

tural leases, and we are not supposing that it does, but we do think that the principles to which it gives expression are principles which, for the most part, were good law in respect of the facts covered by them before they found Legislative expression in the Transfer of Property Act, and among such would certainly be the principle upon which we found our decision here. We think, therefore, that the decree of the lower appellate Court must be confirmed and this appeal dismissed with all costs.

*Decree confirmed.*

G. B. R.

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### CRIMINAL REFERENCE.

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*Before Mr. Justice Heaton and Mr. Justice Shah.*

EMPEROR v. VINAYAK NARAYAN ARTE.<sup>o</sup>

*Criminal Procedure Code (Act V of 1898), section 349—Trying Magistrate sending up a case to the Sub-Divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-Divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.*

A Magistrate of the Second Class trying a case sent up the case to the Sub-Divisional Magistrate on the ground that he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class, who committed it to the Court of Session. A question having arisen if the commitment was legal :

*Held*, quashing the commitment, that under section 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-Divisional Magistrate alone who was competent to deal with the case.

THIS was a reference made by K. B. Wassoodev, Additional Sessions Judge of Thana.

<sup>o</sup> Criminal Reference No. 31 of 1914.

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The accused was tried in the first instance by the Second Class Magistrate of Pen for offences punishable under sections 336 and 452 of the Indian Penal Code. The Magistrate found the accused guilty; but he was of opinion that he could not pass a sufficiently severe sentence against the accused. He, therefore, sent up the proceedings to the Sub-Divisional Magistrate, Kolaba Northern Division, under section 349 of the Criminal Procedure Code. The latter transferred the case to the First Class Magistrate for disposal, who committed the case to the Court of Session at Thana.

The Additional Sessions Judge of Thana, being of opinion that the commitment was illegal, referred the case to the High Court, observing as follows :—

I humbly submit that the order of transfer made by the Sub-Divisional Magistrate, Kolaba, N. D., is illegal and the proceedings of the committing Magistrate are therefore void. The Second Class Magistrate, who first enquired into this case, submitted his proceedings to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code. Section 349 (2) makes it obligatory on the Sub-Divisional Magistrate to pass "such judgment, sentence, or order in the case as he thinks fit." In this case the Sub-Divisional Magistrate has neither passed judgment nor sentence. He has made an order of transfer to a Magistrate subordinate to him under section 528, Criminal Procedure Code. It is submitted, that the order of transfer is not such an order as is contemplated by section 349 (2), Criminal Procedure Code. The word 'order' in this section necessarily implies a "final order." The order of transfer is not a final order. It only directs a Subordinate Magistrate to enquire into the case. The fact that the words "judgment and sentence" precede and are associated with the word "order" implies that the word "order" is used *ejusdem generis* with the words "judgment and sentence." I am, therefore, of opinion that the Sub-Divisional Magistrate had no power to transfer the case sent up to him under section 349, Criminal Procedure Code.

The committing Magistrate apparently observed the above difficulty and therefore referred the case to the District Magistrate. The latter in his memo. (page 9 of Book No. 3) has expressed an opinion that the Sub-Divisional Magistrate's order was not irregular. Presumably the District Magistrate was under the impression that a Sub-Divisional Magistrate had general powers of transfer under section 528, Criminal Procedure Code. It is submitted that section 528, Criminal Procedure Code, does authorise a Sub-Divisional Magistrate,

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to whom a case is sent up under section 349, Criminal Procedure Code, to transfer the same to any other Subordinate Magistrate. His powers are limited to withdrawing and recalling cases from Subordinate Magistrates, and then referring them for enquiry or trial to any other Subordinate Magistrates. If the District Magistrate had withdrawn this case from the Sub-Divisional Magistrate under section 528, and then referred it for trial to the committing Magistrate, the procedure might have been regular. But this has not been done.

Another provision in the Criminal Procedure Code which empowers a Sub-Divisional Magistrate to transfer cases to a Subordinate Magistrate is contained in section 192. Even under this section the powers of transfer are limited to cases which have been taken "cognizance of" by the Sub-Divisional Magistrate. The mode in which cognizance of an offence can be taken is given in section 190, Criminal Procedure Code. In the present case the Sub-Divisional Magistrate cannot be said to have taken cognizance of the offence with which the accused is charged in any of the modes indicated in section 190. For these reasons I am humbly of opinion that the order of transfer of the Sub-Divisional Magistrate cannot be sustained and consequently it vitiates the subsequent proceedings of the committing Magistrate. This defect in the proceedings cannot, in my opinion, be cured by section 532, Criminal Procedure Code, which does not apply to a commitment by a Magistrate duly empowered to commit.

The reference was heard.

