With regard to costs in the lower Court, the Subordinate Judge's order, "that the contending claimant shall recover from and bear the cost of the Government in proportion to his excess claim respectively allowed and disallowed," will stand good, but will be applied to the compensation as now settled by us for both the appellants.

Appeals dismissed: cross-objections allowed.

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32 C. 351 (=9 C. W. N. 277=2 Cr. L. J. 78.)

[351] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Mitra.

JOGENDRA NATH MOOKERJEE *v.* SARAT CHANDRA BANERJEE.*

[27th January, 1905.]

Sanction for prosecution—Whether a sanction granted to a particular person could be availed of by some other person—Criminal Procedure Code (Act V of 1898), s. 195.

A sanction for prosecution expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority.

***Giridhari Mondul* v. *Uchil Jha* (1), *Baperam Surma* v. *Gouri Nath Dutt* (2), *In re Banarsi Das* (3), *Kali Kinkar Sett* v. *Nritya Gopal Roy* (4), and *Durga Das Rukhit* v. *Queen-Empress* (5) referred to.**

[Diss. 8 Bom. L. R. 32=1 M. L. T. 47; Not followed: 14 I. C. 206=18 Cr. L. J. 206; 8 Bom. L. R. 32=1 M. L. T. 47; Fol. 2 C. L. J. 619=10 C. W. N. 222=3 Cr. L. J. 112; Ref. =13 Cr. L. J. 551=15 I. C. 967; 43 Bom. 538=21 Bom. L. R. 266=50 I. C. 1007.]

RULE granted to the petitioner, Jogendra Nath Mookerjee.

One Khiroda Sundari Debi applied to the District Judge of 24-Parganas for probate of a will alleged to have been executed by her deceased mother. The application was opposed by Aprokash Chandra Mookerjee, brother of the deceased testatrix, on the ground that the alleged will was not a genuine document. The case was transferred to the Court of the Subordinate Judge who found that the will was not genuine; and his decision was upheld by the High Court.

Aprokash Chandra Mookerjee then applied for sanction to prosecute the petitioner, Jogendra Nath Mookerjee, a pleader of the Judge's Court, who had given evidence in support of the will, under ss. 467, 471 and 193 of the Indian Penal Code. The application [352] was refused by the Courts below, but was granted by the High Court on the 4th June 1904.

The sanction for prosecution was explicitly given to Aprokash Chandra Mookerjee.

One Sarat Chandra Banerjee, who claimed to have purchased a share of the interest inherited by Aprokash Chandra Mookerjee from his sister, on the day previous to the expiry of the statutory six months, applied to the District Magistrate to issue process against the said Jogendra Nath Mookerjee upon the sanction that had already been granted to Aprokash Chandra Mookerjee.

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* Criminal Revision, No. 1867 of 1904, against the orders passed by Krishna Kali Mukherjee Deputy Magistrate of Alipur, dated Dec. 18, 1904.

(1) (1881) I. L. R. 8 Cal. 435.
(2) (1892) I. L. R. 20 Cal. 474.
(3) (1896) I. L. R. 18 All. 213.
(4) (1904) 8 C. W. N. 883.
(5) (1900) I. L. R. 27 Cal. 820.

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The District Magistrate transferred Sarat Chandra's application to a Deputy Magistrate for disposal, with a direction to record the complaint and issue process. The Deputy Magistrate, thereupon, recorded the complaint and issued process against Jogendra Nath Mookerjee.

Jogendra Nath then moved the High Court and obtained this Rule, on the grounds, (*i*) that the prosecution could not be started on the application of Sarat Chandra Banerjee to whom no sanction was granted under s. 195 of the Code of Criminal Procedure; and (*ii*) that the District Magistrate when transferring the petition of Sarat Chandra to the Deputy Magistrate for disposal acted illegally in making a direction that process should issue.

