

It is contended before us that this view of the learned District Judge is erroneous in law. It is true that the plaintiff had no notice of the defendant's ownership; and that the plaintiff was misled by the fact that the sale-deed (Exhibit 11) was in Guracharya's name, and that, on his death, it was in the custody of his widow Laxmibai. So far the plaintiff had reason to believe that the property belonged to Guracharya, and he could have successfully urged estoppel as against the defendant but for another principle of law. It is found by the Court below that the property was in the actual possession of the defendant at the date of the plaintiff's purchase. It was therefore the plaintiff's duty, not merely to rely upon the paper title disclosed by the sale-deed Exhibit 11, but also to make enquiries of the defendant in actual possession as to her title. Therefore, so far as the defendant was concerned, the plaintiff, having failed to make any enquiries of her, was bound by such title as she possessed. This is the law expounded in *Kondiba v. Nana*<sup>(1)</sup>, and it applies to the facts of this case. The plaintiff fails because he omitted to make the enquiries which he was bound to make to perfect his own title and by his own negligence exposed himself to the risk of purchasing property which in reality belonged not to his vendor but to the defendant.

The decree must, therefore, be confirmed with costs.

*Decree confirmed.*

R. R.

(1) (1903) 27 Bom. 408.

## CRIMINAL REVISION.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

EMPEROR v. AMIR BALA.\*

*Criminal Procedure Code (Act V of 1898), section 123—Order to furnish security—Reference by Magistrate to Sessions Judge—Sessions Judge to go into merits of the case.*

In a proceeding under sections 110 and 118 of the Criminal Procedure Code, 1898, the Magistrate ordered the accused to be bound over for a period

\* Criminal Application for Revision, No. 420 of 1910.

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of three years and referred the case to the Sessions Judge under clause (3) of section 123 of the Code. The latter confirmed the order without going into the merits of the case.

*Held*, that the words of clause (3) of section 123 of the Criminal Procedure Code, 1898, were wide enough to give discretionary power to the Sessions Judge to deal with the case on the merits and pass such orders as the circumstances of the case might require.

THIS was an application to revise the order passed by F. J. Varley, Sessions Judge of Khandesh.

Proceedings under sections 110 and 118 of the Criminal Procedure Code, 1898, were instituted against the accused before J. P. Brander, First Class Magistrate of East Khandesh. The Magistrate held the inquiry and found that the acts of the accused fell within clauses (a), (c); (d) and (f) of section 110 of the Criminal Procedure Code, 1898. He, therefore, ordered them under section 118 of the Code to be bound over for a period of three years, and directed each one of them to execute a personal bond for Rs. 5,000 and to furnish two respectable sureties for the same amount. He then referred the case to the Sessions Judge of Khandesh under section 123 of the Criminal Procedure Code, 1898.

The Sessions Judge heard the accused's Counsel, and confirmed the order without allowing him to go into the merits of the case, on the following grounds:—

It is not disputed that there is abundant information, and evidence upon the record, which would, if believed, justify the Magistrate's order; the novel contention put forward, so far as this Court is aware for the first time, is that the Sessions Court should in the course of these proceedings exercise its judicial functions in the direction of entering fully into the merits of the case reappreciating the evidence, and setting the order of the Magistrate aside as based on false information and worthless evidence.

Now, in the first place, there is no provision in the Code for the party, or his pleader being heard at all in proceedings submitted under this section, but on general principles it may be conceded that a party to whose prejudice an order may be passed may have a hearing (I. L. R. 23 Calcutta, page 493, and I. L. R. 27 Calcutta, page 656) but the scope of this hearing must be rigidly limited by section 123 (3), Criminal Procedure Code; he may urge that the information or evidence require to be supplemented, or that the order may be modified in one direction or another, or even, if it were based patently on no evidence or

information (and this defect could not be remedied by the Magistrate) in the last resort set aside; but from the proposition that the party or his pleader can ask the Sessions Court, whether as a Court of first instance or appeal to enter into the merits of the case, or reappraise the evidence this Court must emphatically dissent; there is, of course, no authority, if it needed to be enforced, for the principle that the order passed by the Sessions Court is its own order, and no mere adoption of the provisional order of the Magistrate, and the Court will exercise its own discretion in passing such an order within the limits assigned to it by section 123 (3).

That the Court is not exercising its ordinary criminal jurisdiction, and that the jurisdiction conferred by section 123, Criminal Procedure Code, upon a Sessions Court is concerned rather with the exercise of a power for *the prevention of an offence* is emphasised by a Full Bench Criminal Ruling of the Bombay High Court, No. 73 of December 1895.

