

the ordinary way. In the case in the House of Lords a mortgagor having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee, selling under a power of sale contained in his mortgage; it was held that the mortgagor could not by this purchase defeat the title of the second mortgagee. This case has been followed in *Raghnath Sahay Singh v. Lalji Singh* (2). That was a case in which a property had been put up for sale under a mortgage decree and purchased by the mortgagor; but the purchase money was not sufficient to satisfy the mortgage debt. The mortgagee a second time attempted to put the same property to sale. It was held that he was entitled to do so, and that the previous sale under the mortgage decree was no bar to a fresh sale under the same decree. The principle of this ruling seems to us to be applicable to this case. We have failed to detect in the argument to the contrary addressed to us any sort of substance. We think, therefore, that the order of the Court below cannot be supported. We are also of opinion that the plea of *res judicata* set up on behalf of the respondent is untenable. We accordingly decree this appeal, set aside the order of the Court below, and send back the case to that Court under section 562 of the Code of Civil Procedure for disposal according to law. The appellants are entitled to their costs of this appeal.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1903
February 28.

Before Mr. Justice Banerji.

EMPEROR v. GIRAND.*

Criminal Procedure Code, sections 123 and 340—Security for good behaviour—Reference to the Sessions Judge—Notice to be given of proceedings before the Judge to the persons required to find security.

Where under section 123 of the Code of Criminal Procedure reference is made to the Sessions Judge in the case of a person called upon by a Magistrate to find security for a term exceeding one year, it is expedient, and highly desirable for the ends of justice, that a date should be fixed for the

* Criminal Revision No. 853 of 1902.

(2) (1895) I. L. R., 23 Cal. 397.

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hearing of such reference, and that notice of such date should be given to the person concerned. *Jhoja Singh v. Queen-Empress* (1), *Nakhi Lal Jha v. Queen-Empress* (2) followed. *Queen-Empress v. Ajudhia* (3) and *Queen-Empress v. Mutasaddi Lal* (4) referred to.

THE facts of this case sufficiently appear from the order of the Court.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI, J.—In this case five persons were ordered by a Magistrate of the first class to furnish security for good behaviour, and as the security was not given he submitted the proceedings to the Sessions Judge under section 123 of the Code of Criminal Procedure. The Sessions Judge, on the 9th of September 1902, made an order confirming the order of the Magistrate, but did not follow the procedure prescribed in section 123. His proceedings were accordingly set aside by this Court on the 27th of October 1902, and the Sessions Judge was directed to pass orders in compliance with the provisions of the section referred to above.

The learned Judge has made an order directing the five persons concerned to enter into securities for good behaviour for a period of three years, and has ordered them to be rigorously imprisoned for three years in the event of their failing to give security. Applications have been made to this Court for the revision of this order, and one of the grounds taken in the applications is, that the learned Sessions Judge did not give the applicants an opportunity to show cause before him. In the judgment of the learned Sessions Judge he stated that notice had been issued to Girand, Muni, Laohman, Baldeo Singh, and Mathura Singh, but no appearance had been made in their behalf. As no notice was found on the record, I asked the learned Judge to forward to this Court the notices to which he referred in his judgment. He now states that he did not give any notice to the applicants of the date of hearing, and that all that he did was to write a letter to the superintendent of the jail to communicate to the persons concerned the result of their application to this Court. The learned Judge,

(1) (1896) I. L. R., 23 Cal., 493. (3) Weekly Notes, 1898, p. 60.
(2) (1900) I. L. R., 27 Cal., 656. (4) (1898) I. L. R., 21 All. 107.