Mr. *Dunne* (Babu *Basanta Coomar Bose*, Babu *Harendra Nath Mukerjee*, Babu *Atulya Charan Bose* and Babu *Bidhu Bhushan Ganguli* with him) showed cause. The question is whether a Magistrate can take cognizance of a case in which sanction is necessary if sanction has been already granted to a particular person, and that person does not want to proceed with it. When a sanction has been once granted, the condition is satisfied and the Magistrate can take cognizance of the case although the particular person to whom the sanction has been granted does not choose to avail of it: see *The Empress* v. *Nipcha* (1), *In re Thathayya* (2), and *In re Ganesh Narayan Sathe* (3). In the case of *Kali Kinkar Sett* v. *Nritya Gopal Roy* (4), this point was never argued and decided; in this case the Judges nowhere said that the sanction **[353]** granted under s. 195 of the Criminal Procedure Code should come to an end if the person to whom sanction was granted did not choose to prosecute the case.

Mr. *Garth* (Mr. *Donogh*, Mr. *Sinha*, Babu *Charu Chandra Ghose* and Babu *Sarat Chandra Ghose* with him) for the petitioner. In the case of *Empress* v. *Nipcha* (1) what was said by the learned Judges was an *obiter dictum*. No sanction should be given to satisfy a private grudge of a person: see *Giridhari Mondul* v. *Uchit Jha* (5), *In the matter of Chundra Kant Ghose* (6). Any person not a party to the suit should not be permitted to get a sanction. Sanction to prosecute presupposes an application for sanction. The cases of *Baperam Surma* v. *Gouri Nath Dutt* (7), *In the matter of the petition of Banarsi Das* (8), *Durga Das Rukhit* v. *Queen-Empress* (9), *Kali Kinkar Sett* v. *Nritya Gopal Roy* (4) support my contention, that a sanction granted to a particular person cannot be availed of by any other person.

Cur. adv. vult.

PRATT AND MITRA, JJ. The facts which led up to the present application are briefly as follows:—

One Kheroda Sundari Debi applied to the District Judge for probate of a document purporting to be the will of her deceased mother. The application was opposed by Aprokash Chandra Mookerjee, brother of the alleged testatrix. The case was transferred for trial to the Court of the Subordinate Judge, who held that the will was not genuine, and his decision was upheld by the High Court in appeal.

Aprokash Chandra Mookerjee then applied for sanction to prosecute Jogendra Nath Mookerjee, a pleader of the Judge's Court, who had given evidence in support of the will, the offences charged being under

(1) (1878) I. L. R. 4 Cal. 712.
(2) (1888) I. L. R. 12 Mad. 47.
(3) (1889) I. L. R. 13 Bom. 600, 603.
(4) (1904) 8 C. W. N. 883.
(5) (1881) I. L. R. 8 Cal. 435, 439.
(6) (1888) 3 C. W. N. 3.
(7) (1892) I. L. R. 20 Cal. 474.
(8) (1896) I. L. R. 18 All. 213.
(9) (1899) I. L. R. 27 Cal. 820.

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sections 467, 471 and 193 of the Indian Penal Code. The application was refused both by the Subodinate Judge and by the District Judge, but was granted by the [354] High Court on the 14th June 1904. The sanction was explicitly given to Aprokash Chandra Mookerjee.

On the day before the expiry of the period of six months for which the sanction could be in force, a person named Sarat Chandra Banerjee, who claimed to have purchased a share of the interest inherited by Aprokash Chandra Mookerjee from his sister, petitioned the District Magistrate to issue process against Jogendra Nath Mookerjee upon the sanction to which we have already referred.

The District Magistrate transferred the petition to a Deputy Magistrate with a direction to record the complaint and issue process. The latter officer complied with the direction, and the accused then obtained the present Rule upon the District Magistrate as well as the complainant to show cause why the prosecution should not be quashed on the grounds—

(i) That the prosecution could not be initiated on the application of Sarat Chandra Banerjee who was not the person to whom sanction had been granted ; and

(ii) That the District Magistrate acted illegally in making a direction to the Deputy Magistrate to issue process.

