

CRIMINAL REVISION.

Before Chief Justice Scott and Mr. Justice Knight.

EMPEROR v. BHAUSING DHUMALSING.*

1908.

July 7.

Criminal Procedure Code (Act V of 1898), sec. 106 (3)—Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.

Section 106, clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority.

Mahmudi Sheikh v. Aji Sheikh⁽¹⁾; *Muthiah Chetti v. Emperor*⁽²⁾ and *Paramasiva Pillai v. Emperor*⁽³⁾, dissented from.

Dorasami Naidu v. Emperor⁽⁴⁾, referred to with approval.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898), from an order passed by E. G. Turner, Magistrate, First Class, of Yeola.

The accused with eight others was tried by the Second Class Magistrate of Yeola for rioting and causing hurt, offences punishable under sections 147, 323 and 325 of the Indian Penal Code (Act XLV of 1860). The Magistrate convicted the accused of offences under sections 174 and 323, and sentenced him to undergo simple imprisonment for 15 days.

On appeal, the First Class Magistrate of Yeola altered the conviction to one under section 323 of the Indian Penal Code, reduced the sentence to simple imprisonment for five days, and ordered the accused, under section 106 of the Criminal Procedure Code (Act V of 1898), to execute a bond of Rs. 100 with one surety in like amount to keep the peace for one year.

The accused applied to the High Court.

M. V. Bhat, for the applicant.

* Criminal Application for Revision No. 84 of 1908.

(1) (1894) 21 Cal. 622.

(3) (1906) 30 Mad. 48.

(2) (1905) 29 Mad. 190.

(4) (1906) 30 Mad. 182.

1908.

The Government Pleader for the Crown.

EMPEROR
v.
BHATSING.

SCOTT, C. J.:—The petitioner, with eight other persons, was charged with rioting and causing hurt to the complainant under sections 147, 323 and 325 of the Indian Penal Code, in the Court of the Second Class Magistrate of Yeola, and was convicted under sections 147 and 325 of the Code and sentenced to simple imprisonment for fifteen days.

The petitioner then appealed to the First Class Magistrate, who altered the conviction to one under section 323 and reduced the sentence to five days' simple imprisonment and under section 106 of the Criminal Procedure Code directed that the appellant should execute a bond of Rs. 100 to keep the peace for one year.

The petitioner now applies to us in revision to set aside the order for execution of a bond contending that the Court had no jurisdiction to add such an order to the sentence of the Second Class Magistrate.

We cannot accept that contention. Section 106 of the Criminal Procedure Code authorises such an order whenever any person is convicted of an assault by the Court of a Magistrate of the First Class and such Court is of opinion that it is necessary to require the execution of such a bond. Both conditions are fulfilled in the present case, for the order of conviction under section 323 was passed by the First Class Magistrate and his opinion was that the bond was necessary.

It has however been contended that such an order cannot be made in appeal and in support of that contention the following cases have been cited: *Mahmudi Sheikh v. Aji Sheikh*⁽¹⁾; *Muthiah Chetti v. Emperor*⁽²⁾ and *Paramasiva Pillai v. Emperor*⁽³⁾.

We are not prepared to accept the construction placed upon section 106 in those cases. We think that clause 3 makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The clause runs:—"An order under this section may *also* be

(1) (1894) 21 Cal. 622.

(2) (1905) 29 Mad. 190.

(3) (1906) 30 Mad. 48.

made by an appellate Court or by the High Court when exercising its powers of revision," the "also" plainly implying that it may be independently made by those Courts as well as by the original Courts specified in the first clause; and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. In support of this view we may refer to the judgment reported in the case of *Dorasami Naidu v. Emperor*⁽¹⁾, which throws doubt upon the correctness of the decisions above mentioned. We may say that we entirely concur in the reasoning of the latter part of that judgment.

For these reasons we dismiss the application.

R. R.

(1) (1906) 50 Mad. 182.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Chaudal.

NATHU PIRAJI MARWADI (ORIGINAL PLAINTIFF), APPELLANT, v.
UMEDMAL GADUMAL (ORIGINAL DEFENDANT), RESPONDENT.*

1908.

July 22.

Practice—Allegations by parties at trial—Case determined on those allegations—Making a new case in appeal.

A litigating party can only succeed *secundum allegata et probata*, and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, reversing the decree passed by B. R. Mehendale, Joint Subordinate Judge at Nasik.

Suit for declaration that defendant was not entitled to possession of land.

The land belonged originally to one Piraji Marwadi, who died leaving a widow Gangabai. In 1887 Gangabai sold the property to one Dewrao, who sold it to Balvantrao in 1893. Balvantrao in 1893 and 1895 mortgaged it to Gadumal, the defendant.

Meanwhile, Nathu Piraji was adopted by Gangabai in 1884.

* Second Appeal No. 227 of 1907.