FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Brett, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Holmwood, Mr. Justice Sharfuddin and Mr. Justice Doss.

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June 14.

BAHADUR
v.
ERADATULLAH MALLICK.*

"Court," meaning of—Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order—"Judicial proceeding"—Execution proceedings—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 476.

The word "Court" in s. 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed, or to whose notice the commission of it was brought in the course of a judicial proceeding.

Where, therefore, the judgment-creditor brought to the notice of the Munsif, on the 23rd December 1908, the fact of resistance to the attachment of moveables in execution of his decree, and the Munsif called upon the opposite party to show cause, but his successor, after holding a preliminary enquiry under s. 476 of the Code, ordered their prosecution, on 6th October 1909, for offences under ss. 183, 186 and 353 of the Penal Code:—

Held, that the order was not without jurisdiction.

Action under s. 476 should, as far as possible, be prompt and expeditious and not unduly protracted.

The definition of a "judicial proceeding" in s. 4 (*m*) of the Criminal Procedure Code is not exhaustive. It includes an execution proceeding; and the resistance to the attachment of moveables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s. 476 of the Code.

Sheikh Eradatulla Mallick and his father, the taluqdars of village Jhansi, in the Hooghly District, obtained two *ex parte* rent decrees in suits Nos. 413 and 414 of 1908, respectively, against the petitioner, Pran Krishna Mandal, and his brothers. Applications for execution of the decrees were made, on the

*Reference to Full Bench in Civil Rule No. 778 of 1910.

17th September, to Babu B. B. Mukerjee, Third Munsif of Howrah, who ordered warrants of attachment of the moveables of the judgment-debtors to issue on the 10th December. On the 23rd two peons, Jagdish Chunder Ghosh and Sital Chunder Roy, went with the two warrants to Hakola, accompanied by Kiran Sardar, the identifier, and Ashutosh Sardar, a drummer. After Jagdish had attached certain articles in the house of Pran Krishna, the latter came and asked for half an hour's time to pay. He then went away, but returned shortly after with 10 or 12 persons. The petitioners, Bahadur and Manik, tore up the warrants, while some of the others re-captured the attached property and assaulted the peons, the identifier and the drummer. On the same day the peons submitted separate reports of the occurrence, and two applications were made by the decree-holders to the Munsif praying that the petitioners might be committed for trial under sections 183, 186 and 353 of the Penal Code, and the Munsif issued notices upon them, under section 476 of the Criminal Procedure Code, to show cause why they should not be prosecuted as prayed for. He fixed the 23rd January 1909 for the hearing of the case, but it was subsequently postponed from time to time at the instance of the one or the other party. Babu B. B. Mukerjee was transferred on some date after the 1st May. His successor, Babu P. K. Mukerjee, after several other postponements, ultimately took the matter up on the 25th September and examined the peons, the identifier and the drummer. By his order, dated the 6th October, he directed the prosecution of the five petitioners under sections 183, 186 and 353 of the Penal Code, and sent a copy of his order to the District Magistrate of Howrah.

On the 21st January 1910, the petitioners moved the Sessions Judge of Hooghly, who at first determined to send up a report to the High Court recommending the quashing of the order, but he dismissed the application on the 31st, on the ground that he had no power to refer the case. The petitioners then, on the 21st February, obtained a Rule from the High Court (Mookerjee and Teunon JJ.) which came on for hearing before the same Bench. Their Lordships, after hearing the

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learned pleaders for the parties, determined to send the case for the decision of a Full Bench, in the following terms :—

