

Assignee is entitled to that sum with such interest as may have been raised in respect thereof and that the plaintiff is entitled to the balance of the fund in the Official Assignee's hands, and decree accordingly.

We do not disturb the Judge's order as to costs, but the respondent will only get half his costs of the appeal.

Attorneys for plaintiff—*Messrs. Payne, Gilbert and Sayani and Moos.*

Attorneys for the Official Assignee (defendant 1)—*Messrs. Mansukhlal, Damodar and Jamsetji.*

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### CRIMINAL REFERENCE.

*Before Mr. Justice Ranade and Mr. Justice Fulton.*

IMPERATRIX v. RATNYA.\*

1897.

November 3.

*Jurisdiction—Scheduled Districts—Reference and appeal in a criminal case from the Scheduled Districts—Act No. XI of 1846—Scheduled Districts Act XIV of 1874.*

The Collector of Khándesh, in his capacity of Political Agent for the Mehwási Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference.

*Held*, that the High Court had jurisdiction.

REFERENCE by A. Cumine, Collector of Khándesh and Political Agent of the Mehwási Estates of Kathi in the Khándesh District, under section 7 of the Scheduled Districts Act No. XIV of 1874 in a murder case.

The accused was charged under section 302 of the Indian Penal Code (Act XLV of 1860) with having committed murder at Piprapani, a village belonging to the Mehwási Estate of Kathi,

\* Criminal Reference No. 104 of 1897.

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a Scheduled District under Act XIV of 1874, in the Khândesh District. He was tried by the Collector of Khândesh as Political Agent of the Mehwasî estate of Kathi, and was found guilty and sentenced to transportation for life. After the conviction and sentence the Political Agent forwarded the papers of the case to Government for confirmation, but Government having directed him to submit the proceedings to the High Court in accordance with Rule XXXV of the Rules made under Act XI of 1846,<sup>(1)</sup> he made the present reference. The accused also appealed to Government against the conviction and sentence, and his appeal was forwarded to the High Court along with the proceedings, and was registered as No. 593 of 1897.

There was no appearance for either party.

(1) (1) Sections 3 and 4 of Act XI of 1846, entitled an Act for the exemption of certain territory in the province of Khândesh and the zilla Ahmednagar from the operation of the General Regulations :

3. And it is hereby enacted that it shall be competent to the said Governor in Council by an order in Council to prescribe such rules as he may deem proper for the guidance of the Agent aforesaid and of all the officers subordinate to his control and authority, and to determine to what extent the decision of the Agent in civil suits shall be final and in what suits an appeal shall lie to the [Sadar Dewani Adalat], and to define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the decision of the [Sadar Foujdari Adalat].

4. And it is hereby enacted that upon the receipt of any criminal trials referred by the Agent under the rule which may be hereafter prescribed by the Governor in Council [the Sadr Fouzdari Adalat] shall proceed to pass a final judgment, or such other order as may after mature consideration seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge.

(2) Rule XXXV of the rules promulgated under section 3 of Bombay Act XI of 1846 :

XXXV.—The absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for (5) five years with or without hard labour ; and sentences involving a punishment beyond that period or of greater severity must be submitted for the confirmation of the Sadar Fouzdari Adalat.

(3) Section 7 of Act XIV of 1874 :

7. All rules heretofore prescribed by the Governor General in Council or the Local Government for the guidance of officers within any of the Scheduled Districts for all or for any of the purposes mentioned in section 6, and in force at the time of the passing of this Act, shall be continued to be in force unless and until the Governor General in Council or the Local Government, as the case may be, otherwise directs.

All existing officers so appointed previous to the date on which this Act comes into force in such district shall be deemed to have been appointed hereunder.

RANADE J. :—In this case the Collector of Khándesh, acting in his capacity as Political Agent for the Mehwási estates, tried the accused Ratnya on a charge of the murder of his wife at Piprapani village belonging to the Kathi estate, and sentenced the accused to transportation for life, subject to the confirmation of the sentence by His Excellency the Governor in Council. The accused also presented a petition of appeal to the same authority. His Excellency the Governor in Council, however, directed the Political Agent to submit the proceedings to this Court, and the present reference was accordingly made by the Political Agent under Rule 35 of the Rules promulgated in July, 1855, under the powers conferred on Government by section 3 of Act XI of 1846.

