[3 Mad. 48.]

APPELLATE CRIMINAL.

The 2nd May, 1881.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Rami Reddi and Seshu Reddi.....Petitioners.*

Conviction coram non judice—*Acquittal—Subsequent order for retrial—Criminal Procedure Code, Sections 284, 464—Sanction to prosecute for perjury unaffected by abortive trial—Evidence of witnesses in trial for breach of trust admitted in subsequent trial of complainant for bringing a false charge, wrongly admitted against witness tried for perjury in same case—Evidence Act, Section 33.*

When a Sessions Judge on appeal annuls the conviction of a Magistrate for want of jurisdiction and omits to order a retrial at the time under Section 284† of the Criminal Procedure Code, he is not precluded, by virtue of Section 464,‡ from passing such an order subsequently.

The order annulling the conviction in such a case does not amount to an acquittal: Where sanction is given for a prosecution for perjury and the case tried by an incompetent Court and the conviction quashed on appeal, a competent Court may retry the prisoner upon the subsisting sanction without any order of the Appellate Court by whom the conviction is quashed.

The evidence of a witness given in a proceeding pronounced to be *coram non judice* cannot beused under Section 33 $ of the Indian Evidence Act, if the witness is dead, on a retrial before a competent Court.

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*Petitions 69 and 82 of 1881 against the orders of C. A. Bird and J. D. Goldingham, Sessions Judges of Nellore, confirming the sentences of the District Magistrate of Nellore, dated respectively 2nd December 1880 and 22nd January 1881.

Procedure in case of conviction by Court not having jurisdiction.

† [Sec. 284:—When any Court has convicted a person of an offence not triable by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction.]

Judgment what to contain.

‡ [Sec. 464:—The judgment or final order shall contain the point or points for determination, the finding thereupon, and the reasons for the finding, and shall be dated and signed by the Judge in open Court at the time of pronouncing it. When a judgment or final order has been so signed, it cannot be altered or reviewed by the Court which gives such judgment or order. It shall specify the offence of which the accused person is convicted, and the punishment to which he is sentenced; or, if it be a finding of acquittal, it shall direct that he be set at liberty.

* * * *

Nothing herein contained shall prevent any Court from recalling any order other than a final order.

No error or defect in any judgment shall invalidate the proceedings.]

Evidence in a former judicial proceeding when relevant.

$ [Sec. 33.—Evidence given by a witness in a judicial proceeding; or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse

R charged *A* with breach of trust, and *S* gave evidence in support of the charge. *A* being acquitted, *R* was tried for making a false charge and *S* for perjury.

Held—(1) That the depositions given by witnesses in the first case could be used against *R* in the second case, but not against *S* under Section 33, Evidence Act.

(2) That the word "questions" in Section 33 does not mean "all the questions," and that though additional issues were involved in the second trial, yet the evidence as to the issues common to both trials was properly admitted at the second trial against *R*.

THESE were the petitions under Section 297* of the Criminal Procedure Code.

[49] The facts and arguments sufficiently appear in the judgment of the Court (INNES and MUTTUSAMI AYYAR, JJ.).

M. O. Parthasaradi Ayyangar for Petitioners.

The Government Pleader (Mr. *Handley*) for the District Magistrate of Nellore.

Judgment:—These criminal petitions pray for the interference of the Court to set aside the convictions and sentences passed by the District Magistrate upon the two petitioners in cases 7 and 8 of 1879 of his file on the 7th and 13th October 1880 respectively.

Appeals were preferred to the Sessions Court but were dismissed.

The facts of the cases, which are connected, are shortly as follows:—

On the 5th June 1877, the petitioner, in Petition No. 69, one Rami Reddi preferred a charge of breach of trust against one Abbayi Chetti before the District Magistrate.

On the 5th November 1877 the case was transferred to Mr. Atkinson, who, on the 8th February 1878, acquitted Abbayi Chetti.

On the 15th June of the same year, Mr. Moore sanctioned the prosecution of the two petitioners—M. Rami Reddi for making a false charge, and Seshu Reddi for giving false evidence against the person accused on the trial of that charge. Mr. Moore tried the cases and convicted the two petitioners. They appealed, and on the 14th March 1879 the Sessions Judge annulled the conviction on the ground that the Magistrate having sanctioned the prosecution had no jurisdiction to try the case.

