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GHEELABHAI

v.

BAI JAVER.

essential basis of the decree which virtually and finally declared that Vithal's widow was entitled to the property only for maintenance, but not as heir of her deceased husband.

On this ground, therefore, we must hold that both the Courts below took a correct view of the previous litigation so far as the representative character of the widow therein was concerned, but differing from the lower appellate Court on the other point relating to *res judicata*, namely, as to the effect of the withdrawal of the appeal, we must reverse the order under appeal and restore that of the Subordinate Judge with costs throughout upon the respondent.

Order reversed.

R. R.

CRIMINAL REVISION.

Before Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR v. VISHNU BALKRISHNA BAM.*

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September 27.

Criminal Procedure Code (Act V of 1898), sections 397, 123—Sentence—Postponement of sentence—Person undergoing¹ imprisonment for failing to give security—Penal Code (Act XLV of 1860), section 379—Theft—Practice and procedure.

The accused was convicted of an offence of theft and sentenced to suffer rigorous imprisonment for six months. At that date he was undergoing imprisonment for failing to give security for good behaviour. The Magistrate directed that the sentence passed in the theft case should take effect after the expiry of imprisonment inflicted in the security proceedings:—

Held, that the sentence passed in the theft case could not be postponed to the expiry of imprisonment in the security proceedings, inasmuch as the latter was not a "sentence of imprisonment" as used in section 397 of the Criminal Procedure Code, 1898.

Emperor v. Kanji⁽¹⁾, *Emperor v. Durga*⁽²⁾, and *Emperor v. Arjun*⁽³⁾, followed.

THIS was an application for revision preferred by the Government of Bombay, from an order passed by J. H. Garrett, Sub-Divisional Magistrate, First Class, at Malegaon.

* Criminal Application for Revision No. 281 of 1912.

(1) (1902) 5 Bom. L. R. 26.

(2) (1904) 6 Bom. L. R. 1098.

(3) (1909) 34 Bom. 326.

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On the 29th January 1912 the accused was called upon to furnish security for his good behaviour; and on his failing to find security was ordered to undergo rigorous imprisonment for one year or until such time as he should find security. He was next tried for an offence of theft, and on the 28th June 1912, he was convicted of the offence and sentenced to suffer rigorous imprisonment for six months. The Magistrate however ordered that the latter sentence was to take effect on expiry of the imprisonment inflicted in the security proceedings.

The Government of Bombay applied to the High Court under its criminal revisional jurisdiction against the order postponing the sentence.

L. A. Shah, Acting Government Pleader, for the Crown.

No appearance for the accused.

BACHELOR, J. :—This is an application in revision made to us by the Government of Bombay. The accused was convicted under section 379, Indian Penal Code, and was sentenced to six months' rigorous imprisonment. The Magistrate ordered that the sentence was "to take effect from the date of expiry of the accused's present sentence." That phrase, as explained in the warrant, meant "the sentence which the accused was undergoing for failing to find security for good behaviour under section 123, Criminal Procedure Code."

The whole question before us is whether the Magistrate was entitled to defer the sentence in regard to the theft until after the expiry of the imprisonment which the accused was suffering owing to his inability to find security. Upon this question we have unfortunately not had the advantage of argument from the accused's point of view. But the learned Government Pleader has laid the whole case before us and has drawn our attention to the various authorities on both sides. It is a little remarkable that on such an apparently simple question there should be such a sharp difference of judicial opinion. In that state of the case, however, and seeing that we have had no argument from one side, we think that our best

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course is to state our own opinion as tersely as may be. Our opinion is that the correct view has been taken by this Court in *Emperor v. Arjun*⁽¹⁾, *Emperor v. Kanji*⁽²⁾ and *Emperor v. Durga*⁽³⁾, that is to say, in our construction of the Code, when a person is committed to prison under section 123 for failure to give security he is not undergoing a sentence of imprisonment within the meaning of section 397. We think that the authorities, which we have referred to, constitute a sufficiently uniform *cursus curiæ* to preclude the necessity of any further reference, though we do not overlook that a somewhat divergent view was taken in 1895 by Mr. Justice Jardine and Mr. Justice Ranade in *Queen-Empress v. Pandu Khandu*⁽⁴⁾. It is represented to us that possibly some embarrassment has been caused in the Courts below by the order which was passed in *Emperor v. Dongrya Gangaram Bhil*⁽⁵⁾ to which order one of us was a party. It should, therefore, be explained that in that case this Court returned the papers without making any order for the reason that the ground, upon which an order was sought by the District Magistrate of East Khandesh, was the existence of a certain Government Resolution which, in the opinion of this Court, was irrelevant to the purpose then in hand. There is nothing in the order passed upon that reference which conflicts with the view which we have now expressed as to the meaning of sections 123 and 397 of the Criminal Procedure Code. We observe that this is the view which has found acceptance in the Madras High Court: see *Emperor v. Muthukomaran*⁽⁶⁾ and *Joghi Kannigan v. Emperor*⁽⁷⁾; and it is in our judgment the view which must at present be adhered to by the Courts subordinate to this Court.

The result will be that the application succeeds and the Magistrate's order directing that the sentence of imprisonment

(1) (1909) 34 Bom. 326.

(2) (1902) 5 Bom. L. R. 26.

(3) (1904) 6 Bom. L. R. 1098.

(4) (1895) Ratanlal's Cri. Cas. 774.

(5) Cri. Ref. No. 91 of 1911 (Unreported).

(6) (1903) 27 Mad. 525.

(7) (1908) 31 Mad. 515.

in regard to the theft should be postponed till after the expiry of the imprisonment being suffered under section 123, Criminal Procedure Code, must be set aside. The substantive sentence of imprisonment under section 379, Indian Penal Code, must take effect from the time at which it was passed.

Order set aside.

R. R.

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CRIMINAL REVISION.

Before Mr. Justice Batchelor and Mr. Justice Rao.

EMPEROR v. KOYA HANSJI.*

Indian Arms Act (XI of 1878), sections 13 and 19 (e)—Arms—Gun—License—Going armed without license—Servant fetching gun for his master—Liability of servant.

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The accused was sent to an adjacent village by his master, who was licensed to bear arms, to fetch a gun which he (the master) had left there. While so returning with the gun, the accused was arrested for going armed in contravention of the provisions of section 13 of the Indian Arms Act (XI of 1878). He was convicted and sentenced under section 19 (e) of the Act.

Held, acquitting the accused, that the mere temporary possession, without a license, of arms for purposes other than their use was not an offence within the meaning of section 19 of the Indian Arms Act (XI of 1878).

Emperor v. Harpal Rai(1), followed.

THIS was an application in revision against conviction and sentence passed by N. A. Parnaik, Magistrate, First Class, at Broach.

The accused was the servant of one Mahomedbhai, who held a license to keep a gun. Mahomedbhai sent his servant to a neighbouring village where he had left his gun. The accused while so returning with the gun was arrested for going armed with a gun in contravention of the provisions of section 13 of the Indian Arms Act, 1878. The accused was, on these facts, convicted under section 19 of the Indian Arms Act and was sentenced to pay a fine of Rs. 5.

The accused applied to the High Court.

* Criminal Application for Revision No. 278 of 1912.

(1) (1902) 24 All. 454.