

He relied on *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (1), but we think that it is not on all fours with the present case. On the other hand, there is a case, *Ram Lal v. Narain* (2), which is exactly in point; and is, we think, a clear authority for the view we take. In another case *Poresh Nath Mojundar v. Ram Jodu Mojundar* (3), it was held that in a foreclosure suit the mortgagor can redeem at any time until the order absolute is made under section 87 of the Transfer of Property Act, and similarly we think that in a suit for sale the mortgagor can under section 89 redeem at any time before an order absolute for sale has been made. The appeal fails and must be dismissed with costs.

s. c. G.

*Appeal dismissed.*

1895  
TARA PRASAD  
ROY.  
v.  
BHOBODEB  
ROY.

### CRIMINAL REFERENCE.

*Before Sir W. Comer Pethcram, Knight, Chief Justice, and Mr. Justice Beverley.*

QUEEN-EMPRESS v. GASPER. \*

*Criminal Procedure Code (Act X of 1882), section 386—Distress Warrant—Claim by third party to the property distrained.*

1894  
Sept. 11.

A Magistrate, who has issued a distress warrant under section 386 of the Criminal Procedure Code, is not required by law to try any claim which may be preferred to the ownership of the property distrained.

THIS was a reference by the Chief Presidency Magistrate of Calcutta under section 43 of the Criminal Procedure Code.

The facts of the case and the point referred for the opinion of the High Court appear sufficiently from the following letter of reference:—

"Mr. D. M. Gasper having been sentenced to a fine of Rs. 600 under section 293 of the Penal Code, warrants for the levy of the amount by distress and sale were issued on the 8th day of August 1894.

"Certain moveable property, found on the premises occupied by Mr. D. M. Gasper, was in execution of such warrant seized, and a date was duly fixed by me for the sale of such property. Prior to the date of sale a claimant, Mr. T. A. Frangopolo, appeared to such property, and I thereupon fixed a day for hearing his claim. Objection was taken as to my jurisdiction to hear it.

\* Criminal Reference No. 2 of 1894, made by T. A. Pearson, Esq., Chief Presidency Magistrate, dated 3rd September 1894.

(1) I. L. R., 18 Calc., 139.

(2) I. L. R., 12 All., 539.

(3) I. L. R., 16 Calc., 246.

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"There appears to be no section in Chapter XXVIII of the Code of Criminal Procedure directing or authorizing a Magistrate to hear or determine such a claim, but there is a Criminal Circular Order of the Calcutta High Court No. 806, 22nd June 1864, to be found in the General Rules and Circular Orders of High Court, Appellate Side Criminal 1891, headed 'Procedure for the levy of fines' which lays down that, if a claimant come forward (to the property distrained upon), then the ownership of the property distrained must be determined by the Magistrate and not by the Police.

"A similar rule has been laid down for the levy of fines in the Punjab, *viz.*, 'When an objector comes forward, he should be warned of the penalties contained in section 207 of the Penal Code against a fraudulent claim to property to prevent its seizure in satisfaction of fines, and the objection should then be enquired into and disposed of, either by admitting the claim or referring the objector to a civil action if his claim seems groundless.' See notes to section 386, Criminal Procedure Code, Henderson's last Edition, page 261.

"This Circular Order of the Calcutta High Court was, however, apparently framed under Act XXV of 1861, section 443 (although it specifically mentions the Act of 1882, section 386), and section 441 of Act XXV of 1861 enacts that the Act should not apply to the procedure of the Chief Commissioner of Police, the Police Magistrates or the Police of the towns of Calcutta, Bombay and Madras, except so far as the Act itself expressly provides, *viz.*, in sections 84, 87, 119 and 112 which appear to be the only sections referring to Presidency Police and Police Magistrates.

"If this Circular Order therefore under Act XXV of 1861 does not apply to Presidency Police Courts, then section 2 of Act X of 1882, which applies the Circular Order to the Act of 1882, does so only with the limitations and restrictions imposed on it by the Act of 1861, when the rule was framed, that is to say, it is applicable only to the Mofussil Courts.

"I may also add that the executive work of the Presidency Police Courts is carried out by the Commissioner of Police and not as in the Mofussil by the Magistrate himself.

