CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Hayward.

In re JESA BHATHA AND ANOTHER.* 1919. October 20

Criminal Procedure Code (Act V of 1898), sections 110, 122—Security for good behaviour—Sureties to be solvent and respectable—Such sureties, when offered, rejected on the grounds that they could not exercise control and that certain outlaws were at large—Order rejecting sureties should be judicial order.

On a charge of habitually harbouring outlaws, certain persons were ordered to execute a personal recognizance and to furnish two solvent and respectable sureties for good behaviour for one year. When such sureties were offered they were summarily rejected on the strength of the Police report that the sureties were not living near enough to exercise control over the accused and that the outlaws were still at large:

Held, that the sureties offered having been shown to be solvent and respectable, the reasons given were not sufficient to disqualify them to be sureties.

THIS was an application under the criminal revisional jurisdiction to revise an order passed by H. V. Date, Sub-Divisional Magistrate, First Class, at Kaira, confirmed by C. H. Blathwayt, District Magistrate of Kaira.

The applicants were the brother and father of Dhula and Mangal respectively, who along with five others having been suspected of harbouring outlaws and thieves were ordered, under section 110 of the Criminal Procedure Code, to execute a bond of personal recognizance for Rs. 100 and to furnish two solvent and respectable sureties for the same amount each for good behaviour for a period of one year.

The sureties demanded not having been offered, the accused were sent to jail.

Later, the applicants produced two persons Gangashankar and Purshottam as sureties. The Magistrate

* Criminal Application for Revision No. 322 of 1919.

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referred the matter to the Police, who certified that the sureties were solvent and respectable. But the report of the Police added that the proposed sureties lived at Umreth, whilst the accused lived at Araj, which was six miles distant from Umreth; and that though the sureties intended to employ the accused they would not be able to exercise any control owing to the distance; and that the outlaws whom the accused were charged to have harboured were not arrested and that it would not be advisable to release the accused, till the outlaws were taken into custody. The Magistrate endorsed an order in Gujarati on the report, which, when translated, ran as follows: "Under the circumstances stated by you bail cannot be granted. Please inform the applicants to that effect and report."

The applicants applied to the District Magistrate against the orders but he declined to interfere on the following grounds:—

The application is made under section 124, Criminal Procedure Code, which is not strictly applicable. That section empowers the District Magistrate to release any persons imprisoned for failure to give security under section 110, Criminal Procedure Code, if he thinks this can be done without hazard to the community. Anyhow, I should certainly not interfere under that section, as there was strong evidence in the Magistrate's Court that Dhula Bhatha and Mangal Chuna had been sheltering outlaws who are still not arrested. The application (which is only for the acceptance of the sureties, not an appeal against the order directing that security be furnished), would therefore lie, I think, under section 406, and I could take action under section 423 (*c*). I should, however, be most unwilling to interfere with the Sub-Divisional Magistrate's discretion except on the strongest grounds. I see no harm in his having consulted the Police; in fact, it is the practice in this district so to consult them, the final decision resting of course with the Magistrate. The Magistrate should have given clear reasons when he refused to accept the sureties (section 122) and not merely said that he agreed with the Police opinion but I would not make this a reason for reversing his order. I doubt myself whether the sureties offered are of sufficient standing, where outlaws and sheltering of them are concerned.

The applicants applied to the High Court.

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H. V. Divatia, for the petitioners :—The Magistrate was wrong in referring our application to accept the sureties to the Police authorities and accepting their report for rejecting them, without giving any reasons for doing so. Under section 122, Criminal Procedure Code, it was incumbent on him to give reasons and to conduct the inquiry himself : *Emperor* v. *Balwant*[1].

Besides, the grounds given by the Police for rejecting the sureties are not valid. There is no suggestion against the respectability or the solvency of the sureties. The grounds given are that the sureties would not be able to control the accused whom they wanted to engage for cultivating their lands and that the release of the accused was not desirable so long as the outlaws for sheltering whom security was demanded from them were not arrested. This test is erroneous : *Emperor* v. *Jiva Natha*[2] ; *Adam Sheikh* v. *Emperor*[3] ; *Jafar Ali Panjalia* v. *Emperor*[4].

