

[CROWN SIDE.]

REG. v. RA'MDA'S SA'MALDA'S.

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August 17.*Ex parte* MA'DAVJI DHARRAMSI..... *Applicant.**High Court Criminal Procedure Act, X. of 1875, Sections 115, 147—
Certiorari—Order of reference—Act XIII. of 1856, Section 36—Order for
delivery of property—Examination of witnesses.*

Semble that the "case" mentioned in Section 147 of the High Court's Criminal Procedure Act, X. of 1875, must refer to some question in the nature of a criminal proceeding, and not to a matter of a *quasi* civil character, such as the reference to a Police Magistrate contemplated in Section 115.

The power of the High Court to issue a writ of *certiorari* has not been taken away by Section 147 of the High Court's Criminal Procedure Act, X. of 1875.

The words "any property" in Section 115 of the High Court's Criminal Procedure Act, X. of 1875, include as well property voluntarily produced before the Magistrate by a witness in the case, as property seized by the Police or found on the person of the prisoner.

The reference to a Magistrate under Section 115 of the High Court's Criminal Procedure Act, X. of 1875, is not a trial for the final determination of the rights of the parties, and it is not incumbent upon the Magistrate on such reference to hear witnesses, but he may rightly order the delivery of property to that one of the rival claimants whom he considers, upon the statement of their respective cases, to have made out a *prima facie* case, and it is not competent to the High Court to review the decision at which the Magistrate so arrives.

THE applicant in this case claimed to be the *bonâ fide* purchaser for value of a certain share certificate in the new Dhurumsey Punjâbhoy Spinning and Weaving Company, and as such to be entitled to the possession thereof against the actual owner and his pledgee, from whom it had been stolen prior to the sale to the applicant. The Magistrate had ordered the share certificate to be restored to the pledgee of the real owner, and it was in consequence of such order of the Magistrate that the present application was made to the High Court.

Inverarity on 27th July 1875 obtained a rule *nisi* on behalf of the applicant, that the case of *Reg. v. Râmdâs Sâmaldâs* and all proceedings had and taken therein before Nânâ Moroji, Esq., Magistrate of Police for the Town and Island of Bombay, relating to the share certificate in question, should be transferred into the High Court, or that a writ

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of *certiorari* should issue to the Magistrate to bring into the High Court the case and proceedings and all papers relating to the matter, unless he should show cause to the contrary.

Purcell (*Jardine* with him) showed cause on August 14.

Inverarity in support of the rule.

Cur. ad. vult.

The following judgment, setting forth all the facts of the case, was delivered, on August 17th, by

MARRIOTT, J.:—The matters in question on this rule arise out of the conviction of one Rámdás Sámaldás who pleaded guilty before me, at the last Criminal Sessions of the High Court, of the offences of theft and of criminal breach of trust as a servant of [amongst other property] one share certificate with blank transfer deed attached in the New Dhurrumsey Punjábhoy Spinning and Weaving Company, No. 37, and standing in the books of that company in the name of Dhurrumsey Punjábhoy. Upon such conviction, in accordance with what has been the ordinary practice of the High Court when a question respecting the ownership of the stolen property arises, and for which provision is now made by Section 115 (a) of the High Court Criminal Procedure Act, X. of 1875, the matter was referred to the committing Magistrate, Mr. Náná Moroji, then Acting Second Magistrate of Police in Bombay. It appears from the affidavit of Hurridás Nuthubhoy, and it is not disputed, that in the month of June 1874 Dhurrumsey Punjábhoy had sold the share in question to the firm of Hurgovundás Cuberdás, and at the

(a) "When the trial is concluded, the Court may make such order as it thinks fit for the disposal of any property produced before it, regarding which any offence appears to have been committed. Any order under this section may be in the form of a reference to a Magistrate, who shall in such case deal with the property as if it had been seized by the Police, and the seizure duly reported to him.

EXPLANATION.—In this section the term 'property' includes not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