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however, proceeded to observe that there was no provision in the Code of Criminal Procedure requiring that notice of the date of hearing of references under section 123 of the Code of Criminal Procedure should be given to the parties concerned, that it was his "practice to take up references at the first convenient opportunity and that it was not usually practicable to intimate the date of hearing to the persons concerned." It is true the Code of Criminal Procedure does not in terms direct that notice of the proceedings under section 123 should be issued to the person against whom such proceedings are taken, but it has been repeatedly held by this Court that before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. I may refer to the case of *Queen-Empress v. Ajudhia* (Weekly Notes, 1898, p. 60). Section 340 of the Code of Criminal Procedure provides that every person accused before any criminal Court may of right be defended by a pleader. It was held in *Queen-Empress v. Mutasaddi Lal* (1) that a person against whom proceedings are taken under Chapter VIII is an "accused person" within the meaning of the Code of Criminal Procedure, being a person over whom a Magistrate or other Court could exercise jurisdiction. Therefore the person against whom proceedings are taken under section 110 or section 123 of that Code, may of right be defended by a pleader. This was distinctly held by the Calcutta High Court in *Jhoja Singh v. Queen-Empress* (2). The right which a person against whom proceedings are held under these sections has of being defended by a pleader cannot be exercised by him unless a date is fixed for hearing, and notice of such date is given to him. The practice, therefore, to which the learned Sessions Judge refers in his letter is not only one which is not warranted by law, but is a practice which in many cases may result in the denial of justice. In the recent case of *Nakhi Lal Jha v. Queen-Empress* (3), it was held that when a reference is made to the Sessions Judge under section 123 of the Code of Criminal Procedure, he is bound to give notice to

(1) (1898) I. L. R., 21 All. 107.

(2) (1896) I. L. R., 23 Cal., 493.

(3) (1900) I. L. R., 27 Cal. 656.

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the person concerned. It is true, as I have already said, that the Code of Criminal Procedure does not in distinct terms require that such notice should be given, but it is expedient, and highly desirable for the ends of justice, that a date should be fixed for hearing, and that notice of such date should be given to the person concerned. As it is clear in this case that no such notice was given to the applicants, and they had not an opportunity of being heard, I must set aside the order of the learned Sessions Judge, and send back the case to him with directions to pass proper orders after fixing a date for hearing, and giving due notice thereof to the persons concerned. I order accordingly.

APPELLATE CIVIL.

1903

February 28.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

ANANT RAM (DEFENDANT) v. CHANNU LAL AND ANOTHER (PLAINTIFFS).^{*}
Act No. IX of 1872 (Indian Contract Act), section 239—Partnership—Joint Hindu family—Rights and liabilities of a partnership composed partly of individual members of a joint Hindu family and partly of strangers.

In a suit for accounts and division of profits of a partnership alleged to have been previously dissolved, such partnership having been composed of certain individual members of a joint Hindu family, and of one person who was a stranger to the family, it was held on a plea taken as to non-joinder of necessary parties, namely, other members of the joint Hindu family—(1) that a member of an undivided Hindu family may enter into a contract in his individual capacity, and when suing to recover moneys due to him under that contract, he need not join the members of the joint family as plaintiffs, and (2) that members of an undivided Hindu family who are minors, and who are not shown to have been admitted into the trading firm, or to have taken part in its business, need not be made parties as plaintiffs to a suit to recover moneys due to the family trading firm. *Kalidas Kovaldas v. Nathu Bhagwan* (1), *Imam-ud-din v. Laladhar* (2), *Samalbhai Nathubhai v. Sameshwar* (3), *Alagappa Chetti v. Vellian Chetti* (4), *Jugal Kishore v. Hulasi Ram* (5), *Ramsebak v. Ramlall Koondoo* (6), *Jagabhai Lallubhai v. Rustamji Nasarwanji* (7), and *Lutchmanan Chetty v. Siva Prokasa Modaliar* (8), referred to.

^{*} First Appeal No. 185 of 1900 from a decree of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 13th of July 1900.

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| (1) (1883) I. L. R., 7 Bom., 217. | (5) (1886) I. L. R., 8 All., 264. |
| (2) (1892) I. L. R., 14 All., 424. | (6) (1881) I. L. R., 6 Cal., 815. |
| (3) (1880) I. L. R., 5 Bom., 38. | (7) (1885) I. L. R., 9 Bom., 311. |
| (4) (1894) I. L. R., 18 M.L., 33. | (8) (1893) I. L. R., 26 Cal., 349. |