"We are invited in this Rule to set aside an order made under s. 476 of the Criminal Procedure Code, on the ground that the offence in respect of which it has been made was not brought to the notice of the Judicial Officer who made it. The circumstances under which the order was made are not disputed. On the 17th September 1908, Eradatullah Mallick and others, one of whom is the opposite party to this Rule, applied in the Court of the Third Munsif of Howrah for the execution of a decree which they held against Pran Krishna Mandal and others, some of whom are petitioners before this Court. Writ of attachment under s. 254 of the Civil Procedure Code was directed to be issued on the 10th December 1908. At the time when this writ was executed obstruction was caused by certain persons: the peon, the drummer and the identifier were assaulted, copies of the writ were torn into pieces, and the moveable properties attached were snatched away. On the 23rd December 1908 the peon made a report to this effect, and the decree-holders also applied for the prosecution of the persons who were alleged to have committed these offences. The Munsif, Mr. B. B. Mukerjee, directed notices to be issued on the persons named in the petition to show cause why they should not be criminally prosecuted. The notices were served in due course. The parties called upon to show cause appeared, and upon their application time was granted to them to put in their defence. The decree-holder took out summonses upon his witnesses, and, as some of the witnesses so summoned did not enter appearance, fresh processes had to be issued and the case adjourned, from time to time, at the instance of one or other of the parties. Meanwhile Mr. B. B. Mukerjee was transferred, and Mr. P. K. Mukerjee succeeded him on some day between the 1st May and 5th June 1909. The persons called upon to show cause repeatedly obtained adjournments to enable them to produce evidence, oral or documentary, with the result that the case was not heard till the 4th October 1909; the case was closed on the day following, and the order under s. 476 was made on the 6th October 1909. The validity of that order is now attacked substantially on the ground that Mr. P. K. Mukerjee had no jurisdiction to make it, inasmuch as the offence alleged to have been committed was not brought to his notice, but to the notice of his predecessor. In support of this proposition, reliance is placed upon the decision of the majority of a Full Bench of this Court in *Begu Singh* v. *Emperor* (1), which was followed in *Kartik Ram Bhakat* v. *Emperor* (2). It is also suggested, somewhat faintly, that s. 476 is inapplicable, inasmuch as an execution proceeding is not a judicial proceeding, and, therefore, the commission of the offence cannot be said in this case to have been brought to the notice of the Court "in the course of a judicial proceeding." In support of this proposition reliance is placed upon the cases of *Hara Charan Mookerjee* v. *King-Emperor* (3) and *Kanto Ram Das* v. *Gobardhan Das* (4).

(1) (1907) I. L. R. 34 Calc. 551.
(2) (1907) I. L. R. 35 Calc. 114.
(3) (1905) I. L. R. 32 Calc. 367.
(4) (1907) I. L. R. 35 Calc. 133.

In so far as the first of the grounds urged on behalf of the petitioner is concerned, it must be conceded that the Full Bench decision to which reference is made does support it. The majority of the Court decided in that case that the expression "Court" in s. 476 means the Judge who tries the case in the Court before which the offence is committed. If this view is adopted, there is no room for controversy that the order now under consideration was made without jurisdiction. The learned vakil who has appeared to show cause has, however, invited us to re-consider the matter in view of the fact that the rule laid down in the Full Bench case has been dissented from by the learned Judges of the Bombay and Allahabad High Courts [*In re Lakshmidas Lalji* (1) and *Girwar Prasad* v. *King-Emperor* (2)], while the case of *Rahimadulla Sahib* v. *Emperor* (3), though it may at first sight appear to support the contention of the petitioners, is found on closer examination to decide merely that the power conferred by s. 476 is properly exercisable only at or immediately after the conclusion of the trial. We have carefully examined the decisions to which reference has been made, with the result that we feel constrained to express the doubts we entertain as to the soundness of the view that in s. 476 the expression "Court" signifies the Judge who tries the case. The line of reasoning which commended itself to the majority of the Full Bench was that, unless this view of the scope of s. 476 was adopted, there would be no reason for the existence of s. 195. The case which was then before the Court was one of the commission of an offence in the course of a judicial proceeding, and it was held that, if the power conferred by s. 476 is to be exercised in a case of this description, it ought to be exercised at or immediately after the conclusion of the trial. The inference was, therefore, drawn that the power conferred by s. 476 could be exercised only by the Judge who tried the case in the course of the trial of which the alleged offence was committed. Sufficient attention does not appear to have been paid to the other contingency contemplated by the section, namely, the commission of an offence, not before the Court, but brought to its notice in the course of a judicial proceeding. In such a contingency it is obviously impracticable to make an order under s. 476 on the basis of the materials before the Court, which has seisin of the judicial proceeding. This is well illustrated by the facts of the case now before us. Here it was alleged that offences of a serious nature had been committed while officers of the Court were making an attempt to execute the writ and to attach the moveables of the judgment-debtors. Obviously, an investigation into the truth or otherwise of this allegation by means of evidence adduced before the Court would be essential, and the matter to be investigated would be distinct from the determination of any question which might arise in relation to the execution of the decree between the decree-holders and the judgment-debtors. Here the investigation was taken up immediately after the matter was reported to the Court; but during the pendency of the enquiry the presiding officer was transferred. The whole of the evidence was adduced before his successor, who held that a *prima facie* case had been made out so as to justify an order under s. 476. Indeed, the learned vakil for the opposite

