in this case had been that there was wilful neglect, it would have been for this Court to say whether there was any evidence of wilful neglect and that undoubtedly was a question of law. But when the learned Judge in the Court below has considered all the facts and circumstances in the case and come to the conclusion as a fact that there has been no wilful neglect, I agree with the argument which was put forward by Mr. S. N. Bose on behalf of the respondent that the matter is concluded so far as this Court is concerned. On that ground alone it seems to me that the appeal should fail. But on both questions, namely, whether there was any wilful neglect and on the second question which I have just stated, it seems to me that the appeal must fail. There was a question in the Court below as to whether the value of the goods was proved. On the evidence which was adduced in the case it seems to me that there was sufficient proof of the value of the goods; but for the reasons which I have just stated this question obviously does not now arise.

In those circumstances I would dismiss the appeal with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Adami and Scroope, JJ.

KING-EMPEROR

v.

BERAIK NARENDRA NATH SINGH.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 122, 123 *and* 406-*A*—*proceedings laid before Sessions*

*Criminal Reference no. 91 of 1929, made by H. R. Meredith, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, in his letter no. 5196-R., dated the 18th November, 1929.

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Court under section 123 (2)—Sessions Court, whether has jurisdiction to test sureties offered by person bound down—magistrate, exclusive duty of.

Section 122, Code of Criminal Procedure, 1898, provides :

(1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond :

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall before holding the inquiry give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reason for so doing :

Provided that, before making an order rejecting any surety who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him."

Section 123 of the Code then lays down :

" (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given, commences, he shall, except in the case hereinafter mentioned, be committed to prison, or, if he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court of Magistrate who made the order requiring it.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Presidency Magistrate, pending the order of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court. * * *

* * * * * * *

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate."

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Held, that the Sessions Court before which proceedings are laid under section 123 (*2*) has no jurisdiction to test sureties offered by the person who is bound down, and that the duty of testing sureties is vested in the Magistrate alone for whose procedure in the matter there is special provision in section 122.

Imperator v. *Allahdino* (1), not followed.

The facts of the case material to this report are stated in the judgment of Adami, J.

The Assistant Government Advocate, in support of the reference.

Sir Ali Imam (with him *I. B. Saran*), against the reference.

ADAMI, J.—This is a reference under section 438 of the Criminal Procedure Code made by the Judicial Commissioner of Chotanagpur recommending that an order passed by the Assistant Sessions Judge with regard to the testing and acceptance of certain sureties offered in pursuance of an order passed under section 123 (*3*) of the Criminal Procedure Code, should be set aside.

On the 25th August, 1928, Bhondu Singh, as a result of proceedings taken against him under section 110, was ordered to execute a bond of Rs. 2,500 with four sureties of the like amount each to be of good behaviour for a period of three years. The security not having been furnished, the Magistrate referred his order to the Judicial Commissioner as required by section 123(*2*). The Judicial Commissioner transferred the matter to the Assistant Sessions Judge under section 123 (*3-B*) for disposal, who confirmed the order made by the Magistrate, but instead of requiring Bhondu Singh to execute a bond to be of good behaviour, directed that he should execute a bond to keep the peace. It is quite evident that this was a mere oversight on the part of the learned Assistant

(1) (1911) 12 Cr. L. J. 410.

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Sessions Judge, since a bond to keep the peace cannot be required in proceedings under section 110. However, that is not the point in this reference.

After the order was passed by the Assistant Sessions Judge he proceeded to call on Bhondu Singh to provide sureties before him and directed that the sureties would be tested in his Court in the presence of the Public Prosecutor. On the date fixed Bhondu Singh offered his father, Sidnath Singh, and three others as sureties. The Public Prosecutor put forward objections to the persons offered on the ground that Sidnath Singh had a previous conviction, that one of the other three persons had encumbrances on his property, and that another was heavily involved in debt. The Assistant Sessions Judge overruled the objections as to Sidnath and the person who had encumbered property, but allowed the objection as to the other. When a substitute for the latter was offered the Public Prosecutor argued that the testing of sureties was the duty of the Magistrate and that the Assistant Sessions Judge had no jurisdiction in this matter. The Assistant Sessions Judge overruled the objection, relying on a passage in Sir J. Woodroffe's Criminal Procedure Code, 1920, and a ruling of the Judicial Commissioners in Sind—*Imperator* v. *Allahdino*(1)—as also on the wording of section 123 (*4*).

The point referred to this Court for decision is whether the Sessions Court before which proceedings are laid under section 123 (*2*) has the duty or power to test sureties offered by the person who is bound down.