Section 406, Criminal Procedure Code, makes all orders from Magistrates in the District appealable to the District Magistrate, and the Sessions Court has really no concern with the merits of orders passed by Magistrates: that this is the intention of the Legislature is clear from the amendment of section 123 (3), Criminal Procedure Code, when the Calcutta High Court (I. L. R. 24 Cal. 155) laid down that the information and evidence which was defective must be supplied by the Sessions Court itself: the delegation of this duty to the Magistrate who held the inquiry under section 118, Criminal Procedure Code, clearly shows that there never was any intention that the Sessions Court should enter into the merits of the making of these orders under Chapter VIII. As the contention if allowed would add enormously to the work of the Sessions Court, its decision is one of great importance. Mr. Kazi Kabirudin having announced his intention of not resting content with the Ruling of this Court, proceedings are suspended, and this Court rules that there is no authority for Mr. Kazi Kabirudin's contention, and must decline to hear him on the merits.

The accused applied to the High Court under its criminal revisional jurisdiction.

*P. B. Shingne*, for the accused.—The language of section 123 of the Criminal Procedure Code, 1898, is wide enough to warrant the Sessions Judge to go into the merits of the case. If the order were to be for a security for one year, the accused could have appealed under section 406 of the Code. The learned Judge should therefore have gone into the merits of the case.

*G. S. Rao*, Government Pleader, for the Crown.—The accused, if aggrieved, have the recourse to appeal or apply in revision. It will be sufficient for purposes of justice. The language of

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section 123 does not warrant the conclusion for which the accused are moving this Court.

CHANDAVARKAR, J.:—Clause 3 of section 123 of the Criminal Procedure Code provides:—

“Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit.”

The words are wide enough to give discretionary power to the Sessions Judge or the High Court, as the case may be, to deal with the case on the merits and pass such order as the circumstances of the case, in his opinion, may require.

We must, therefore, make the rule absolute and ask the Sessions Judge to deal with the matter, having regard to this order.

HEATON, J.:—I agree to the proposed order. Unless the words used in section 123 of the Criminal Procedure Code are intended to confer on the Court of Session power to go into the merits in a case of this kind, and, indeed, unless they require it to go into the merits, if any point is raised which involves the merits, I am unable to understand what these words mean. It is true that section 406 provides that an appeal lies to the District Magistrate. But I think that the Sessions Judge is wrong in arguing that although he himself might make an order under section 123, the order requiring security would still be the order of the Magistrate, and would still be open to appeal to the District Magistrate under section 406. It seems to me that when the Sessions Judge has dealt with a case under the provisions of section 123, the order passed by him, whatever it may be, becomes the order in the case; and there is no longer an order by a Magistrate made under section 118, which can be the subject of an appeal to the District Magistrate.

Therefore, the Sessions Court is the only Court which has the power to deal with these cases; and being that only Court it must go into the merits if required; and if the Judge is to go into the merits, he is bound, according to the general principles

of justice, which are applicable in British India, to give the person affected by the order an opportunity of being heard.

Therefore, I consider that the rule must be made absolute.

*Rule made absolute.*

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## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

NARAYAN SADOBA HALWAI (ORIGINAL DEFENDANT), APPELLANT, v.  
UMBAR ADAM MEMON (ORIGINAL PLAINTIFF), RESPONDENT.\*

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*Civil Procedure Code (Act XIV of 1882), sections 282, 287—Decree—Execution—Attachment—Application to raise attachment by a third person—Court declaring lien in his favour—Property sold subject to lien—Third party suing the auction purchaser for amount of lien—Auction purchaser can question the existence of lien.*

In execution of a money decree obtained by G against H certain property belonging to the latter was attached. U intervened in those proceedings and asked to raise the attachment on the ground that the property was his. The Court investigated the claim under sections 280 and 281 of the Civil Procedure Code of 1882 and held that the property belonged to H and that U was entitled to a lien on the property for Rs. 687-11-3. The property was then sold at a Court sale subject to the lien and purchased by N. U sued N to recover the amount of his lien. N contended that the order passed in the miscellaneous proceedings did not bind him and that he was entitled to question the existence of the lien :—

*Held*, that N was not bound by the order passed in the miscellaneous proceedings, for he could not be regarded as a party to it being not a representative either of the judgment-debtor or of the judgment-creditor.

*Vasanji Haribhai v. Lallu Akhu*<sup>(1)</sup>, *Vishwanath Chardu Naik v. Subraya Shivaya Shetti*<sup>(2)</sup>, followed.

*Held*, further, that N was entitled to question the existence of the lien, inasmuch as the order passed by the Court as to the lien could not be regarded as one passed under section 282, but as one passed under section 287 of the Civil Procedure Code of 1882.

\* Second Appeal No. 958 of 1909.

(1) (1885) 9 Bom. 285

(2) (1890) 15 Bom. 290.