

31 C. 424 (=1 Cr. L. J. 442.)

CRIMINAL REVISION.

Before Mr. Justice Ghose and Mr. Justice Stephen.

ABINASH CHANDRA ADITYA v. ANANDA CHANDRA PAL.*

[16th February, 1904.]

Penal Code (Act XLV of 1860), ss. 353, 149—Civil Procedure Code (Act XIV of 1882), s. 251—Criminal force by members of an unlawful assembly to deter public servant from discharge of duty.

Section 251 of the Code of Civil Procedure requires the Court to specify in a warrant for execution of decrees the day on or before which the warrant must be executed.

A Commissioner attempting to give possession under a time-expired warrant has no authority to go upon land in the possession of the party, who resists the execution.

THE Civil Court appointed a Commissioner under "a parwana" for the ascertainment of mesne profits and under another parwana to deliver possession of the property decreed. The date of the original parwana for the delivery of possession was the 30th March. This parwana was recalled, and by some mistake the date [425] (30th March) was not altered, when the parwana was issued again. The Commissioner went to execute it on the 22nd of April and was resisted by the appellants, who were convicted under the above sections.

They appealed to the District Judge, who upheld the conviction under the above sections.

Mr. S. P. Sinha (Babu Akhoy Kumar Banerjee with him), for the opposite party.

This was a warrant for delivery of possession under s. 263, Civil Procedure Code. The form of the warrant is given in form 137 appended to O'Kinealy's Civil Procedure Code. No returnable date is given there. It was held in the case of *Queen-Empress v. Janki Prasad* (1), a case also under s. 353, Criminal Procedure Code, that although it was proper that the person signing a warrant should write his name in full, yet if the warrant was only initialled, still it was the duty of the officer to execute it.

Mr. P. L. Roy (Babu Harendra Narain Mitter with him), for the petitioners.

S. 263 of the Code of Civil Procedure refers to the mode of delivery; the authority to the officer is under s. 251, and under that section the returnable date must be given; it is imperative: the word used is "shall"; if the date is not mentioned the warrant is illegal. The 30th March I take, it was meant to be the returnable date. The Commissioner attempted to execute it on the 22nd April.

GHOSE AND STEPHEN, JJ. The petitioners before us have been convicted of offences under sections 147, 353, read with section 149 and section 379, read with section 149, Indian Penal Code, and upon an application made by them to this Court, a rule was granted to show cause why the conviction and sentences should not be set aside upon the grounds—first, that the warrant under which the Commissioner appointed by the Civil Court is said to have acted did not authorize him to deliver

* Criminal Revision No. 1118 of 1903, against the order passed by S. K. Mullick, Sessions Judge of Tipperah, dated Nov. 28, 1903, modifying the order passed by Raj Narain Banerjee, Deputy Magistrate of Comilla, dated July 31, 1903.

(1) (1886) I. L. R. 8 All. 293.

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possession of the property to the decree-holder and, second, that upon the date that [426] possession was attempted to be delivered, the warrant was a time expired warrant.

So far as the first-mentioned ground is concerned, we are of opinion, after hearing learned Counsel on both sides, that it must fail, because there is distinct evidence upon this record—evidence that has been accepted by the Sessions Judge on appeal—that, in addition to the parwana issued by the Civil Court for the ascertainment of mesne profits, there was another parwana for delivery of possession of the property decreed. That parwana, however, according to the case for the prosecution, was snatched away from the hands of the Commissioner by some one or other of the accused, and therefore it could not be produced at the trial.