time of such sale had executed a blank transfer and application for transfer to that firm; that in the same month of June the firm of Hurgovundás Cuberdás pledged that share with the firm of Gungádás Vizbukundás, and at the same time handed over the share certificate and blank transfer and application for transfer to Nursidás Jaitrá, the *munim* of the firm of Gungádás Vizbukundás, as security for a loan. The prisoner, Rámódás Sámaldás, was a servant of the firm of Gungádás Vizbukundás, and the theft was discovered on the 18th of February last, but must have been committed some days previously. The share was transferred from the name of Durrúmsey Punjábhoj into that of Sorábji Hormasji Jussáwállá on the 11th of February last, and it appears from the affidavit of the applicant, Mádavji Dharramsi, that he, in the usual course of business, on the 2nd of April last, purchased the share in the share market in Bombay through a broker named Cupurchund Cursondás, at the then market price of Rs. 1,320, and that on the 5th of that month the transfer deeds were, together with the share certificate, deposited at the company's office. The purchase money was paid, and on the same day the share was transferred into the name of the applicant, Mádavji Dharramsi. In order to effect the transfer to Sorábji Hormasji Jussáwállá, the prisoner must have fraudulently filled up the blank transfer and application for transfer signed by Dhurrúmsey Punjábhoj. On the 9th of June last, the share certificate was produced by the *gumastá* of the applicant before Mr. Náná Moroji, before whom the prosecution was then pending previous to committal. Mr. Náná Moroji retained the share certificate as one of the exhibits in the case, and it was one of the exhibits sent up to this Court with the case. On the 22nd of July last, the question as to the disposal of the share certificate, under an order of reference, came on before Mr. Náná Moroji, when the applicant, Mádavji Dharramsi, appeared and claimed by his solicitor, Mr. Rimington, to be entitled to the share as a *boná fide* purchaser thereof for value in the open share market in Bombay, without notice of the fact of its having

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been stolen property. But the Magistrate ordered the share certificate to be delivered up to Nurseydás Jaitráam, the *munim* of the firm of Gungádás Vizbukundás. The rule *nisi* in this matter, granted on the 26th of July last, directed that the case and all proceedings had and taken therein, relating to a certain share certificate, No. 37, in the New Dhurumsey Punjábhoy Spinning and Weaving Company, Limited, be transferred into the High Court, and that the said Náná Moroji do transfer the same and all papers relating to the said matter into the High Court accordingly; or that a writ of *certiorari* do issue out of the said High Court, directed to him, the said Náná Moroji, to bring before the High Court the said case and proceedings mentioned, and all other papers relating to the said matter, &c. The rule was so granted in the alternative, because I had doubts, when the rule was moved for by Mr. Inverarity, whether this was a matter within the provisions of Section 147 of the High Court Criminal Procedure Act, X. of 1875. That section provides—"Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any criminal Court situate within the local limits of its ordinary original criminal jurisdiction; and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." It appeared, and still appears, to me that the "case" mentioned in that section must refer to some question in the nature of a criminal proceeding, and could not refer to a matter of a *quasi* civil character, of which a reference to the Police Magistrate under Section 115 of the same Act partakes. But, be that as it may, it appears clear to me that this Court, which, like the Court of Queen's Bench in England, has a superintendence over all inferior Courts within its jurisdiction, and may remove all proceedings therein depending and transfer them to its own jurisdiction, has power to issue a

writ of *certiorari* in a case like the present. It was, indeed, contended on the argument of the rule that the writ of *certiorari* was taken away by Section 147 of the High Court's Criminal Procedure Act; but, although that section gives power to the Court to remove cases from inferior Courts by the form of procedure there given, yet I apprehend the jurisdiction of this Court to issue writs of *certiorari* could only be taken away by express enactment, and that this Court has still jurisdiction to issue that writ in cases to which that section does not apply (b). The rule came on for argument on Saturday last, when it was objected on behalf of the applicant that the order of reference to the Magistrate had not been drawn up, and, therefore, that the Magistrate had no jurisdiction. It has not been the practice to draw up these orders, but that does not render the order invalid, and it is not the less an order of the Court because it has not been drawn up. It was further objected on behalf of the applicant that, as this share certificate had not been seized by the police or been found on the person of the prisoner, but had been produced before the Police Magistrate by a witness, the provisions of Section 115 of the Act did not apply. The words of the section are—"When the trial is concluded, the Court may make such order as it thinks fit for the disposal of any property produced before it, regarding which any offence appears to have been committed. Any order in this section may be in the form of a reference to a Magistrate, who shall in such case deal with the property as if it had been seized by the police, and the seizure duly reported to him." The share certificate was the property regarding which the theft, for which the prisoner was convicted, had been committed, and the words "any property" are certainly large enough to include property whether seized by the police or produced by a witness in the case. In the case of *R. v. Stanton* (c) the prisoner was indicted for the theft of a £10 Bank of England note, which had been subsequently paid by the bank, and which was produced in Court by a

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 (b) See *R. v. Reeve*, 1 W. Bl. 231; *R. v. Allen*, 15 East 333.

(c) 7 C. & P. 431.