Rule 25 invests the Agent with the functions of a Magistrate. Rule 32 empowers him to take cognizance of all crimes and offences perpetrated within the limits of his political charge, and Rule 35 gives him absolute jurisdiction to sentence offenders to fine and imprisonment for five years, and it directs that sentences involving punishment beyond that term or of greater severity must be submitted for confirmation to the Sadar Fouzdari Adalat. Rule 43 directs the Political Agent to forward the record of such cases, when confirmation is necessary, to the Sadar Fouzdari Adalat, and Rule 44 empowers the Adalat to call for proceedings on petition from the prisoner sentenced in such cases, and thereafter to deal with them as laid down in section 4 of Act XI of 1846. Section 4 of this latter Act provides that the Sadar Fouzdari Adalat shall in such confirmation cases pass the final sentence or order in the same manner as if the trial had been sent up in ordinary course by Court of Session. The present reference to this Court comes up for disposal under these provisions, and the point we have to consider is whether this Court possesses the jurisdiction which belonged to the late Sadar Fouzdari Adalat to deal with such cases either by way of confirmation or by way of appeal.

There have not been many occasions for the exercise of this jurisdiction since the constitution of the High Courts. In the only reported case, *Queen-Empress v. Sarya*,<sup>(1)</sup> a Division Bench

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of this Court (Birdwood and Jardine, JJ.) held that in cases where the sentence passed by the Political Agent was within the limits of the absolute jurisdiction of that officer, no appeal lay to this Court. Their Lordships held that Rule 44 noticed above was *ultra vires*. Birdwood, J., observed that there is no provision in Act XI of 1846 which empowers Government to confer appellate powers on the Adalat as done by Rule 44, and that rule cannot be regarded as a valid rule made under the Act. He makes a distinction between the rule relating to appeals and the rule directing references to be made to the Sadar Fouzdari Adalat, for he admits that the Act did contemplate that Court as a Court of reference for the confirmation of sentences passed in certain criminal trials. The present case, so far as it is such a reference, would thus, in the opinion of Birdwood, J., not be excluded from the jurisdiction of the Sadar Fouzdari Adalat, and therefore (under section 9 of the High Courts Act, and section 27 of the Letters Patent) of the High Court, which has taken up the place of the old Fouzdari Adalat in respect to all manner of jurisdiction. Jardine, J., indeed went much further. While agreeing with Mr. Justice Birdwood in his view that Rule 44 was *ultra vires*, Jardine, J., expressed an opinion to the effect that after the enactment of Act XIV of 1874 which repealed Act XI of 1846, these rules under the old Act ceased to be in force, so far as they had reference to the powers of this Court. He was of opinion that section 7 of Act XIV of 1874 did not continue these rules except so far as they related to the Political Agent and his officers, as they cannot be regarded as being in force at the time when the Scheduled Districts Act (XIV of 1874) was passed, and they were in conflict with the Letters Patent of the High Court. These remarks, it will be seen, have a larger bearing than the validity or otherwise of Rule 44. My colleague, Mr. Justice Fulton, is of opinion that section 7 of Act XIV of 1874 continued the rules of 1855 framed under Act XI of 1846, and that in consequence the powers of this Court as a Court of reference for confirmation purposes were continued. I am myself inclined to hold that this confirmation jurisdiction of the Sadar Fouzdari Adalat was in force under the operation of Act XI of 1846 and

the rules of 1855 at the time when the High Court was constituted, and that until a fresh notification to the contrary has been issued under Act XIV of 1874 cancelling the rules of 1855, they must be held to be still in force by virtue of section 7 of Act XIV of 1874. The notifications of 1879 and 1887 have clearly not the effect. The rules of 1855 so far as they relate to confirmation proceedings are clearly contemplated by Act XI of 1846, and were in force in 1862, and are therefore still in force, and confer this jurisdiction on the High Court. As the point under consideration is, however, not entirely free from difficulties, I agree with Mr. Justice Fulton that it would be desirable to issue notice to the Political Agent and the accused, and to hear further argument in the case before the reference is finally disposed of.

