APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Best.

QUEEN-EMPRESS

v.

SUBBARAYAR. *

1895. August 15, 21.

Criminal Procedure Code—Act X of 1882, *ss.* 87, 88, 89, 439, 537—*Proclamation for person absconding—Attachment of his property—Irregularity in publication of proclamation—Revisional powers of High Court.*

An accused person for whose arrest a warrant had been issued having absconded, a proclamation was issued and affixed to the Court house on the 6th of November requiring him to appear on the 11th of December 1893, and his property was attached. The proclamation was not published at the village where the accused resided until the 15th of November. The accused surrendered on the 25th of June 1894 and applied for restoration of the property under Criminal Procedure Code, section 89, and an order was made by which the restoration of his property was refused. The accused preferred a petition to the High Court for the revision of that order:

Held, that there was no legal proclamation under Criminal Procedure Code, section 87, and that the order should be set aside and the attachment declared void.

PETITION under Criminal Procedure Code, section 439, praying the High Court to revise an order of E. J. Sewell, Acting Sessions Judge of Tanjore, in criminal appeal No. 93 of 1894, modifying the order of R. B. Clegg, Joint Magistrate of Kumbakonam, in magisterial case No. 6 of 1893.

On the 14th October 1893 a warrant was issued by the Joint Magistrate for the arrest on a criminal charge of one Kuthur Subbarayar. The warrant was not executed and it was reported that the accused had absconded. A proclamation under Criminal Procedure Code, section 87, was issued on the 6th of November, the date fixed for the appearance of the accused being the 11th of December 1893. The proclamation was published by the affixing of a copy on the Court house on the 6th of November, but it was not published in the place where the accused resided until the 15th of November. The property of the accused was attached under Criminal Procedure Code, section 88, after the issue of the

* Criminal Revision Case No. 135 of 1895

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proclamation. The accused surrendered on the 25th of June 1894 and he was then heard to show cause under Criminal Procedure Code, section 89, why his property should be restored to him. The Magistrate held that the accused had been absconding, that the want of completeness in the publication of the proclamation was a mere irregularity which he regarded as immaterial with reference to Criminal Procedure Code, section 537, and he made an order that the property should be sold and the sale-proceeds credited to Government. The Sessions Judge on appeal concurred in the finding that the accused had been absconding, but altered the order appealed against into one refusing to restore the property to the accused.

The accused preferred this petition.

Mr. *K. Brown* and *Sivaswami Ayyar* for petitioner.

The Government Pleader and the Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

JUDGMENT.—The only point argued on behalf of the petitioner was that any proceeding under the 88th section of the Criminal Procedure Code was vitiated by the fact that the proclamation had not been published in due accordance with the provisions of the previous section. The 87th section authorizes the issuing of a proclamation requiring the absconding person "to appear at a "specified place and at a specified time not less than thirty days "from the date of publishing such proclamation." The section then proceeds :—

"The proclamation shall be published as follows :—

(*a*) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

(*b*) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides, or to some conspicuous place of such town or village ; and

(*c*) a copy thereof shall be affixed to some conspicuous part of the Court house."

The proclamation requiring the petitioner to appear on the 11th December was issued on the 6th November and on that day affixed to the Court house. It was not published in the village in which the petitioner resides till the 15th November.

Clearly therefore there was a failure to comply with the provisions of the section. The minimum allowance of thirty days was not allowed to the petitioner as from the date of the proclamation in the village.

Apart from the provisions of the 537th section of the Code which were invoked by the Magistrate, there can be no question that the proclamation was vitiated by the defect.

Section 87 prescribes certain rules with regard to time and with regard to place. In respect of these matters the section is imperative and the neglect of the rule with regard to time is no more excusable than would be the neglect of the rule requiring publication in two places. Suppose that the petitioner had, in consequence of his failure to attend in obedience to the proclamation, been charged under the 174th section of the Indian Penal Code, could it be said that he was legally bound to attend in obedience to the proclamation, when it appeared that the proclamation had not been duly made and published under the 87th section of the Procedure Code? Clearly not.

In the ordinary case of a summons it is necessary in order to establish a charge under the 174th section of the Penal Code to prove that the summons was duly served on the person charged. In the case of a proclamation personal service being impracticable, other modes of bringing the order to the notice of the person addressed are prescribed. It appears to us that whether personal service or substituted service has to be proved, equally strict proof should be demanded in order to establish a charge under the 174th section of the Penal Code. If a charge under that section had been brought against the petitioner, it could never have been suggested that the provisions of the 537th section of the Criminal Procedure Code should be used to supplement the deficiency of proof, nor can we understand how the Magistrate could imagine that he had any right to utilize that section in the actual proceedings. He was not sitting as a Court of appeal or revision, but as a Magistrate enforcing the penal consequences of alleged disobedience to a proclamation.

It may be suggested that, although the Magistrate was not at liberty to refer to the 537th section, it was competent to the Sessions Judge on the appeal or is competent to this Court to consider whether the provisions of that section should be applied. It was contended that the defect in the proclamation was an error,

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omission or irregularity within the meaning of the section. If it were necessary to decide the point we should hesitate to accede to this contention. But the present case is peculiar. The Magistrate had to consider whether a legal proclamation had been legally published. It was his duty in considering this to have regard to the actual facts as they appeared before him. Instead of confining himself to the facts he exercises a dispensing power which he does not possess, and by the aid of it holds that the proclamation was a legal one. In our opinion the proceedings of the Magistrate was wholly illegal.

There was no legal proclamation. The petitioner could not have been convicted on a charge of disobedience to the proclamation and for the same reason the other penal consequences of disobedience cannot be visited on the petitioner.

The order of the Sessions Judge who adopts the reasoning of the Magistrate is wrong and must be set aside, as also that of the Joint Magistrate and the attachment declared void.

ORIGINAL CIVIL.

Before Mr. Justice Subramania Ayyar.

1895. October 3.

KANDASAMI PILLAI (PLAINTIFF),

v.

MURUGAMMAL (DEFENDANT).*

Hindu law—Wife's right of maintenance among Sudras—Continued unchastity and misconduct.

In 1887 a suit was instituted against a Sudra by his wife and a decree was passed for her maintenance. The judgment-debtor now sued to have that decree set aside, alleging that his wife had since committed adultery and given birth to an illegitimate child. The wife denied the adultery and stated that her husband had become reconciled to her and that her child was legitimate. It was found that the plaintiff's case was established and that the defendant's misconduct had been recent, open and continuous:

Held, that the decree in the previous suit should be set aside, and that the defendant was not entitled to a bare maintenance.

* Civil Suit No. 143 of 1895.