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clerk of the bank. The prosecutrix applied for a return of the note under the Act then applicable, 7 and 8 Geo. IV., C. 29, S. 57. The Court declined to make the order, as the note had been paid by the bank, and the proviso of that section was applicable, but it does not appear that the Court doubted its power to make the order, because the note was produced by a witness. To put the construction contended for on the section, would be not to give full effect to the words in their natural and ordinary sense, and would, I think, limit the beneficial effect of the section, which was intended to provide a simple and immediate means for the restitution of stolen property. It was further contended that the Magistrate had refused to permit the applicant to call any witnesses, and also that no opportunity was given of cross-examining Nurseydás Jaitrá́m, whereby it was suggested such a case of negligence might be made out as would disentitle him to a return of the share certificate. The Magistrate has not made any affidavit, and the only account of what took place before him is that contained in the affidavit of the applicant. In the 5th para. he says:—"On or about the 13th July 1875 I was served with another summons issued by Mr. Náná Moroji, calling on me to attend before him and show cause why the said certificate of share No. 37, therein described as having been detained in the case, should not be returned to the complainant; in obedience to which I attended with my solicitor, Mr. Rimington, on the 22nd July, and my said solicitor then urged before the said Magistrate that I was the *boná-fide* purchaser in the open market of the said share for valuable consideration, without notice of any claim thereto whatsoever, either on the part of the complainant Nurseydás Jaitrá́m or of any person other than the said Sorábjí Hormasjí Jussáwallá, who was the registered holder and owner of the share at the time of such purchase; and submitted that, as the certificate on the face of it showed that I was the registered holder of the share, and that it had been transferred from time to time in manner aforesaid, the said share certificate ought to be returned to me as the person entitled thereto, and from whose custody

it came into the hands of the Magistrate; and that if the Magistrate had any doubt as to my right to have the share certificate delivered to me without further enquiry, I was prepared to adduce evidence before him to show that the facts hereinbefore stated, as to the circumstances under which I acquired the said share, were true. The Magistrate, however, said that he did not wish to hear any evidence on the subject, that he did not wish to decide anything as to the legal rights of the parties; but that he would order the said certificate to be delivered up to the complainant, and that I could resort to the civil court to enforce my right to the said share if I was so advised," &c. Upon that statement it appears that the applicant had an opportunity, through his solicitor, of stating his case, and the effect of the evidence he was prepared to adduce, and it does not appear from the affidavit that any application was then made to cross-examine Nurseydás Jaitráam. That suggestion was made on the argument of the rule. In order to decide whether the Magistrate was wrong in not permitting the applicant's witnesses to be examined, it is necessary to look at the character of the proceedings before him. Section 115 provides that the Magistrate, when an ordinary reference is made to him, "shall in such case deal with the property as if it had been seized by the police and the seizure duly reported to him." In Bombay, jurisdiction as to the disposal of stolen property is given to Police Magistrates by Section 36 of Act XIII. of 1856, which provides that "it shall be lawful for any Magistrate to make an order for the delivery of such property to the party who shall *appear to be* the rightful owner thereof," and the section also provides that no such order shall bar the "right of any person to sue the party to whom the property shall be returned, and to recover such property from him by action at law, so that the action be commenced within two months after such order shall have been made." It appears to me upon that section that the proceeding before the Magistrate was not intended to take the form of a regular trial, wherein the rights of the parties were to be finally determined, but rather of a preliminary

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proceeding, wherein the Magistrate, upon the statements of the respective cases of the rival claimants, should make an order for delivery of property to the one which he considered had made out a *prima facie* case. If the correctness of the Magistrate's decision be impugned, that may be done as in this case in a civil suit. That being so, it does not appear to me that it was incumbent upon the Magistrate to hear the applicant's witnesses, the effect of whose evidence and the alleged legal result therefrom he had heard already stated before him by the applicant's solicitor, and it is not competent to this Court to review the decision of the Magistrate, even if I were of opinion—which I am not—that he had come to a wrong conclusion as to the disposal of the property upon the statements before him of the cases of the respective claimants (*d*). For these reasons I think the rule must be discharged, and with costs.

(*d*) With regard to the correctness of the Magistrate's conclusion as to the disposal of the property, see the case of *Swan v. The N. British Australasian Company* (2 H. & C. 175) affirming the judgment of the Court of Exchequer (7 H. & N. 603).

[APPELLATE CIVIL JURISDICTION.]

Regular Appeal No. 24 of 1874.

June 14. * SA'VITRIAVA' and another... *Defendants and Appellants.*

ANANDRA'V; deceased;
his sons and heirs,
APA' SA'HEB and BA'-
BA' SA'HEB ... } *Plaintiffs and Respondents.*

Watan—Partition of watan—Cessation of duties attached to watan.

A cessation, (even though sanctioned by the Government,) of the performance of the duties attached to an impartible *watan*, does not alter the nature of the estate and make it partible.

THIS was an appeal from the decision of A. M. Cantem, 1st Class Subordinate Judge of Dharwar, in original suit No. 613 of 1866.