*Manubhai Nanabhai (amicus curie)* for the accused:—Under section 349 of the Criminal Procedure Code it was only the Sub-Divisional Magistrate alone who ought to have dealt with the case: he had no power to transfer the case. See *The Queen v. Velayudam*<sup>(1)</sup>. Section 528 of the Code did not apply as he had not "withdrawn" or "recalled" the case. The transfer was further not authorised by section 192, because the Sub-Divisional Magistrate had not taken "cognizance of" the case at its initial stage. Assuming that the section applies to cases of which cognizance is taken at a later stage, the power can only be exercised when the transfer has to be made for "inquiry" or "trial". Proceedings under section 349 are of a very special nature, and are not to be assimilated to ordinary cases.

(1) (1881) 4 Mad. 233.

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The order of transfer being bad, all proceedings before the First Class Magistrate, inclusive of the order of commitment, are bad.

*S. S. Patkar*, Government Pleader, for the Crown:—The order of transfer by the Sub-Divisional Magistrate is not bad, because section 349 empowers him to pass any order which he thinks fit and which is according to law. He can exercise the powers of transfer given to him by section 192.

As the proceedings before the First Class Magistrate are not void because he has not passed any sentence within the meaning of section 530, clause (1). He has simply committed the case to the Court of Session, which is within his ordinary powers.

SHAH, J.:—The facts that have given rise to this reference are briefly these: the accused was in the first instance tried by a Second Class Magistrate for offences punishable under sections 336 and 452, Indian Penal Code. He sent up the proceedings under section 349 of the Criminal Procedure Code to the Sub-Divisional Magistrate, Kolaba, Northern Division, as he thought that he could not pass a sentence sufficiently severe against the accused. The Sub-Divisional Magistrate, instead of disposing of the matter himself, transferred the case to a First Class Magistrate, and the First Class Magistrate committed the accused to the Court of Session. The Additional Sessions Judge of Thana has made this reference, pointing out that in his opinion the commitment by the First Class Magistrate is illegal.

Having regard to the special character of the provisions of section 349 I am of opinion that it is only the District Magistrate or the Sub-Divisional Magistrate who has jurisdiction to exercise the powers mentioned in paragraph 2 of section 349, *i. e.*, to pass such judgment, sentence or order in the case as he thinks fit. The

Sub-Divisional Magistrate in this case has apparently acted under section 528 of the Criminal Procedure Code, which, in my opinion, has no application to proceedings submitted to him by a Second Class Magistrate under section 349; and in the argument before us it is not suggested that the powers of transfer under section 528 could justify the transfer of the proceedings to the First Class Magistrate in this case.

Having regard to the powers of a First Class Magistrate and of a Sub-Divisional Magistrate as specified in Schedule III and to section 530, clause (d) of the Code, I feel fortified in the view I take of the section that the jurisdiction to deal with the proceedings under section 349 is conferred upon District Magistrates and Sub-Divisional Magistrates and upon no other Magistrates. Even assuming that the Sub-Divisional Magistrate had the power to transfer these proceedings to the First Class Magistrate, he could not transfer the jurisdiction which was conferred upon him by the section and not upon the First Class Magistrate. It seems to me that this is not a question of the power of the Sub-Divisional Magistrate to transfer any proceedings before him but a question of jurisdiction.

The Government Pleader has sought to support the order of commitment by relying upon section 532, Criminal Procedure Code. But it is quite clear that the section has no application to the facts of this case, in which the proceedings are supposed to be wholly without jurisdiction. I think, therefore, that the proceedings before the First Class Magistrate are without jurisdiction. The result is that the order of commitment is set aside and the proceedings are sent back to the Sub-Divisional Magistrate, to whom they were, in the first instance, submitted by the Second Class Magistrate under section 349, to be disposed

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of by him according to law. We are indebted to Mr. Manubhai for having argued the reference on behalf of the accused at our request.

HEATON, J. :—I concur. I do not feel any doubt now (at one time I did) that section 349 confers special powers, or, what may be called, a special jurisdiction, and confers it only on District and Sub-Divisional Magistrates. That being so, every case which is referred under section 349 must be disposed of by a Magistrate who has that special jurisdiction. In this particular case the matter was disposed of by a Magistrate who had not this jurisdiction, and I concur in the proposed order.

*Order set aside.*

R. R.

## APPELLATE CIVIL.

*Before Mr. Justice Heaton and Mr. Justice Shah.*

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 July 29.

SIDDAPPA BIN BAPU BIRADUR AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, v. NINGANGAVDA BIN SIDDANGAVDA AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 2), RESPONDENTS.\*

*Hindu law—Adoption—Adoption made by widow of predeceased son—Contemporaneous consent of her mother-in-law in whom estate vested as heir.*

Under Hindu Law, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir.

*Payapa v. Appanna*<sup>(1)</sup>, followed.

SECOND appeal from the decision of F. K. Boyd, District Judge of Bijapur, confirming the decree passed by V. R. Kulkarni, Subordinate Judge at Muddebihal.

Suit for declaration that certain lands belonged to the plaintiff,

\* Second Appeal No. 103 of 1913.

<sup>(1)</sup> (1898) 23 Bom. 327.