

1873,
April 5.

[ORIGINAL CIVIL JURISDICTION.]

KÁSEIR'AV R. SÁHER HOLKAR AND ANOTHER *Plaintiffs*,
VITHÁEDÁS MANGALJI..... *Defendant*.

Practice—Attachment—Equity of Redemption—Immoveable property in possession of mortgagee—Civ. Proc. Code, Secs. 235 and 246.

A mortgagee, in possession of mortgaged premises that have been attached by prohibitory order under Sec. 235 of the Code of Civil Procedure, in execution of a decree obtained against his mortgagor, is entitled to come in under Sec. 246 of the Civil Procedure Code and have the attachment raised.

THE plaintiffs in the above suit, by a prohibitory order issued under Section 235 of the Code of Civil Procedure, bearing date the 2nd of December 1872, attached, in execution of a money decree they had obtained against the defendant, a house assessed as No. 81, situated in the Kalbadevi Road and a second house adjoining the former, assessed as No. 1, situated in Withalwadi Street.

On the 22nd of February 1873, Vináyakráv Ganpatráv Gopálráv Ganpatráv, and Makundráv Ganpatráv, carrying on business in Bombay under the name of Ganesh Vináyak, took out a Judge's summons, calling upon the plaintiff to show cause why the said attachment should not be removed.

From the affidavits filed in the matter, it appeared that the premises in question had been conveyed, on the 5th of January 1859, by V. and N. Mádhavdás to the firm of Genesh Vináyak and their *munim*, Balvantráv Bhikáji. The purchase money had been paid by the firm of Genesh Vináyak at the request, and on account, of the defendant, on condition that if the defendant should repay to the firm of Genesh Vináyak the purchase money they had advanced with interest and should adjust and settle the balance of his general account with the firm, the firm should convey the premises to the defendant. The purchase money, which amounted to Rs. 16,500, was then debited to the defendant in the books of Ganesh Vináyak.

The firm of Ganesh Venáyek collected the rents and profits of the premises and held the name to secure payment by the defendant to them of the said purchase money and interest and the balance of their account with the defendant, until the premises were attached.

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The plaintiffs did not admit that the premises were held by the firm of Ganesh Venáyek, subject to the conditions above referred to, but (without waiving that point) alleged that the value of the premises at the date of attachment was greater than the amount of the mortgage debt, and that the interest upon the purchase money had been more than paid by the rents and profits that the firm of Ganesh Vináyak had received, and that, therefore the defendant had an interest in the premises which the plaintiff was entitled to attach and sell.

The summons was argued in chambers before SARGENT J.,

Marriott showed cause, and contended that the defendant was entitled to an equity of redemption in the premises, and that such equity of redemption was property (and it might be very valuable property) which was liable, like all other property of the defendant, to be attached and sold. He contended that if it were held otherwise, fraudulent debtors could easily mortgage their immoveable property much below its real value to *bona fide* mortgages and give up possession to them, and thus defeat altogether the claims of the mortgagor's creditors.

Mayhew, in support of the summons, said that it was the invariable practice of the Court, at the instance of a mortgagee in possession, to raise an attachment laid upon the premises mortgaged to him, and relied upon the case of *Nagsi Sevdas v. Punjabai*,* where BAYLEY, J., decided this point after argument. He contended that an equity of redemption was not property of which the mortgagee in possession was trustee for the mortgagor within the meaning of Section 246 of the Code. As to the hardship of the case, he said that the

*Note — Suit No. 771 of 1869, decided by BAYLEY, J., on the 5th of August 1870.

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Cur. Adv. vult.

On the 5th of April, SARGENT, J., ruled that the firm of Ganesh Vinayak were not in possession of the mortgaged premises as trustees for the defendant, and directed the attachment that had been laid upon the mortgaged premises to be raised, and ordered the plaintiff to pay the costs of the summons.

Attorney for the plaintiff : G. Tyebji.

Attorneys for the claimants : Dallas and Lynch.

March 20.

[CROWN CASES.]

REG. v. NATHALAL PITAMBAR.

Ceniorari—Conviction on Merits—Error in decision on merits—Jurisdiction of High Court to interfere—Act XIII. of 1856, Section CXI.

Section CXI. of the Police Act (XIII. of 1856) does not give jurisdiction to the High Court, when a case is brought before it *ceniorari*, to enquire whether the Magistrate has come to a correct conclusion as to the guilt or innocence of the prisoner. The object of that section is to limit the objections to a conviction to some substantial meritorious ground, such as want of jurisdiction or the like, and to prevent a conviction from being quashed on a mere error of form or of procedure. But the section does not give the High Court any right to interfere on the ground that the Magistrate has come to a wrong conclusion on the question of the guilt or innocence of the accused person. Though affidavits may be used to show a want of jurisdiction in a Magistrate, even though such affidavits contradict for this purpose the finding of the Magistrate, they cannot be used as affording materials for reviewing the Magistrate's decision on the merits.

ON the 4th day of March 1873, *Mayhew* obtained from green J. a rule nisi calling upon, Charles Philip Cooper, Esquire; Second Magistrate of Police for the Town and Island of