The Sessions Judge, in his order disposing of the appeal, omitted to order a new trial before a competent Court, but afterwards, having been moved to do so, added a direction to this effect to his order.

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party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:—

Provided that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity, to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.]

* [Sec. 297:—If, in any case either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit.

Powers of revision.

* * *]

The District Magistrate, after considerable delay occasioned by the disappearance of the accused persons, recommenced the trial in April 1880. Abbayi had died in December 1879. Some of the witnesses also were dead, and others were at a considerable distance from the place of trial, and their attendance was not easily procurable. Under these circumstances the District Magistrate used against the accused persons the evidence given by [50] Tambaya Chetti, Muthusami Chetti, Adinarayana and Abbayi in the former proceedings.

The evidence of the three first-named was taken in the breach-of-trust case. That of Abbayi was taken before Mr. Moore in the first trial of the charges against these petitioners. The District Magistrate sentenced M. Rami Reddi to 18 months' rigorous imprisonment and a fine of 100 rupees, or in default to 3 months' further rigorous imprisonment, and Seshu Reddi to 18 months' rigorous imprisonment.

It was contended before us—

(1) That the District Magistrate had no jurisdiction to proceed in the case. It was urged in support of this contention that the Judge having already passed a final order quashing the former proceedings could not afterwards vary it by adding the order for a retrial;

(2) That there was no evidence that the attendance of the witnesses, whose depositions given in the breach-of-trust case were admitted in evidence in the present trial, could not be procured;

(3) That the parties to the two proceedings were not the same, and the questions in issue were not substantially the same;

(4) That Seshu Reddi was merely a witness in the breach-of-trust case and not a party, and that consequently the evidence so admitted is not evidence against him;

(5) That there was an acquittal by the Sessions Judge, and that it was not competent to the Magistrate, while that acquittal was in force, to proceed to take up the case *proprio motu* and, without an order passed in accordance with law by the Sessions Judge, to retry the case; and that consequently, if the order so passed is not valid, the proceedings of the District Magistrate are not sustainable.

The case was very ably argued by the Vakil for the petitioners. We had also the advantage of hearing Mr. *Handley* in support of the convictions.

First, it may be observed that the order of the Sessions Judge did not amount to an acquittal. It simply pronounced that the proceedings before the Head Assistant Magistrate had been [51] without jurisdiction. There had been no trial, and consequently there could have been no acquittal. No doubt the order annulling the proceedings was in the nature of a judgment or final order, which, under Section 464, Criminal Procedure Code, when once dated and signed, cannot be reviewed. But this provision refers to the mode in which the appeal is dealt with—not to directions in regard to ulterior proceedings—and although a literal construction of Section 284 seems to contemplate that the order directing ulterior proceedings shall be made simultaneously with the order quashing the proceedings already had, we do not consider that a Judge who omits to do so is precluded by the terms of Section 464 from passing such an order subsequently. We are further of opinion that, if no order had been made at all by the Judge, a competent Court might have proceeded to retry the case upon the sanction still subsisting, upon which no legal proceedings had been taken. The Vakil was in error in saying that there was no evidence

before the Court to justify it in failing to require the personal attendance of the witnesses whose former depositions it had admitted in evidence. The District Magistrate took evidence upon this point and satisfied himself that the legal conditions had arisen which would enable him to dispense with their personal attendance.

Under the explanation to Section 33 of the Evidence Act, the parties were the same to the proceedings in the breach-of-trust case and the proceedings against Rami Reddi. Seshu Reddi was merely a witness—not a party in the breach-of-trust case—and the evidence so admitted was certainly not admissible in the case against him.

The evidence of Abbayi, which was given in a proceeding subsequently pronounced to be one *coram non judice*, is not admissible against either Rami Reddi or Seshu Reddi.

On the further contention that the questions in issue are not substantially the same in the one case as in the other, we are *not* of opinion that the evidence other than that of Abbayi must be excluded as against Rami Reddi. In the breach-of-trust case the question of whether there had been the breach of trust by Abbayi alleged by Rami Reddi was the only question involved.

In the case against Rami Reddi there is, no doubt, the [52] further question whether he knew, or had reason to believe, that the charge was false, and in that against Seshu Reddi whether he supported the false charge knowing it to be false.

