1917

NANDI v. SARUP LAL.

court that the defendant expended the money out of his own pocket, in our opinion it affords no answer to the present suit. If the defendant chose to spend money on the house, he did so at his peril. It is quite clear that the partition between the two ladies operated merely during their life, and upon the death of Musammat Bakhti the property became the property of the surviving widow for the period of her life. We allow the appeal, set aside the order of the court below, and restore the decree of the court of first instance with costs in all courts.

*Appeal decreed.*

## REVISIONAL CRIMINAL.

1917
*March*, 28.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

EMPEROR *v.* SITA RAM.*

*Criminal Procedure Code, section* 125—*Security to keep the peace—Application to cancel order for security—Appeal—Revision.*

An application made to the District Magistrate to cancel an order for security to keep the peace under section 125 of the Code of Criminal Procedure cannot be regarded in the same light as an appeal, and the Magistrate's order thereon would not be vitiated by the fact alone that the applicant had not been heard.

*Semble* that on an application for revision of an order for security to keep the peace the High Court should not refuse to interfere *solely* on the ground that the applicant has not first applied to the District Magistrate under section 125.

THE facts of this case are set forth in the following order of reference to a Divisional Bench.

WALSH, J.—I think this raises an important question which it is desirable that two Judges should decide. *A priori* I should have thought that the right of an applicant to apply to the District Magistrate to cancel a bond under section 107 of the Code of Criminal Procedure included the right to be heard on the application. Mr. Justice KNOX clearly thought so, not in the body of the case reported, but in *Emperor* v. *Abdur Rahim* (1), where he says that this Court will refuse to entertain an application in revision until the applicants have applied under

* Criminal Revision No. 164 of 1917, from an order of G. B. Lambert, District Magistrate of Benares, dated the 17th of January, 1917.

(1) Weekly Notes, 1905, p. 143

section 125 of the Code of Criminal Procedure, to the District Magistrate, and he says there that if the applicants "can satisfy the District Magistrate that there is no danger of a breach of the peace or that the bond has been wrongfully taken from them, the Magistrate will no doubt cancel the bond. I am not prepared to interfere in revision until it has been shown to me that the applicants have made use of the direct remedy provided by section 125 of the Code of Criminal Procedure." I gather from that that Mr. Justice KNOX thought that a direct remedy was by way of an application to the District Magistrate on which the applicant was to be heard, and if it is a judicial act, it seems contrary to natural justice that it should be disposed of without hearing the party seeking to enforce the remedy. On the other hand, in the case of *Banarsi Das* v. *Partab Singh* (1), so recently as November, 1912, Mr. Justice TUDBALL said that the cancellation of the bonds contemplated in section 125 could only lie on the ground that the bonds were no longer necessary; the Magistrate's power was confined merely to examining the record; and he sent the record back to be placed before the District Magistrate so that he might examine it himself and see whether or not it was any longer necessary to keep the party under the bond. It seems to me that Mr. Justice TUDBALL has treated the function of the Magistrate under section 125, as a merely executive function to examine the record. I think it is an important question and one which should be settled beyond controversy whether it is a judicial act which the District Magistrate is called upon to exercise and whether therefore the applicants have a right to be heard. In this case the matter has been dealt with without a hearing or without any invitation to the applicant to be heard. I refer it to the Chief Justice, who admitted the application, either to decide it himself or refer it to a Bench of two Judges.

Babu *Satya Chandra Mukerji*, for the applicant.

Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

RICHARDS, C. J., and BANERJI, J. :—This is an application in revision which was made under the following circumstances.

(1) (1913) I. L. R., 35 All., 103.

1917

EMPEROR v. SITA RAM.

The applicant was ordered by a Magistrate of the first class to give security to keep the peace under section 107 of the Code of Criminal Procedure. He presented a petition to the District Magistrate asking him to exercise his powers under section 125 of the Code of Criminal Procedure. The Magistrate without hearing the applicant, or his pleader, made an order in the following words :—" There is no appeal to me from section 107 of the Code of Criminal Procedure orders. Application is made, however, under section 125. The lower court has found certain allegations made against the applicants to be true. These allegations justify action under section 107 of the Code of Criminal Procedure. I decline therefore to take action under section 125 of the Code of Criminal Procedure. The application is rejected." The present application is against the order just quoted, and it is contended that the District Magistrate should not have disposed of the application without hearing the applicant or his pleader. It is quite unnecessary for us to decide whether or not it was actually illegal for the learned District Magistrate to make his order without hearing the applicant or a pleader on his behalf. At the same time we think that it clearly was open to the applicant to ask the District Magistrate to exercise his powers under section 125 to cancel the bond, and that as a general practice either the applicant or his pleader should be heard before the application is rejected. Reading the matters mentioned in the petition that was made to the District Magistrate, it is quite clear that the application was in reality an appeal from the order of the Magistrate of the first class directing the applicant to furnish security. Section 125 provides that the District Magistrate may at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under the chapter therein referred to. An appeal is expressly allowed by the Code against an order of the Magistrate directing a party to give security for good behaviour. No such appeal is given against an order directing security to be given to keep the peace. It seems to us therefore that it could not possibly be the intention of the Legislature to give what would be nothing short of a right of appeal under section 125 when it refrained from

1917

EMPEROR v. SITA RAM.

expressly doing so, as it did in the case of security for good behaviour. The order of the District Magistrate rejecting the application was in our opinion right. There was no allegation that there had been any change in the circumstances between the time that the Magistrate made his order and the application to the District Magistrate. The only thing that can be said against the District Magistrate's order is that it was made without giving the applicant or his pleader an opportunity of being heard. If this view which we have just expressed be correct, we think that applications for revision made to the High Court in respect of orders to give security to keep the peace ought not to be rejected *solely* on the ground that the applicant has not first made an application to the District Magistrate. The High Court is the only court which can interfere in revision in a matter like this. We reject the present application to this Court, but in doing so our order is to be without prejudice to any application in revision to this Court from the first order directing security to be given to keep the peace, or to any further application which the applicant may be advised to make to the District Magistrate under section 125.

*Application rejected.*

## FULL BENCH.

*Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.*

1917
*March*, 30.

BIJAI MISIR AND ANOTHER (PLAINTIFFS) *v.* KALI PRASAD MISIR AND OTHERS (DEFENDANTS).*

*Act (Local) No III of* 1901 *(United Provinces Land Revenue Act), section* 233 *(h)—Partition—Suit in civil court to recover property which had been the subject of a partition.*

Certain co-sharers in a village applied for partition of their shares under section 107 of the United Provinces Land Revenue Act, 1901. Notice was issued to all the recorded co-sharers, as required by section 10 of the Act, and thereupon an application was made by other co-sharers, under clause (2) of the section, praying for partition of their shares. In that application the applicants set forth the extent of the shares which they prayed should be formed into one lot, or *qura*. Subsequently a proceeding was drawn up under

* Appeal No. 61 of 1916, under section 10 of the Letters Patent.