1)—in which it was held, that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a re-trial; but we observe that in all these cases the trials were held with the aid of assessors, and not by jury, as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a jury to have been influenced by what he learnt in the other case, and while the verdict of the jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds we consider that the prisoners in these cases should be retried before a separate jury in each case; and we, accordingly, set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of the cross-examination of an adverse witness by counsel.

This Court has already pointed out to the Sessions Judge on more than one occasion—see particularly the case of *Chinibash Ghose* (2)—that, by exercising the power allowed by s. 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions, after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explan-

(1) B. L R., Sup. Vol., 750; S. C., 8 W. R., Cr. Rul., 47.
(2) 1 C. L. R., 436.

ation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner, in the second case, he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

We cannot consider that trials so commenced have been fairly conducted. The minds of both the Judge and jury are at the outset prejudiced by irresponsible statements made by the accused, while subject to this system of cross-examination, before their guilt has been established by the examination of a single witness. We trust that the Sessions Judge will discontinue this practice which has been repeatedly condemned by this Court, and is, in our opinion, quite opposed to the spirit of our law in India.

Convictions set aside, and retrial ordered.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF RAMESSURI DASSEE.*

RAMESSURI DASSEE (REPRESENTATIVE OF JUDGMENT-DEBTOR) *v.* DOORGADASS CHATTERJEE (EXECUTION-CREDITOR).

1880 *May* 25.

Execution of Decree—Civil Procedure Code (Act X of 1877), ss. 248 and 311.

When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings.

* Appeal from Order, No. 295 of 1879, against the order of Baboo Radha Krishna Sen, Munsif of Raneegunge, in Zilla East Burdwan, dated the 24th September 1879.