1878.

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the machinery prescribed for imposing the tax did not exist when it was imposed, and it was held that the suit would lie as there was no *legally* sanctioned tax. The matter of fact in dispute in this suit is no part of that machinery, and in the case of error in respect to it, the only remedy the plaintiff has is the appeal allowed by Section 85.

If he either fails to prefer the appeal or if the appeal preferred by him is disallowed by the Commissioners, Section 85 is a bar to a suit to contest the assessment.

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## APPELLATE CRIMINAL.

1878.
October 25.

*Before Mr. Justice Innes (Officiating C. J.) and Mr. Justice Muttusámi Áyyar.*

IN THE MATTER OF AUROKIAM, PETITIONER.*

*Act X of 1872, Sec. 297—High Court—Revision.*

In the course of a serious riot one S. was killed by a shot from a gun. The first prisoner and others were charged with murder. The Sessions Judge believing the statement of the first prisoner and his witnesses that he had fired in self-defence, acquitted him of the charge. Upon a petition presented by the widow of the deceased praying the Court to exercise their powers of revision,

*Held*, 1st, that under the provisions of Section 297 of the Criminal Procedure Code the High Court may exercise its powers of revision upon information in whatever way received:

2ndly, that it was not intended by the legislature that the powers given by Clause 1 of Section 297 should be exercised only in the particular instances of error and in the particular manner given in the succeeding clauses, which are merely intended to show the particular course which may be taken in those particular instances of error:

3rdly, that it is not a ground for revision by the High Court that all the evidence for the prosecution which might have been brought before the Session Judge has not been brought before him.

4thly, that the words 'material error' in that section cannot be held to include error in the appreciation of evidence:

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* Criminal Petition No. 463 of 1878 presented under Section 297 of the Criminal Procedure Code against the finding and sentences of the Session Court of South Tanjore in Case No. 91 of the Calendar for 1878.

5thly, that under the 1st clause of Section 297 the High Court cannot set aside findings of fact except in case of an appeal from a conviction.

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THIS was a petition presented under Section 297 of the Criminal Procedure Code (Act X of 1872) praying the High Court to revise the finding and sentence of the Court of Session of South Tanjore in Case No. 91 of the calendar for 1878.

Mr. *Wedderburn* for the Petitioner.

The *Government Pleader* (Mr. *Handley*) in support of the conviction.

The Court delivered the following judgments :—

INNES, C.J. (*Offg.*)—In the course of a serious riot, one Sinnapayel was killed by a shot from a gun. First prisoner and others were charged with murder among other charges. The Session Judge acquitted upon the charge of murder. The evidence was conflicting, but there was considerable evidence to the effect that first prisoner, while in the open street, being moved thereto by second prisoner, had deliberately fired at the man and shot him down. The other evidence was to the effect that the gun had been fired off from within second prisoner's house. First prisoner had, before the Magistrate, at first denied having fired off a gun at all; afterwards he admitted having done so, but said the shot was fired in self-defence after the party to which he belonged had taken shelter in the second prisoner's house and when the other party threatened to fire the house, from which if they carried out their threat he apprehended he should not be able to escape. The Judge believed the statement of the prisoner and acquitted him. This petition is now presented by the widow of the deceased who asks the Court to call for the record and pass such order in the case as may appear right; in other words, to exercise our powers of revision.

It seems very obvious from the language of Section 297 of the Criminal Procedure Code that the High Court may exercise its powers of revision upon information in whatever way received, and consequently upon the petition, as in the present case, of a private person occupying the position of a complainant in the case in which revision is sought, and I am not aware of any case in which a doubt upon this point, which seems to have been lately discussed by the Allahabad High Court (1) has ever been raised here.

(1) See *In the matter of Hardeo*, I.L.R., 1 All., 139.

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The more material question is whether, in the particular circumstances, there is any ground for interference, and, if so, whether we have the power to interfere by way of revision.

Looking to the reasons given by the committing Magistrate for committing on the charge of murder, it would appear that from the situation and nature of the screen through which prisoner said he had fired, he was pursuaded that first prisoner's account of what occurred was absolutely false, but there does not appear to have been any evidence before the Sessions Court as to the matters which thus influenced the committing Magistrate.

I agree with the opinion of Oldfield, J., in the Allahabad case referred to, that it was not intended by the legislature that the powers given by clause 1 of Section 297 should be exercised only in the particular instances of error and in the particular manner given in the succeeding clauses, which are merely intended to show the particular course which may be taken in those particular instances of error.

