

[335] APPELLATE CRIMINAL.

The 19th December, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE KINDERSLEY.

The Queen *against* Amirtam.*

*Salt Laws, Breach of—Act XVII of 1840—Punishment—Imprisonment
in default of payment of fine illegal.*

A sentence of imprisonment in default of payment of a fine imposed under the provisions of Act XVII of 1840 is illegal.

THIS and eight other similar cases were referred for the orders of the High Court under Section 296 of the Code of Criminal Procedure by the District Magistrate of South Arcot on the ground that the sentence was illegal.

The facts are set out in the Judgment of the Court (INNES and KINDERSLEY, JJ.)

No Counsel were instructed.

Judgment:—The Third-class Magistrate convicted the accused under Act XVII of 1840, and passed a sentence of fine, with imprisonment, in default.

The award of imprisonment in default of payment of fine is not allowable under the provisions of Act XVII of 1840, under which and the provisions of Madras Act II of 1878 the accused person was held to have committed an offence.

Act XVII of 1840, as was held in the Full Bench decision of 15th December 1879,† allows of either fine or imprisonment being imposed as the

Revision Case 159 of 1881.

Calendar Case 236 of 1881 before C. Srinivasayangar, Third-class Magistrate of Porto Novo.

† FULL BENCH—December 15, 1879.

(Turner, C.J. Innes, Kernan, Kindersley, and Muttusami Ayyar, JJ.)

Case referred for the orders of the High Court under Section 297 of the Criminal Procedure Code by the District Magistrate of—

(Act XVII of 1840 authorizes a substantive sentence of imprisonment.)

JUDGMENT:—The accused, in the cases submitted, have been convicted by the Second-class Magistrate of offences against the Salt Laws (Madras Regulation I of 1805, Act XVII of 1840; and Madras Act II of 1878) and have been sentenced, each, to be rigorously imprisoned for a term of thirty days.

The District Magistrate submits the proceedings for revision on the ground, 1st, that the sentences are unduly severe, and, 2ndly, that the punishment is opposed to the Order of Government, dated 25th August 1879, No. 2209. The Order of Government referred to by the District Magistrate, though not communicated directly to the High Court, was published in the Gazette of the district from which this reference arises. The points on which the cases have been submitted for revision by the District Magistrate present no difficulties, but the Court has taken occasion to consider whether sentences of imprisonment, for the term in excess of ten days as substantive sentences, are authorized by any of the provisions of the Salt

substantive punishment. If fine is imposed, imprisonment in default of payment the fine cannot be awarded.

[336] The award of such imprisonment in this case is not legal under that Act, and the sentence in that respect must be amended.

Laws, and the doubts entertained on this question by some members of the Court have led to the cases being referred to a Full Bench for decision.

An examination of the earlier Salt Laws (*viz.*, Regulation I of 1805 and Regulation V of 1831) suggests very strongly that the intention of the Legislature in enacting Act XVII of 1840 was not to create any new penalties (or penalties not authorized at the date of its enactment) for breaches of the Salt Laws, but simply to empower the authority therein described (*viz.*, the Magistrate of the district) to impose the penalty prescribed by the then existing law to an extent short of that awardable by the then Criminal Courts. That penalty was the penalty of fine, and the punishment of imprisonment could be adjudged by the Criminal Courts only on the omission or refusal of the convicted person to pay the amount of the fine.

Whatever may be the correct construction of the law expressed in Act XVII of 1840, the High Court, dealing with the matter at the present time, finds a difficulty in ruling that Act XVII of 1840, read with subsequent Acts on the same subject, did not operate to authorize a substantive sentence of imprisonment. The Courts throughout the country have, in practice, assumed for years that the Act did authorize imprisonment as a substantive punishment; and the Legislature in an Act passed twelve years later (*viz.*, Act VII of 1852) appear to have assumed it was authorized. This High Court had also, on at least one occasion (High Court Proceedings, dated 22nd December 1876, No. 3012), adopted and expressed the same view. It appears to the Court that, although, if the question were now submitted to it for the first time, there might be ground for adopting a different construction of the Act, it is bound by long practice and by precedent to support the construction which has hitherto been accepted.