Sir Ali Imam who appears to oppose the reference relies mainly on the decision of the Judicial Commissioners of Sind referred to above and on section 123 (*3*) which runs—

"(*3*) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit;"

(1) (1911) 12 Cr. L. J. 410.

and on sub-section (*4*) of the section which is to the effect that—

"(*4*) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate."

He argues that, as stated in the above cited decision, the Magistrate has no power to require by his order security for a period exceeding one year, and, therefore, he can have no power to test sureties when the order is for security for a period of three years. It is not exact to say that the Magistrate has no such power to pass an order; he has full power to make the order, but if security is to be given for a period exceeding one year, the proceedings must be laid before the Sessions Judge for confirmation or such orders as may seem fit to the Judge. It is not clear that the orders referred to in sub-section (*3*) include the testing of sureties, such testing being a separate proceeding which follows after an order has been passed requiring a bond to be executed and sureties to be furnished, and there is only one section in the Code prescribing the manner in which sureties are to be tested, namely, section 122, and that refers to the Magistrate only as the testing authority. There is no provision in the Code referring to or regulating the testing of sureties by a Sessions Judge, unless it can be said that sub-section (*4*) of section 123 contemplates such a proceeding, as argued by learned Counsel and as was found by the Judicial Commissioners in Sind. That sub-section certainly shows that when the Sessions Court has passed an order under section 123 (*3*) and a warrant from the Court has reached the officer in charge of the jail, that officer, if a person comes to him and offers himself as surety, must refer the matter to the Sessions Court, but the sub-section does not state that the Court must thereupon test the surety. The Court can, and as far as I know, always does, refer the duty of testing the surety to the Magistrate for whose procedure in the matter

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there is special provision in section 122. If the warrant comes from the Court, the Court is naturally the only authority to whom the officer in charge of the jail can make a reference, and that seems to be the reason why section 123 (4) is so worded.

ADAMI, J.

That it was not intended by the legislature that the testing of sureties should be done by the Sessions Court is, I think, shown by the new section 406-A, which was inserted in the Code of 1923, giving a right of appeal against an order under section 122 refusing to accept or rejecting a surety. While orders made by a Presidency Magistrate, District Magistrate, or other Magistrates are made appealable, there is no mention of any such order made by a Sessions Court. It seems that such an order by a Sessions Court was not contemplated. It can hardly be imagined that it is intended that a Sessions Judge should be altogether untrammelled in the procedure he follows in testing a surety, there being no provision similar to section 122 to regulate his procedure, and that there should be no right of appeal against an order passed under such circumstances.

Section 112 requires a Magistrate in his order to specify the number, character and class of sureties that are to be given; the Sessions Judge passing an order under section 123 (2) will not go beyond this. His chief object when the case is laid before him under section 123 will be to determine whether the security should be given for good behaviour for so long a period as three years.

Clearly the Magistrate will have better opportunities of satisfying himself as to the sufficiency of a surety offered than will the Sessions Judge and so far as my experience goes the Sessions Judge has always left the matter of testing sureties to the Magistrate. If the Magistrate rejects any of the sureties offered, there is a right of appeal given by section 406-A. That section was not enacted at the

time when the Judicial Commissioners in Sind gave their decision.

I find that the Assistant Sessions Judge had not jurisdiction to test the sureties and, therefore, would set aside the orders passed by him and direct that the matter of accepting or rejecting the sureties offered in this case be dealt with by the Magistrate under section 122. The necessary correction will be made in the order of the learned Assistant Sessions Judge, substituting the words " to be of good behaviour " for the words " to keep the peace."

SCROOPE, J.—I agree.

Reference accepted.

APPELLATE CIVIL.

Before Das and Ross, JJ.

SYED HASAN IMAM

v.

BRAHMDEO SINGH.*

1930.

January, 7, 8, 9, 15.

Limitation Act, 1908 (*Act IX of* 1908), *sections* 19, 20 *and* 29—*amendment of section* 29, *scope and effect of—sections* 19 *and* 20, *whether apply to suits governed by Schedule III to Bengal Tenancy Act*, 1885 (*Act VIII of* 1885)—*section* 185(2) *of the Act, whether affected by the amendment of section* 29, *Limitation Act*, 1908.

Section 29, Limitation Act, 1908, as amended by Act X of 1922, provides :

"(2) " Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(*b*) the rmaining provisions of this Act shall not apply ".

*Appeal from Original Decree no. 200 of 1927, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Patna, dated the 5th of September, 1927.