"A somewhat, although not entirely, analogous question has been decided by the High Courts of Bengal and Allahabad under Chapter VI of the Criminal Procedure Code, heading C, Proclamation and Attachment, section 88. It has, in such decisions, been held where property, moveable or immovable, has been attached under section 88 as the property of an absconder or proclaimed person, that as the Criminal Procedure Code makes no provision for any investigation by a Magistrate of the claims of third persons to property which has been attached, the proper remedy of such claimant is by civil suit following the property, Peacock, C.J., and Norman, J., adding:—"*We are not prepared to say that, when claimants have held back for six months, a Magistrate may not be perfectly justified in presuming that the property was not theirs, and leaving them to vindicate any right they might have in a*

*civil suit.* He may fairly say that he is not bound to try a question which is more properly one for the Civil Court." Seton Karr, J., however, dissented from this view, considering that the Magistrate should determine upon the claim, see *Queen v. Chumroo Roy* (1). That case has, however, been followed by *In re Chunder Bham Sing* (2), a case of the attachment of an absconder's property under the old Code, and also by the case of *Queen-Empress v. Sheodihal Rai* (3), a case under section 88 of the Code of 1882.

"There appear, however, to be some matters of distinction between cases of claims to attach property under section 88, Chapter VI of the Code, and cases of distraint under section 386. In the first place the attachment under section 88 may be made in several prescribed ways which are very similar to attachments by a Civil Court; and, secondly, the attached property can only be sold after a period of six months after such attachment (unless it is property liable to decay), and this provision is, of course, the reason for the observation of the learned Judges who decided the case of *Queen v. Chumroo Roy* (1) which observation I have underlined in quoting the case: whereas under section 386 there is no such period of six months during which the property is to remain under distraint before sale, and the same inference cannot, therefore, be drawn against claimants under section 386 as was drawn against claimants coming in under section 88.

"Further, section 88 applies to both moveable and immoveable property, whereas section 386 applies only to moveable property, and it might well be that, where immoveable property is concerned, the property could be followed, and the matter of the claim be best determined in a Civil Court.

"There is, however, still in both sections the difficulty that the Code itself does not provide any procedure for a Magistrate trying either of such claims, and unless the Circular of the High Court, dated the 22nd June 1884, applies to Police Courts in the Presidency towns, there appears to be no direct authority for the trial of a claim under section 386 being investigated by a Magistrate. The reported cases all, as far as I am aware, deal with the question as arising under attachment of property of absconders only. As the question is of great importance to the public, whose property may be seized under distress warrants issued by the Presidency Police Courts, I solicit the opinion of the High Court as to whether a Presidency Magistrate is bound to hear and decide upon claims made to property attached under distress warrants issuing out of the Presidency Courts, or whether the person claiming the property seized is to be referred to the Civil Court for his remedy.

"The matter has been adjourned, and the sale of the property seized stayed pending the decision of the High Court."

The parties were not represented at the hearing of the reference.

(1) 7 W. R., Cr., 35.

(2) 17 W. R., Cr., 10.

(3) I. L. R., 6 All., 487.

1895

QUEEN-  
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The opinion of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

It does not appear that the Code contains any provision for the trial of claims which may be preferred to property which is distrained under section 386, and any orders which this Court might issue could only be by way of advice. We are of opinion that when the Magistrate had issued his warrant under that section in the form given in the schedule, he had done all that was required of him by the Code, and that he is nowhere required by law to try any claim that may be preferred to the ownership of the property distrained. We express no opinion as to how such claims can be determined.

S. C. B.

## APPELLATE CIVIL.

*Before Mr. Justice Prinsep and Mr. Justice Ghose.*

1895  
June 19.

RADHA PERSHAD SINGH (PLAINTIFF No. 1) v. BUDHU DASHAD AND ANOTHER (DEFENDANTS) AND ANOTHER (PLAINTIFF No. 2).\*

*Service tenure—Jagir granted to Gorait or village watchman—Resumption<sup>n</sup> by Zemindar—Notice.*

A service tenure created for the performance of services, private or personal, to the zemindar may be resumed by the zemindar when the services are no longer required or when the grantee of the tenure refuses to perform the services. The distinction between a grant of an estate burdened with a certain service, and an office the performance of whose duties is remunerated by the use of certain lands, pointed out.

*Sanniyasi v. Salur Zemindar* (1); *Hurrogobind Raha v. Ramrutno Dey* (2); *Sreesch Chunder Rae v. Madhub Mochee* (3); *Nilmony Singh Deo v. Government* (4); *Unide Rajaha Raje Bammarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (5); *Forbes v. Meer Wahomed Takee* (6);

\* Appeal from Appellate Decree No. 933 of 1893, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Shahabad, dated the 16th of February 1893, affirming the decree of Babu Srigopal Chatterjee, Munsif of Buxar, dated the 30th of January 1892.

(1) I. L. R., 7 Mad., 268.

(3) S. D. A., 1857, p. 1772.

(5) 7 Moo. I. A., 128.

(2) I. L. R., 4 Calc., 67.

(4) 18 W. R., 321.

(6) 13 Moo. I. A., 438 (464.)