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in specific immoveable property, I find it difficult to understand why when a transferee transfers his interest in specific immoveable property that should not amount to a transfer of an interest in specific immoveable property. Strength to the argument was accorded by the decision in *Bai Jadi v. Purshotam*,⁽¹⁾ but for reasons which have been already given by my learned brother I am, with respect, unable to accept the principle underlying that case. If the true position is that by reason of the transaction evidenced by the transfer the transferee gets a right to be in possession and a right of enjoyment of the usufruct of the mortgage, I find it difficult to understand the contention that it should not amount to a transfer of an interest in specific immoveable property. For these reasons I think the view taken by the lower Court was correct and I agree with the order proposed by my learned brother.

Decree confirmed.

K. B. S.

⁽¹⁾ (1922) 24 Bom. L. R. 729.

APPELLATE CRIMINAL

Before Mr. M. C. Chagla, Chief Justice.

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 Feb. 8

MADHAV RAOJI SHELKE (ORIGINAL ACCUSED), APPLICANT v. STATE.*

Motor Vehicles Act (IV of 1939), ss. 89, 112, 116, 131—Criminal Procedure Code (Act V of 1898), s. 246—Accused prosecuted for offence under s. 89—Magistrate, on evidence before him, convicting accused under s. 116—Whether conviction according to law in view, of s. 246 of the Criminal Procedure Code.

The accused was prosecuted under s. 89 read with s. 112 of the Motor Vehicles Act, 1939. A summons for the offence under those sections was served on him within 28 days of the commission of the offence. The trying Magistrate held that the offence disclosed on the evidence led before him was an offence under s. 116 and convicted the accused under s. 116 of the Act. The conviction was challenged, on the ground that it was not proper in view of s. 131 of the Act.

Held, that as none of the conditions laid down by s. 131 for a conviction under s. 116 of the Act was satisfied, the Magistrate was in error in convicting the accused under s. 116 of the Act.

The powers of the Court under s. 246 of the Criminal Procedure Code, 1898, are not so wide that it can convict an accused in respect of an

* Criminal Revision Application No. 1130 of 1951.

offence although the conditions laid down by the legislature for his conviction are not satisfied.

Criminal Revision against the order of conviction and sentence passed by K. J. Khambata, Chief Presidency Magistrate, Bombay.

The accused was originally charged under s. 89 read with s. 112 of the Motor Vehicles Act, 1939, for failure to report to the Police an accident caused by the car driven by him on May 28, 1951, and which had caused injury to a pedestrian. A summons was served on him within 28 days of the commission of the offence to the effect that he had failed to report the accident at the police station. The Chief Presidency Magistrate, Bombay, after hearing the evidence led before him came to the conclusion that the proper charge was not under ss. 112 and 89 of the Act but under s. 116 of the Act for reckless or dangerous driving. He accordingly altered the charge and took the plea of the accused on the altered charge. The defence urged before the Magistrate was that by virtue of the provisions of s. 131 of the Act, the accused could not be convicted on a charge under s. 116 of the Act because no summons for an offence under s. 116 was served on him within 28 days as required by s. 131. The Magistrate rejected this defence and convicted and sentenced the accused under s. 116 of the Act.

The accused applied in revision to the High Court. The application was heard.

S. S. Kavalekar, D. M. Parulekar, and V. N. Talpade for the accused.

R. Jethmalani and B. K. Hirani, for the Complainant.

H. M. Choksi, Government Pleader for the State.

CHAGLA C. J. The case for the prosecution was that the accused was driving a station wagon on May 28, 1951, at the island around Wellington Fountain opposite the Regal Cinema, and he caused injury to a pedestrian. A summons was served upon him to the effect that he had failed to report the accident at the police station, and he was prosecuted under s. 89 read with s. 112 of the Motor Vehicles Act. When the case went on before the learned Chief Presidency Magistrate, on the evidence the learned Chief Presidency Magistrate came to the conclusion that the offence disclosed was a much more serious one; it was an offence under s. 116, viz. driving recklessly or dangerously; and thereupon the learned

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Chief Presidency Magistrate convicted the accused under s. 116 and fined him Rs. 75, and he directed that a sum of Rs. 30 out of this sum of Rs. 75 should be paid to the complainant as compensation.