S. S. Patkar, Government Pleader, for the Crown :—The report of the Police shows that the sureties are living at a distance from the village where the accused are to be employed by them. The object of the sureties is to get the accused released in order to work on their fields which are situated at a distance from their village. Therefore, there would be no effective control over them. Besides, the accused are suspected of harbouring outlaws which is serious thing, and, therefore, the sureties should be substantial. The application is not filed by the person affected but by his relatives.

SHAH, J. :—In this case seven persons including Dhula Bhatha and Mangal Chuna were ordered by the Sub-Divisional Magistrate on the 18th of December 1918 to

(1) (1904) 27 All. 293.
(2) (1914) 16 Bom. L. R. 138.
(3) (1908) 35 Cal. 400.
(4) (1910) 37 Cal. 446.

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execute a personal recognizance for Rs. 100 and to furnish two solvent and respectable sureties for the same amount each for good behaviour for a period of one year. On the same day they were ordered to suffer rigorous imprisonment for one year or until within such period the security required was furnished, as no sureties were furnished by the persons concerned on that day. On the 16th of April last an application was made by the relations of these two persons Dhula and Mangal offering the necessary sureties on their behalf. The persons offered as sureties were two brothers, Purshottam and Gangashankar. The Sub-Divisional Magistrate referred the matter to the Police and on the 3rd of May last a report was made by the Sub-Inspector of Umreth that the sureties offered had land in the village of Araj, and that they were ordinary men. The matter was further referred to the Sub-Inspector of Police at Dakore who made a report on the 12th of June last that the persons concerned had land at Araj and that they intended to employ the two persons Dhula and Mangal to work on their fields, that the sureties lived at Umreth and were not in a position to exercise control over the two persons, that the outlaws, for harbouring whom Dhula and Mangal along with others were called upon to furnish security for good behaviour, were still at large and that it was desirable not to accept any sureties until those outlaws were arrested. On this correspondence an order addressed to the Sub-Inspector was endorsed by the Sub-Divisional Magistrate in Gujarati on the 5th of July as follows:—"Under the circumstances stated by you bail cannot be granted. Please inform the applicants to that effect and report." The relations of the two persons made an application against the said order to the District Magistrate who refused to interfere. They have made an application now to this Court. At the outset, I desire to point out

that this application should have been filed in the names of the persons concerned. In view of the fact that the order now in question was made on the application of the present petitioners, we do not consider it necessary to postpone the matter in order to have the application formally in the names of the two persons concerned. The matter has been brought to our notice, and it seems desirable to make the proper order without any further delay.

It is clear that according to the order made by him on the 18th of December 1918 the Sub-Divisional Magistrate had to inquire whether the two sureties offered were solvent and respectable. Under section 122 he could refuse to accept these sureties if they were unfit persons for reasons to be recorded. In the present case I cannot accept the conclusion reached by the Sub-Divisional Magistrate, nor can I approve of the procedure followed by him. The materials before the Sub-Divisional Magistrate clearly showed that the sureties offered were solvent persons. There was nothing against them and they were apparently respectable persons. The other reason given in the Police report for not accepting them was that the persons in jail should not be released until the outlaws were arrested. It is hardly a reason for not accepting these sureties. The Sub-Divisional Magistrate has simply endorsed the report made by the Police. He has given no reasons of his own, and having regard to the state of the original papers in this case it seems to me that he has not treated the matter judicially. Under section 122 when a surety is offered, the Magistrate is required to consider the matter judicially and to state his reasons for not accepting a surety. In the present case he has failed to do so. He does not seem to have realized that according to his previous order he had only to consider whether the sureties were solvent and

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respectable and he took a little over two months and a half to decide this simple question.

The District Magistrate recognized the defects in the order but refused to interfere on the ground that he doubted whether the sureties offered were of sufficient standing. It seems to me that that reason is vague. In dealing with the question of sureties under section 122 it must be remembered that the object of the order for furnishing security for good behaviour is the prevention of crime and not to secure imprisonment of the persons concerned (see *Emperor* v. *Jiva Natha*[1]). The report of the Sub-Inspector of Police clearly shows that he has put forward a reason for not accepting sureties which really has the effect of diverting the preventive provisions to a punitive purpose. I am of opinion that the Sub-Divisional Magistrate was clearly wrong in accepting such a reason and that the sureties offered ought to be accepted in this case.