(1) (1907) I. L. R. 32 Bom. 184, (2) (1909) 6 A. L. J. 392,
(3) (1908) I. L. R. 31 Mad. 140,

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party has suggested that in a case of this description the expression "Court" cannot mean the officer who had seisin of the execution proceedings, and he has sought on this ground to distinguish the Full Bench decision in *Begu Singh* v. *Emperor* (1). It is manifest, however, that the expression "Court" cannot be interpreted in two different ways in the same section in two different cases. We cannot hold that, in the case of the commission of offences before a Court in the course of a judicial proceeding, the expression "Court" means the officer in whose presence the offence is committed, whereas in the case of offences alleged to have been committed, not in Court, but elsewhere, and brought to the notice of the Court, the same expression does not mean the presiding officer. The position is intelligible that in the former class of cases the successor of the Judge before whom the alleged offence has been committed should be very reluctant to make an order under s. 476 when no such order has been made by his predecessor, who, with all the materials before him, did not think it proper to make any such order; but it can hardly be affirmed that under no circumstances should the successor in office of a Judge make an order under s. 476; for, as Mr. Justice Chandavarkar points out in the case of *In re Lakshmidas Lalji* (2), the fact that an offence had been committed may be discovered after the original Judge has ceased to be a member of the Court. In the second class of cases, however, it is fairly clear that, in order to determine whether the alleged offence brought to the notice of the Court has been committed, an independent investigation would be necessary, and it is not easy to realize on what principle the position can be defended that such enquiry must be by the Judge who had seisin of the proceedings, and not by his successor. It is not necessary for us to examine minutely the reasons given in the judgment of the majority of the Full Bench in *Begu Singh* v. *Emperor* (1). We may state generally that we agree with the comments made thereon by the learned Judges of the Madras and Allahabad High Courts in the two cases already mentioned. As the question is one of fundamental importance, and as we are unable to appreciate the decision of the majority of the Full Bench, we must refer for the consideration of a Special Bench the following question: Whether the expression "Court," in s. 476 of the Criminal Procedure Code, means the Judge before whom the alleged offence has been committed, or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding.

The second ground, which has been faintly suggested in support of the Rule, is that an execution proceeding is not a judicial proceeding within the meaning of s. 476. Upon this point there is a divergence of opinion. The cases of *Hara Charan Mookerjee v. King-Emperor* (3) and *Kanto Ram Das* v. *Gobardhan Das* (4) appear to support the petitioners' view. The cases of *Bhola Nath Dey* v. *Emperor* (5), and *Dakhineswar Misra* v. *Haris Chundra Chatterji* (6) support the opposite conclusion. Our own inclination is to adopt the rule laid down in the cases of *Bhola Nath Dey* v. *King-Emperor* (5) and

(1) (1907) I. L. R. 34 Calc. 551.
(2) (1907) I. L. R. 32 Bom. 184, 191.
(3) (1903) I. L. R. 32 Calc. 367.
(4) (1907) I. L. R. 35 Calc. 133.
(5) (1905) 10 C. W. N. 55.
(6) (1909) 10 C. L. J. 450.

Dakhineswar Misra v. *Haris Chandra Chatterji* (1). As under the rules of the Court the whole case has to be considered by the Special Bench, this question also will be open for consideration.

Babu Manmatha Nath Mookerjee, for the petitioners. The case falls within the decision in *Begu Singh* v. *Emperor* (2) which is good law. I rely on the wording of section 476, which shows that "Court" means the Judge before whom the offence is committed or to whose notice it is brought in the course of a judicial proceeding. The scope of sections 195 and 476 is different. When the Court proceeds under the latter section, it takes the responsibility of the prosecution on itself. I adopt the reasoning in the case cited above. If the successor can pass an order under the section, an injustice might arise from his not knowing the facts of the case. The reference to the Full Bench here proceeds on the Bombay and Allahabad cases mentioned therein. The latter loses sight of the words "brought to its notice." Section 476 contemplates a summary inquiry by the same Judge exercising his discretion. The successor does not exercise the discretion contemplated by the section, but continues the proceedings. As to the second question, an execution proceeding is a ministerial and not a judicial proceeding: *Hara Charan Mookerjee* v. *King-Emperor* (3).