Mr. Dunne in showing cause has contended that the law does not provide that the sanction to prosecute must be given to some particular person who alone can avail himself of it; and that when once a sanction has been given by the proper Court, it is competent for the Magistrate to proceed *proprio motu* under section 190 (1) (*c*) of the Code of Criminal Procedure. In our opinion this is not a new question but one which has been already settled by authority. In the case of *Giridhari Mondul* v. *Uchit Jha* (1) it was observed by Pontifex and Field JJ. that the sanction to prosecute contemplated by the Code of Criminal Procedure is not a direction to prosecute, inasmuch as "it leaves a private prosecutor free to exercise his own unfettered discretion as to whether he will proceed or not." In the case of *Baperam Surma* v. *Gouri Nath Dutt* (2) the learned Judges after intimating that the sanction in the case before them had been given to a contemplated prosecution by a definite person, proceed as follows:—"It does appear to [355] us both that a sanction for prosecution under section 195 is not intended by the Code, as it is sometimes treated as being intended, as a sanction given in the abstract, not to any intended prosecutor, not on any application, but a sanction in the abstract which practically may float about the world like a bit of thistle-down until it comes in contact with some possible prosecutor." *In the matter of the petition of Banarsi Das* (3) Aikman, J. sitting alone, expressed the opinion that a sanction to prosecute under section 195 of the Code presupposes an application for sanction and should not be granted otherwise. In *Kali Kinkar Sett* v. *Nritya Gopal Roy* (4) it was held that where sanction was given to a certain person to prosecute, the sanction could not be utilized by another person alleging himself to be the agent of the former, except upon recorded proof of his authority, and as there was no such proof, the prosecution was quashed.

In the case with which we are now dealing, Sarat Chandra Banerjee does not allege any authority from Aprokash Chandra Mookerjee. He came forward as a complainant as Approkash Chandra would not prosecute.

(1) (1881) I. L. R. 8 Cal. 435.
(2) (1892) I. L. R. 20 Cal. 474.
(3) (1896) I. L. R. 18 All. 213.
(4) (1904) 8 C. W. N. 883.

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In *Durgo Das Rukhit* v. *Queen Empress* (1) decided by Prinsep and Stanley JJ., it was observed: "Sanction under section 195, Code of Criminal Procedure, should be given only on application made for it by some person who may desire to complain of the particular offence, and whose complaint could not be entertained without such sanction;" and further :— " It is sufficient at present to repeat that sanction under section 195 was given *proprio motu* by the Deputy Collector and without application for it by any person desiring to make a complaint regarding these offences. As to what followed, we do not mean to say that the District Magistrate was not competent under section 190 (1) (*c*) to take cognizance of the offence, but as the matter was then before him he was competent to do so only on sanction properly given, and there was no proper sanction."

The only case which has been cited to the contrary as directly bearing on the question is *Empress* v. *Nipcha* (2), where the learned Judges say that it was competent for the Magistrate to take up the **[356]** case, although the person to whom sanction was given did not avail himself of it. But that was clearly an *obiter dictum*, as the Sessions Judge had acquitted the prisoners on the merits apart from the question of the legality of the Magistrate's proceedings.

The conclusion at which we arrive is that a sanction expressly given to a particular applicant cannot be availed of by some other person against that person's wish and without his authority, and that the Magistrate acted in this case illegally in accepting and acting upon the complaint of Sarat Chandra Banerjee.

We, therefore, make the Rule absolute on the first ground, and direct that the prosecution be quashed.

It is unnecessary for us to express any opinion regarding the second ground stated in the Rule.

Rule absolute.

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32 C. 357 (=1 C. L. J. 23).

[357] APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Mookerjee.

JOY CHANDRA BANERJEE *v.* SREENATH CHATTERJEE.*

[1st July, 1904.]

Estoppel by judgment—Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Purchaser, previous to suit—Defence in previous suit—Vendor, possession of—Pleader, non-disclosure of facts by—Evidence Act (I of 1872), s. 115—Fraud—Silence when fraudulent.

A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase, although the former had, as pleader for the vendors, actively defended the suit.

Mercantile Investment and General Trust Company v. *River Plate Trust Loan, and Agency Company* (3) *Mohunt Das* v. *Nilkomul Dewan* (4) followed.

If, however, the purchaser had allowed the vendors to remain in possession intending to mislead the plaintiff who having been so misled had sued them, the decree in the suit would bind him on the ground of fraud.

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* Appeal from Appellate Decree No. 544 of 1901, against the decree of Girish Chunder Chatterjee, Additional Subordinate Judge of Dacca, dated Dec. 12, 1900, reversing the decree of Bunwari Lal Banerjee, Munsif of Munshigunge, dated July 28, 1900.

(1) (1899) I. L. R. 27 Cal. 820.
(2) (1878) I. L. R. 4 Cal. 712.
(3) (1894) 1 Ch. 578.
(4) (1899) 4 C.W.N. 283.