It remains to consider the grounds upon which the District Magistrate submits the cases for revision by this Court, *viz.*, 1st, the undue severity of the sentences, 2ndly, that the sentences, are in contravention of the Order of Government above-mentioned. The latter ground does not, in the opinion of the Court, afford any adequate reason for interfering with the sentences of the second-class Magistrate. The order is, it may be admitted, so expressed as to appear to prohibit Magistrates from the exercise of the discretion imposed on them by law as to whether they shall, in the case of certain offences, pass a sentence of fine or a sentence of imprisonment. Such an order would be a *ultra vires*, as, in the absence of any provisions conferring or reserving to the executive Government such a power, the Government cannot, by an executive order, release the Magistracy from their obligation to obey the enactments of the Legislature. The High Court is therefore bound to assume that the terms of the order are suggestive rather than mandatory. It follows that the Court could not, as a Court of Revision, hold a sentence illegal on the ground that it contravened the Order of Government above referred to.

At the same time the Court takes this occasion to express its entire concurrence in the objects aimed at by the order. It is undoubtedly true that petty offences are more appropriately punished by fine than by imprisonment, and that sentences of fine when awarded should be proportioned to the means of the offender; and the High Court, in the exercise of its revisional power, has persistently impressed these views on the Subordinate Courts and Magistracy.

As regards the severity of the sentences in the cases submitted, the High Court agree with the District Magistrate in thinking the imprisonment awarded unduly severe. The accused have already been released on bail under the orders of this Court.

The sentences in each case are now reduced to a fine of Rs. 2, or, in default, to imprisonment for a term of seven days.

[337] The Magistrate is mistaken in supposing that there is any conflict between the ruling of the 15th December 1879 and that of the 26th August 1881.*

The question, whether imprisonment could be awarded in default of payment of fine imposed under Act XVII of 1840, was not considered in the Full Bench ruling of the 15th December 1879.

The imprisonment imposed by the High Court in default of payment of fine in the final paragraph of the Full Bench ruling was a legal sentence under the Act of 1852.† The charge in this case was under Act XVII of 1840, and the fine is beyond what is authorized by Madras Act VII of 1852.† We cannot, therefore, uphold the sentence as a legal sentence under the Act of 1852.

[338] APPELLATE CIVIL.

The 21st December, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND
MR. JUSTICE MUTTUSAMI AYYAR.

Arumugam Pillai.....(Plaintiff), Appellant

and

Vijayammal and another.....(Defendants), Respondents.†

Madras Regulation XXIX of 1802, Section 7—“ Heirs ” to dismissed Karnam.

The word “ heirs ” in Section 7 of Madras Regulation XXIX of 1802 means “ persons who, in the event of death, would inherit from the preceding incumbent.”

THIS was a suit to establish the plaintiff’s right to the office of Karnam of Elanthatanguli, a village formerly attached to the Ariyalur Istimrar Zamindari. Ramalingam Pillai, the undivided brother of the plaintiff, having been dismissed in 1877, after suit brought by the first defendant, the proprietor of the village, the claims of the plaintiff to succeed his brother were passed over by the first defendant in favour of the second defendant who was appointed Karnam.

The accused was convicted of having manufactured earth-salt contrary to the provisions of Section 18, Regulation I of 1805, and was sentenced to pay a fine of 10 rupees, or, in default of payment, to suffer rigorous imprisonment for ten days.

The District Magistrate observes that the order of imprisonment in default of payment of fine is illegal on the ground that Act XVII of 1840, under which the punishment was ordered, provides for fine or imprisonment only being inflicted, and that the General Clauses Act I of 1868 (Section 5) does not render Sections 63 to 70 of Indian Penal Code applicable to enactments passed prior to its date.

This Court directs that the sentence be annulled, and the fine, if levied, refunded.

((Section 1 of Act VII of 1852 is as follows :—“ Heads of District Police may hear and determine cases of offences against the Salt Laws, when the value of the salt in question shall not exceed 5 rupees, and may inflict punishment not exceeding ten days’ imprisonment with labour, or a fine not exceeding 3 rupees, commutable, if not paid, to imprisonment with labour for a period not exceeding ten days.”

Second Appeal No. 583 of 1881 against the decree of F. Brandt, District Judge of Trichinopoly, reversing the decree of S. Ramasami Mudaliar, District Munsif of Ariyalur, dated 21st March 1881.