

that lady. The fatal obstacle to his success upon this ground is the fact that neither of the sons of Chinnayya Rao was born in the life-time of the testator. We are asked to apply to the case the principle enacted in section 100 of the Indian Succession Act, and transferred from that Act to the Hindu Wills Act; but that section, as is pointed out by the learned authors of West and Buhler's Hindu Law, contemplates a power of disposition extending further in time than the Hindu Law allows, as by that law some one in existence at the testator's own death must be the ultimate legatee. (West and Buhler, 3rd edition, page 224). It is needless, we think, to cite authority in support of this statement of the Hindu Law, and we find nothing against it in the judgment of Sir Subramania Ayyar in *Yethirajulu Naidu v. Mukunthu Naidu* (1), to which our attention was invited. The Hindu Wills Act, assuming that it has altered the law in the case of wills to which it is applicable, has, of course, no application to the present case.

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SUBANENI  
VENKATA  
PURU-  
SHOTHAMA  
JAGANADHA  
GOPALA  
ROW.

The appeal is dismissed with costs.

### APPELLATE CRIMINAL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Benson,  
Mr. Justice Boddam, Mr. Justice Wallis, and Mr. Justice*

*Sankaran-Nair.*

CHIDAMBARAM PILLAI AND OTHERS

v.

EMPEROR.\*

1908.  
March 30,  
31.

*Criminal Procedure Code, Act V of 1898 ss. 36, 107—Magistrate to whom person is not sent under s. 107 (3) cannot exercise the power of committing to custody under s. 107 (4)—Section 36 does not confer such power.*

A Magistrate has no jurisdiction to remand a person to custody under section 107 (4) of the Criminal Procedure Code when such person is not sent to him by another Magistrate under section 107 (3). Section 36 of the

(1) I.L.R., 28 Mad., 363.

\* Criminal Revision Case No. 49 of 1908, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of L. M. Wynch, Esq., District Magistrate of Tinnevely, dated 12th March 1908, in Miscellaneous Case No. 4 of 1908, and to quash the proceedings instituted against the petitioners under section 107 of Criminal Procedure Code, by the District Magistrate of Tinnevely.

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Code cannot, when read with section 107 (3), be construed as conferring such jurisdiction on a District Magistrate.

THE facts necessary for this report are stated in the petition presented by petitioners to the District Magistrate and the order thereon. The petition was as follows:—

“That the accused intend to move the High Court for a transfer of this case from the file of this Court to that of another, and, hence, apply for an adjournment for a fortnight.

That no proceedings can be instituted under section 107 of Criminal Procedure Code for the alleged action of the accused, and that the accused have reason to believe that section 107 of Criminal Procedure Code is resorted to by this Court simply with a view to detain the accused in custody under clause 4 of section 107, Criminal Procedure Code.

That the accused offer to give the security required, simply to avoid their detention in custody, without now attempting to show cause why they should not be ordered to give the security, no doubt, retaining the right of showing cause after the orders of the High Court are obtained on the application the accused intend putting under section 526, Criminal Procedure Code.”

Upon this petition, the Magistrate passed the following

ORDER.—“This application was put in immediately after the Court had called upon the petitioners to plead under sections 117 and 242 of the Criminal Procedure Code, and they had said that they did not admit the truth of the information referred to in the notice under section 112, Criminal Procedure Code. I am not prepared to accept the security offered in these terms, and under section 107 (4) of the Criminal Procedure Code I direct that the persons before the Court, Messrs. Subramaniasiva, and Chidambaram Pillai, and Padmanabha Iyengar be remanded to custody until the completion of the enquiry. An adjournment is granted till the 1st April to enable the petitioners to put in their application to the High Court.”

Against this order the petitioners preferred a revision petition to the High Court.

*P. Narayanamoorthy* and *C. S. Govindaraja Mudaliar* for petitioners.

*Mr. C. F. Napier* for the Public Prosecutor, *contra*.

ORDER.— We are of opinion that, on the construction of section 107 (4) of the Code of Criminal Procedure under which the

District Magistrate purported to act, his order cannot be supported, as the petitioners were not sent before him by any other Magistrate under sub section (3) so as to bring the case within sub-section (4). Mr. Napier has, however, contended that the effect of section 36 of the Code is to vest in the District Magistrate the power to arrest and send in custody which is conferred by sub-section (3), so as to enable the District Magistrate to make an order of detention under sub-section (4). We are unable to accede to this contention. Even if section 36 can be construed as giving powers which are not specifically referred to in schedule III, having regard to the terms of sub-section (3) of section 107 we are of opinion that the power is not one which vests in the Magistrate to whom the person is to be sent.

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It was further contended by Mr. Napier that if the order could not be supported under the provisions of section 107 (4), it might be supported under section 114, read with sections 65 and 344 of the Criminal Procedure Code. Assuming that the proviso to section 114 applies in the case of a person who is before the Court (as to which we express no opinion), we do not think the order can be supported under section 114, as the District Magistrate has not followed the procedure therein prescribed. As we are of opinion that the order of the District Magistrate remanding the petitioners to custody until the completion of the inquiry, was made without jurisdiction, we must set it aside. In this view the question, whether a person against whom a valid order under section 107 (4) has been made, is entitled on giving security to be released on bail under the provisions of section 496 of the Criminal Procedure Code until the completion of the inquiry, does not arise. We express no opinion on this question.

If security for appearance has been given under the order of this Court, dated March 20th, 1908, the bail bonds will be discharged. If any person is in custody under the order for detention made by the District Magistrate, he must be discharged so far as that order is concerned.

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