I would accordingly make the rule absolute, set aside the order of the Sub-Divisional Magistrate and order that the sureties may be accepted.

HAYWARD, J. :—I agree. The acceptance of the sureties ought to be ordered It was directed in the preliminary order that two solvent and respectable sureties for Rs. 100 each should be furnished. Two sureties named Gangashankar and Purshottam were produced. They were reported to be solvent and respectable. They owned houses and lands and they were prepared to employ the persons required to give sureties upon their land. It was, however, suggested that they would not be satisfactory sureties as the lands were at a place called Araj which would appear to be about six miles from their residence at Umreth. It was also suggested

(1) (1914) 16 Bom. L. R. 138.

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that it would be unwise to release the men from prison owing to the presence of outlaws in the neighbourhood. The sureties were, therefore, refused by the Sub-Divisional Magistrate, and though it was recognized that the refusal was not quite in order, it was not interfered with by the learned District Magistrate.

It seems to me that the discretion to refuse sureties was not properly exercised. The sureties were within the description of the sureties required. They would, in my opinion, have proved as satisfactory as any sureties to be offered, in that they would have taken the men required to give sureties as their own tenants and would therefore have had good opportunity of preventing them from getting into mischief. The distance of six miles of the land from their residence would not seem to me to be really material in the mofussil. It was obviously no good reason in law to refuse to release the men from prison that there happened to be other outlaws in the neighbourhood.

It seems to me necessary also to observe that the scrappy order in vernacular refusing the sureties gave no reasons whatever for the refusal, and to point out that an order refusing sureties ought to be passed as a judicial order upon proper materials and that it has been specifically provided that reasons for refusal should be recorded. These provisions have been overlooked by the Sub-Divisional Magistrate and ought to have been set right, if he had jurisdiction to do so, by the District Magistrate under section 122 of the Criminal Procedure Code. It seems to me desirable also to repeat that sureties for good behaviour and not imprisonment were the primary objects of the preventive provisions of Chapter VIII of the Criminal Procedure Code.

It is perhaps unnecessary to press the point as the matter is before us and would seem to require the

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orders proposed but it is unusual to proceed on petitions received merely from the relations of parties and should not be taken as a precedent under section 439 of the Criminal Procedure Code.

Rule made absolute.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919 October 21.

SAKHARAM MANCHAND GUJAR (ORIGINAL PLAINTIFF), APPELLANT *v.* KEVAL PADAMSI GUJAR (ORIGINAL DEFENDANT), RESPONDENT.*

Indian Limitation Act (IX of 1908), section 20—Part-payment—Handwriting in respect of part-payment—Part-payment must appear in the handwriting of the person making payment.

The defendant purchased certain goods from the plaintiff on the 10th September 1912 for which he owed Rs. 1,350. He also owed another debt of Rs. 301 to the plaintiff. On the 4th and 5th July 1913, the defendant paid two sums of Rs. 500 and Rs. 235, accompanied by a letter which ran thus :—

"I have sent currency notes of Rs. 500 and a Hundi for Rs. 235, in all Rs. 735. Credit them."

The plaintiff applied the sum in wiping out the smaller debt ; and credited the balance as part-payment of Rs. 1,350.

On the 14th October 1915, the plaintiff sued to recover the unpaid balance of Rs. 1,350 with interest, and sought to bring his claim in time by relying on the part-payment in 1913:

Held, that the plaintiff's claim was in time, for the requirements of section 20 of the Indian Limitation Act were satisfied, as the fact of the payment appeared in the handwriting of the person making the same, and it appeared that the payment was in part satisfaction of the principal of the debt.

SECOND appeal from the decision of J. H. Betigiri, First Class Subordinate Judge, A.P., at Satara, confirming the decree passed by B. B. Kunte, Second Class Subordinate Judge at Rahimatpur.

* Second Appeal No. 441 of 1915.