As regards the Appeal No. 593 of 1897, the precedent is more in point, but there is the consideration that in *Queen-Empress v. Sarya*,<sup>1</sup> the sentence passed was for five years within the absolute jurisdiction of the Political Agent, while the sentence in the present case clearly exceeds his jurisdiction, and certainly requires the confirmation of either this Court or of the Government. I would direct therefore, before admitting the appeal or disposing of the reference, that notices be issued to the Political Agent and the prisoner.

FULTON, J.:— In this case the Agent to His Excellency the Governor in Khândesh has submitted for the confirmation of this Court his proceedings in which he has convicted the prisoner of murder in the Mehwâsi Estate of Kathi, and sentenced him to transportation for life. The reference is one for which no precedent has been brought to our notice, and raises a question of considerable difficulty as to the jurisdiction of the Court.

By Act XI of 1846, which was passed to exempt certain Mehwâsi Estates from the civil and criminal jurisdiction of the ordinary Courts, it was enacted that the Governor in Council might prescribe such rules as he deemed proper for defining the authority of the Agent in criminal trials, and for determining what cases the Agent should submit for the decision of the Sadar

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Fouzdári Adálat. It was further provided that "on receipt of any criminal trials referred under the said rule, the Sadar Fouzdári Adálat should proceed to pass a final judgment, or such other order as might after mature consideration seem to the Court requisite and proper, as if the trial had been sent up in the ordinary course by a Sessions Judge." It must be remembered that in 1846, when this Act was passed, the procedure prescribed by Regulation 13 of 1827, section 2, and Regulation 3 of 1830 required the Sessions Judge to submit for confirmation not merely sentences of death but also sentences of transportation or imprisonment for life. In 1855, rules which will be found on pages 1342—1346 of the Government Gazette for that year, were accordingly made. Rule 35 provided that the absolute jurisdiction of the Agent in criminal cases should extend to fine and imprisonment for five years, and directed that sentences involving punishment beyond that period, or of greater severity, should be submitted for the confirmation of the Sadar Fouzdári Adálat. Rule 43 declared that if the punishment deemed suitable by the Agent should exceed his own absolute jurisdiction, he should record the punishment he would award, and should forward the case in original to the Sadar Fouzdári Adálat, which Court should proceed to take cognizance of the case, and to pass such sentence or order as they might think proper, and that the instructions conveyed to the Agent from the superior Court should be carried into effect by him. Rule 44 purported to give the Sadar Fouzdári Adálat power to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence might have been passed by the Agent, and thereafter to proceed according to the provisions of section 4 of Act XI of 1846.

In the case of *Queen Empress v. Sarya*<sup>(1)</sup> some prisoners who had been sentenced to five years' imprisonment by the Agent for an offence committed in one of the mehwási villages petitioned the High Court. Their Lordships treating the petition as an appeal rejected the application on the ground that Rule 44 was *ultra vires* as beyond the provisions of Act XI of 1846. This decision does not directly affect the case now under consideration, but the laborious researches of the learned Judges who decided

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it help most materially in enabling us to dispose of the question now before us. Accepting the conclusion that Rule 44 was *ultra vires*, and that the Sadar Fouzdári Adálat had under the Act no jurisdiction as a Court of Appeal or Revision in respect of sentences not exceeding five years, it seems nevertheless that its jurisdiction in the case of sentences beyond that term was unquestionable, being expressly provided for by the Act. The Criminal Procedure Code of 1861 did not extend to non-regulation districts (*vide* section 445), and as it did not touch Act XI of 1846, it left unaffected the jurisdiction of the Agent to refer and of the Sadar Fouzdári Adálat to deal with cases like the present. In 1862 the High Court was established under 24 & 25 Vic., c. 104, the 9th section of which enacted that its jurisdiction should be determined by Letters Patent save in so far as it might subsequently be modified by legislation. The original Letters Patent were issued in that year. Clause 27 provided that the High Court should be a Court of reference and revision from the criminal Courts subject to its appellate jurisdiction and should have power to hear and determine all such cases referred to it by the Sessions Judge, or by any other officers authorized to refer cases to the Sadar Fouzdári Adálat, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as were then subject to reference to or revision of by the said Court of Sadar Fouzdári Adálat.