Although the Act, in using the word 'questions' in the plural, seems to imply that it is essential that all the questions shall be the same in both proceedings to render the evidence admissible, that is not the intention of the law.

The principle involved in requiring identity of the matter in issue is to secure that in the former proceeding the parties were not without the opportunity of examining and cross-examining to the very point upon which their evidence is adduced in the subsequent proceeding. And though separate proceedings may involve issues, of which some only are common to both, the evidence to those common issues given in the former proceeding may (on the conditions mentioned in Section 33 arising) be given in the subsequent proceedings. Thus, "if in a dispute respecting lands, any fact comes directly in issue, the testimony given to that fact is admissible to prove the same point in another action between the same parties or their privies though the last suit relates to other lands"—Taylor on Evidence, 4th Edition, Section 436.

The evidence, therefore, to the fact to which these witnesses spoke in the former proceeding, was admissible in the subsequent trial against Rami Reddi.

Excluding then the evidence of Abbayi in the case against Rami Reddi and that of Abbayi, Tambaya Chetti, Muthusami Chetti, and Adinarayana Chetti in the case of Seshu Reddi, is there evidence which the Magistrate believed and upon which he might have found the prisoners guilty?

There is in the case of Seshu Reddi the evidence of Narayanasami Chetti and the document F to the same point as that to which the excluded evidence speaks. The Magistrate says the evidence of all these witnesses, including that of Narayanasami Chetti, is perfectly disinterested, and the document F affords, as his judgment shows, strong corroboration of the fact to which he speaks of the absence of Abbayi from Nellore on the 4th January.

In the case of Rami Reddi the evidence of Abbayi alone is excluded, and his evidence upon this point is supplied by that **[53]** of Narayanasami Chetti, Tambaya, Muthusami Chetti, and Adinarayanasami Chetti.

No doubt the direct evidence of Abbayi Chetti in denial of the receipt of the waist-belt is shut out, but we think apart from that if the Magistrate found, as he has found, upon evidence which, excluding that which is inadmissible, is still substantial and satisfactory that Abbayi was not in Nellore on the 4th January, and that the evidence to the payment on that date was false, and that documentary evidence had been fabricated to impart to the pretence of payment an appearance of great probability, he could not but find that the entire charge against Abbayi was false.

We think, therefore, the petitions should be dismissed.

[3 Mad. 53.]

APPELLATE CIVIL.

The 3rd June, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Venkayyar.....(Defendant) Appellant.

versus

Venkata Subbayyar.....(Plaintiff) Respondent.*

Registration Act, Section 17, Clause (c)—Receipt for money paid under an hypothecation bond.

A receipt acknowledging as a fact part-payment of a sum due under an hypothecation bond does not require registration under Section 17, Clause (*c*) of the Registration Act, unless the fact is referred to as a consideration for a contractual engagement, whereby the interest created by the prior registered instrument is limited or extinguished.

A mere receipt does not acknowledge the receipt or payment of a consideration. *Dalip singh* v. *Durga Prasad* (I. L. R., 1 All., 442) dissented from ; *Venkatarama Naik* v. *Chinnathambi Reddi* (7 M. H. C. R., 4) approved.

IN this case the plaintiff as representative of his uncle sued to recover Rs. 513-9-0 due under an hypothecation bond, dated October 6th 1873.

The defendant pleaded part-payment of Rupees 443-14-8, of which Rs. 394-14-8 had been paid to deceased on November 3rd, **[54]** 1877, and a receipt given therefor, and 49 rupees on other occasions.

The Munsif found that Rs. 49 had been paid, but, as to other payment, decided as follows : "The receipt is not receivable in evidence, because it has not been registered. It is an acquittance for Rs. 394 and odd, being sums paid in part liquidation of a registered hypothecation bond, and under Sections 17 and 49 of the Registration Act, it is not receivable in evidence because it is unregistered. *See* I. L. R., 1 All., p. 442. The payments may nevertheless be proved by oral evidence, but independent of, and unconnected with, the receipt, there is no other evidence of the payments ; and I must find on the first issue

* Second Appeal No. 795 of 1880 against the decree of J. H. Nelson, District Judge of South Arcot, confirming the decree of the District Munsif of Cuddalore, dated 2nd August 1881.