Chagla C.J. The point raised by Mr. Kavlekar before me is that the conviction under s. 116 is not proper in view of the provisions of s. 131. Section 131 provides that no person prosecuted for an offence punishable under s. 115 or s. 116 shall be convicted unless one of the three conditions are satisfied, and the first is that he should be warned at the time the offence was committed that the question of prosecuting him would be taken into consideration, the second is that within fourteen days of the commission of the offence a notice specifying the nature of the offence and other particulars should be served upon him, and the third is that within 28 days of the commission of the offence a summons for the offence was served upon him. It is clear that none of the three conditions was satisfied in this case. It is true that a summons was served within 28 days of the commission of the offence, but the summons that was served was not the summons for the offence viz. an offence under s. 115 or s. 116. The summons was for an offence under s. 89. The learned Chief Presidency Magistrate has taken the view, and that view has been supported before me by the learned Government Pleader, that inasmuch as the prosecution was initially under s. 89 and not under s. 116, the power of a Court under s. 246, Criminal Procedure Code, to convict the accused of any offence which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons, is unaffected, and therefore the proved facts having disclosed that he had committed an offence under s. 116 it was open to the Court to convict him under s. 116 although he was originally prosecuted under s. 89. It is further contended by the learned Government Pleader that s. 131 only applies when the prosecution initially is under s. 116, and for that purpose the Government Pleader invites my attention to the language of s. 131. The language of s. 131 is not that "no person shall be convicted under s. 115 or s. 116 unless the conditions were satisfied," but the language of s. 131 is that "no person prosecuted for an offence punishable under s. 115 or s. 116 shall be convicted unless the conditions are satisfied." If I were to give this interpretation to s. 131, then it would be rendered entirely nugatory. It would be open to the prosecution to

charge an accused under s. 89, serve the summons a year or two after the commission of the offence, give him no particulars with regard to rash or negligent driving, and in the course of the trial on the evidence led to apply to the Magistrate to try the accused under s. 116 and get a conviction under s. 116. Therefore, once a prosecution was launched under some section other than s. 115 or s. 116, all the rights given to an accused person who is prosecuted under s. 115 or s. 116, would disappear into thin air and the prosecution could safely proceed to secure a conviction without observing the conditions laid down in s. 131. I am not prepared to put that interpretation on s. 131. When s. 131 speaks of "no person prosecuted for an offence," it means that he is prosecuted at the time when the order of conviction is passed. Although, originally the accused was prosecuted under s. 89, ultimately his prosecution was under s. 116 and it was as a result of that prosecution that a conviction resulted. Therefore, in my opinion, s. 131 applies to the facts of this case.

The Government Pleader says that if that were so, the powers of the Court under s. 246 are taken away. In my opinion they are not taken away. It is open to the Court to convict the accused in respect of any offence disclosed in the evidence under s. 246 provided the conviction is in accordance with law. In this case, although the offence disclosed was one under s. 116, the conviction was not in accordance with the law because the conditions laid down in s. 131 were not complied with. Surely, it cannot be suggested that the powers of the Court under s. 246 are so wide that it can convict an accused in respect of an offence although the conditions laid down by the legislature for his conviction are not satisfied. Then the Government Pleader seeks to come under proviso (b) to s. 131, and that proviso is that nothing in this section shall apply where the Court is satisfied that such failure was brought about by the conduct of the accused. This sub-clause refers to the failure to serve the notice and summons referred to in sub-ss. (b) and (c) of s. 131. In this case there is no question of this proviso applying because in fact the summons was served upon the accused within 28 days as required by s. 131. The failure was not to serve the summons, but the failure was to state in the summons the nature of the offence. Therefore, in my opinion, the learned Chief Presidency Magistrate was in error in convicting the accused under s. 116 of the Motor Vehicles Act.

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But in my opinion it is equally clear on the facts found that the accused has committed an offence under s. 89 read with s. 112. His case was that it was not his car which knocked down the pedestrian and that some other car knocked him down, and because it was not his car that knocked down the pedestrian he never reported the accident. It has been found as a fact that it was his car which knocked down the pedestrian. If that be the finding of fact, then clearly he is guilty in law in not having reported the accident at the police station.

I would therefore convict him under s. 89 read with s. 112 and impose a fine of Rs. 20, and I will also direct that Rs. 15 out of this fine if paid, should be paid to the complainant as compensation. Fine in excess of Rs. 20 if paid should be refunded.

Conviction and sentence altered.

K. B. S.