In the present case, therefore, (the other clauses not applying) we may look at clause 1 and act upon it if there has been any such material error in the proceeding as would properly call for the exercise of our powers of revision.

I have noticed that the committing Magistrate has referred to certain circumstances connected with the house which in his opinion showed the first prisoner's story to be false. These circumstances were not in evidence before the Sessions Court. Can it be said that the omission (if it is one) is a material error in the judicial proceeding?

It was unquestionably in the discretion of the prosecution to tender in evidence all that it considered material, and the Court cannot be said to have proceeded erroneously in not taking evidence upon what probably was not within the knowledge of the Court, and as to which if the evidence actually existed the prosecution exercised its discretion by withholding it.

If I felt authorized in pronouncing an opinion upon the facts after an acquittal, I should be inclined, perhaps, to doubt whether the Sessions Judge had rightly appreciated the evidence as to the circumstances attending the death of Sinnapayel. It may be that the prisoners 1 to 13 took refuge in second prisoner's house after and in consequence of the fury of the other faction at the fatal shot,

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But the Judge weighing the evidence has believed the first prisoner and those witnesses who support his story, and disbelieved those who say that he deliberately shot at the man. I do not think that material error can be intended to include error in the appreciation of evidence. Section 297 is an expansion of Sections 404 and 405 of the old Code, and it was held by the Madras High Court in 1869 (1) that, when there is evidence to be considered and weighed by the Court which is called upon to determine whether a person charged with an offence is guilty or not guilty, an error as to the probative force and effect of the evidence is one of fact and not open to correction except upon appeal in the case of a conviction.

I have no doubt that this view is equally applicable to the first clause of Section 297, and that we have not under it the power to set aside findings of fact and substitute our own view of what those findings should have been except in case of an appeal from a conviction.

It would not be competent to us therefore to say that the first and second prisoners ought to have been convicted of murder and to substitute a finding to that effect.

Then it was urged upon us that at all events the law was wrongly applied to the facts found, and that the prisoner ought, upon the findings, to have been convicted of culpable homicide not amounting to murder. If the law was wrongly applied to the facts, this undoubtedly would constitute such error in law as would call for the exercise of our powers of revision. If the Judge, for instance, had found that the prisoner had deliberately and intentionally and without any excuse killed the man and had upon that finding acquitted him, it would be open to the High Court to substitute a conviction and sentence. But what are the facts found here—a furious mob attacking the house—a state of circumstances which might reasonably raise an apprehension in the minds of those within of death or grievous hurt. The right of private defence would then extend to the causing of death, and this none the less that to the calmer judgments of those not concerned in the riot it might appear that the act of firing a single shot while almost certain to be

(1) See 5 M.H.C. Reps., App. X.

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followed by fatal effects might prove altogether ineffective for the purposes of defence.

I would, therefore, refuse in the present case to exercise our powers of revision.

MUTTUSA'MI A'YYAR, J.—I concur.

*Petition rejected.*

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## APPELLATE CIVIL.

1878. *October* 28.

*Before Mr. Justice Innes, (Officiating Chief Justice) and Mr. Justice Forbes.*

SRINIVÁSA (PLAINTIFF) APPELLANT *v.* EMPERUMANAR AND 2 OTHERS (DEFENDANTS) RESPONDENTS.*

*Act VIII of* 1865 *(Madras)—Distraint—Cause of Action.*

The defendants, the landlords, distrained certain produce, the property of plaintiff, their lessee, in view to selling it for alleged claims for rent. The Sub-Collector finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The defendants having refused to restore the property the plaintiff brought this suit under Madras Act VIII of 1865 to recover the value of the produce. *Held* that such wrongful withholding of the property being an act in direct disregard and defiance of the Act, did not constitute a cause of action triable by a summary suit under that Act.

THIS was a Second Appeal against the Decree of the District Judge of Tanjore in Appeal Suit No. 37 of 1878.

*V. Bháshyam A'yyangár* and *S. Gopála Chárri* for the Appellants.

Mr. *Handley* for all the Respondents.

*R. Baláji Ráu* for 1st and 2nd Respondents.

The Court (INNES, *Offg.*, C.J.; and FORBES, J.) delivered the following

JUDGMENT :—The facts are these. The defendants, the landlords, distrained certain produce, the property of plaintiff, their lessee, in view to selling it in satisfaction of alleged claims for rent. The Sub-Collector finding that the formalities required by

* Second Appeal No. 440 of 1878 against the decree of A. C. Burnell, District Judge of Tanjore, dated 27th March 1878, reversing the decree of the Sub-Collector of Negapatam, dated 12th December 1877.