Now it seems to me clear that this clause preserved to the High Court the powers of the Sadar Fouzdári Adálat as a Court of reference from the decisions of the Agent in all cases which he was authorized to refer to the Sadar Fouzdári Adálat. It is true no appeal lay from his decisions to the Sadar Fouzdári Adálat, or subsequently to the High Court; but the express provision that the High Court should have power to hear and determine all such cases referred to it by any officer possessing criminal jurisdiction as were subject to reference to the Court of Sadar Fouzdári Adálat, when read with section 9 of the High Court Act, makes it plain that this jurisdiction was retained. If the clause had stood by itself it might perhaps have been argued that the word "and" was explanatory, and that the High Court was only a Court of reference and revision in respect of Courts from which an appeal lay

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to it. But looking to section 9 of the Act, such a construction becomes impossible, for it cannot be said that the Letters Patent have made any direction curtailing the jurisdiction so as to exclude a class of cases formerly dealt with by the Sadar Fouzdari Adalat. Such a curtailment would be most unlikely, for it could hardly be intended to leave such cases wholly unprovided for, and if it had been so intended the matter would have doubtless been expressed in clear terms so as distinctly to remove it from the comprehensive provisions of section 9. Moreover, there was no appeal to the High Court from the decisions of Magistrates, and yet certain Magistrates were under section 404 of Act XXV of 1861 empowered to refer cases to the Sadar Fouzdari Adalat, and no question was ever raised as to the continuance of such references after the establishment of the High Court. The amended Letters Patent of 1865 made no change. They simply continued the powers conferred by the earlier Letters Patent on the High Court as a Court of reference. The situation was not altered by the enactment of the Criminal Procedure Code of 1872. It extended to the whole of British India, but preserved all special forms of procedure prescribed by any law not expressly repealed. Act XI of 1846 remained in force, and the arrangements under it were not altered. Then came Act XIV of 1874, which was introduced in the Mehwasí villages in the manner explained in *Queen Empress v. Sarya*. It repealed Act XI of 1846, but by section 7 preserved the rules under it. For the purposes of this case the repeal of the Act is immaterial. The rules prescribing the procedure to be followed by the Agent thenceforward derived their validity not from Act XI of 1846 but from section 7 of Act XIV of 1874. They authorized him to make a reference like the present, and clause 28 of the Letters Patent gave the High Court jurisdiction to hear and determine the case when referred. The High Court's jurisdiction never rested immediately either on Act XI of 1846 or on the rules made under it, but simply on the Letters Patent based on section 9 of the High Court Act 24 & 25 Vict., c. 104.

The only other enactment to which it is necessary to refer is the existing Code of Criminal Procedure. It like its predecessor applies to the whole of British India, but as in the absence of

specific provision to the contrary it does not affect any special or local law, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force (see section 7 of Act XIV of 1874), it does not touch the Agent's jurisdiction to refer the case, or the power conferred on us by the Letters Patent to hear and determine it.

From the foregoing review of the course of legislation on this subject, it appears to me that the High Court has jurisdiction to hear and determine the present reference. The case itself is of a simple nature, and presents no special difficulty, but as probably the accused, whose petition is addressed to the Governor in Council, is unaware that we are going to deal with it, I think it would be desirable to direct notice to be given to him before we finally dispose of it.

*Note* :—After giving notice to the accused the High Court considered the reference, confirmed the conviction and sentence and rejected the appeal.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

KING-EMPEROR v. BALA AND NARAYAN.\*

*Criminal Procedure Code (Act V of 1898), sections 337 and 339.—Criminal Procedure—Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn—Practice.*

A committing Magistrate, having, under section 337 of the Criminal Procedure Code (Act V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however,

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\* Criminal Appeal No. 56 of 1901.