As regards the other ground upon which the rule was granted, it appears upon the evidence that, although a warrant for delivery of possession as already mentioned, was issued to one Nobin Chandra, yet the date mentioned, in it as the date for hearing of the case in Court was the 30th March. Apparently there was some mistake in this connection. The original parwana that was issued, was a parwana addressed to one Jotindra Mohun. That was recalled, but, by some mistake or other, the date which was inserted in that document on the margin thereof, viz., the 30th March 1903, was not altered, the date being left as it stood upon the original parwanas. Under section 251, Code of Civil Procedure, it is the duty of the Court to specify in a warrant for execution of decree, whether it be a decree for delivery of possession or otherwise, the day on or before which the warrant must be executed. The 30th March 1903, which was specified in the margin of the document as the date of the hearing of the case, seems to have been understood by all parties concerned as the date within which the warrant was to be executed. It is no doubt true, as has been pointed out by Mr. Sinha, that there was an order entered in the order-sheet under which the date of hearing was subsequently fixed at a later date. It does not, however, appear that a notice of such date was given to the officer in charge of the execution of the warrant and, as we have already indicated the 30th March 1903, the date specified in the margin, seems to have been understood by all parties concerned as the date contemplated by section 251, Code of Civil Procedure. The [427] occurrence in question took place on the 22nd April, that is to say, on a day subsequent to the day by which the warrant was to have been executed; and it is obvious that the Commissioner had no authority, if the view of the facts that we have already mentioned be correct, to go upon the land in the possession of the party, who resisted the execution and to attempt to deliver possession of it to the decree-holder. If he had no such authority, it seems to us that the petitioners could not be convicted of the offences with which they were charged. At one time, however, we were disposed to think that, even if the conviction under sections 147 and 143 could not stand, yet the conviction under section 379 could well stand, it being evidenced by one or two witnesses for the prosecution that some one or other of the accused took away some of the papers that the Commissioner had in his hands. But looking at the judgment of the Sessions Judge in appeal, it appears that, although the Magistrate convicted some of the accused for the substantive offence of theft under section 379, Indian Penal Code, yet the Sessions Judge ruled otherwise; for he convicted all the

accused persons of offences under section 147, 353 read with sections 149 and 379 read with section 149, Indian Penal Code. There could be, we need hardly say, no conviction under any of the two latter sections, unless there was an unlawful assembly within the meaning of section 143. For these reasons we think that the conviction and sentences in this case must be set aside. We order accordingly.

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[428] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Geidt.

GOPAL LAL v. BENARASI PERSHAD CHOWDHRY.*

[11th, 12th and 16th February, 1904.]

Res judicata—Civil Procedure Code (Act XIV of 1859), s. 13, Exp. II—Prior mortgage, omission to plead as a defence in a former mortgage suit—Mortgage suit—Transfer of Property Act (IV of 1882), s. 85.

If a prior mortgagee is made a party to a suit brought by a subsequent mortgagee on a mortgage bond of certain property, but omits to enter appearance and set up his prior right and claim that he should be paid off or that the property should be sold subject to his mortgage, his mortgage lien must be deemed to be extinguished. A suit subsequently brought by him or his heirs on his mortgage is barred by Explanation II of s. 13 of the Civil Procedure Code.

Sri Gopal v. Pirthi Singh (1) followed.

[Foll. 2 C. L. J. 574; 36 Cal. 103=5 C. L. J. 611; 26 I. C. 860. Cons. 1 C. L. J. 327. Dist. 9 C. L. J. 78=3 I. C. 686; 24 I. C. 17; 42=18 O. W. N. 1013. Ref. 39 Cal. 522; 95 All. 111.]

APPEAL by the defendant No. 5, Gopal Lal.

A mortgage bond dated the 23rd May 1885 was executed by three persons, (1) Rang Lal Singh, husband of the defendant No. 4 and father of the defendant No. 1, First Party, (2) Rachha Singh, father of the defendants Nos. 2 and 3, First Party, and (3) Rajpati Singh, in favour of Hari Pershad Chowdhry, father of the plaintiffs, for the sum of Rs. 2,000, whereby a number of properties were hypothecated to secure payment of the debt. Some of these properties were mortgaged by the same mortgagors and Jitan Singh, defendant No. 2, to Gopal Lal, the defendant No. 5, Second Party, by a bond dated the 22nd February, 1887. In 1891 Gopal Lal instituted a suit on his mortgage and made the said Hari Pershad Chowdhry a defendant in the suit, describing him as a subsequent mortgagee and purchaser. Hari Pershad did not appear in the suit and plead his prior mortgage. The suit was [429] decreed and the properties mortgaged were purchased by Gopal Lal in execution of the decree.

The present suit was instituted by the plaintiffs on the mortgage bond of the 23rd May 1885, the defendant No. 5 being made a party to the suit on the ground that he had purchased some of the mortgaged properties. Separate written statements were filed by the defendants Nos. 4 and 5. The latter contended, amongst other things, that as in the previous suit brought by him on the basis of his mortgage bond, he had made the father of the plaintiffs a defendant in that suit, the latter ought to have disclosed in that suit that he had a prior right of mortgage under the bond now in suit and to have prayed that the sale in that suit

* Appeal from Original Decree No. 59 of 1901, against the decree of Tara Prasanna Banerjee, Subordinate Judge of Monghyr, dated the 29th of November 1900.

(1) (1902) I. L. R. 24 All. 429; L. R. 29 I. A. 118.