Babu Harendra Nath Mitra, for the opposite party, was called upon to argue only the first question referred to the Full Bench. [After comparing the arrangement of the sections corresponding to sections 195 and 476 in the earlier Codes, he continued:] Section 476 defines the procedure applicable to complaints of public servants and of Courts under section 195. This is the answer to *Begu Singh* v. *Emperor* (2). There is nothing in section 476 which restricts the meaning of the word "Court." As to hardship or inconvenience, the section provides a preliminary inquiry as a safeguard against it. Besides, this is no ground for limiting the meaning of the word. The object of section 476 is explained in *Ishri Prasad* v. *Sham Lal* (4),

(1) (1909) 10 C. L. J. 450.
(2) (1907) I. L. R. 34 Calc. 551.
(3) (1903) I. L. R. 32 Calc. 367.
(4) (1885) I. L. R. 7 All. 871.

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and by the addition of the opening words to section 200 : *In re Lakshmidas Lalji* (1), *Girwar Prasad* v. *King-Emperor* (2) at p. 398, and *Emperor* v. *Molla Fuzla Karim* (3). The case of *Rahimadulla Sahib* v. *Emperor* (4) merely decides that action under the section should be prompt.

The judgment of the Court (JENKINS C.J., BRETT, WOODROFFE, MOOKERJEE, HOLMWOOD, SHARFUDDIN AND DOSS JJ.) was as follows :—

Two questions have been referred to us for decision in this Rule, namely :—

(*i*) Whether the expression "Court" in section 476 of the Criminal Procedure Code means merely the Judge before whom the alleged offence has been committed, or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding ?

(*ii*) Whether an execution proceeding is a "judicial proceeding" within the meaning of section 476 of the Criminal Procedure Code ?

Upon a careful consideration of the cases mentioned in the order of Reference, as also those cited at the bar, and upon an examination of the language of section 476 of the Criminal Procedure Code, we are of opinion that there is nothing in that section to warrant our withholding from the word "Court" its natural meaning with the sense of continuity this implies, notwithstanding any change of officers.

We are of opinion that the first question ought to be answered in the negative.

The second question ought, in our opinion, to be answered in the affirmative. We entertain no doubt that an execution proceeding is a "judicial proceeding ;" the definition in section 4, clause (*m*) of the Code of 1898 is clearly not exhaustive. In this case the alleged offence was brought under the notice of the Court in the course of such judicial proceeding, and hence section 476 clearly came into play.

(1) (1907) I. L. R. 32, Bom. 184.
(2) (1909) 6 A. L. J. 392.
(3) (1905) I. L. R. 33 Calc. 193.
(4) (1908) I. L. R. 31 Mad. 140.

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It follows, therefore, that Mr. P. K. Mukerjee had jurisdiction to make the order of the 6th October 1909. At the same time we must express our disapproval of the undue protraction of the proceedings. Action under this section should, as far as possible, be prompt and expeditious. The alleged offence was brought to the notice of the Court on the 23rd December 1908, and it was not until 6th October 1909 that the Court passed its final order.

The Rule is accordingly discharged. There will be no order as to costs.

E. H. M. *Rule discharged.*

ORIGINAL CIVIL.

Before Mr. Justice Chitty.

BRIJRATAN *v.* JAYNARAIN.*

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Jan 24.

Practice—Decree, amendment of—Decree not conformable to what the Court intended—Inherent power of Courts in India—Attachment, setting aside of—Sheriff's right to Poundage—Civil Procedure Code (Act V of 1908) s. 152.

The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code (Act V of 1908.)

In re Swire (1) referred to.

Ainsworth v. *Wilding* (2) distinguished.

The Sheriff is only entitled to poundage on sums levied: so where a seizure is wrongful and is withdrawn by direction of law, the Sheriff receives no poundage.

Mortimore v. *Cragg* (3), *In re Ludmore* (4) and *In re Thomas* (5) followed.

RULES were obtained by the defendants, Jaynarain and others, calling upon the plaintiffs to show cause (*a*) why the

* Applications in Original Civil Suit No. 85 of 1909.

(1) (1885) 30 Ch. D. 239.
(2) [1896] 1 Ch. 673.
(3) (1878) 3 C. P. D. 216.
(4) (1884) 13 Q. B. D. 415.
(5) [1899] 1 Q. B. 460.