

## APPELLATE CRIMINAL—FULL BENCH.

*Before Sir Ralph Sillery Benson, Officiating Chief Justice, Mr. Justice Miller, Mr. Justice Munro, Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.*

1909.  
July 16.  
August 25.  
October 8.

OTTUPURA NARAYANAN SOMAYAJIPAD, PETITIONER IN  
CRIMINAL REVISION CASE No. 567 OF 1908,  
CHITRAM NAMBU DIRI, PETITIONER IN CRIMINAL REVISION  
CASE No. 568 OF 1908,  
TIRUMITTAKOTT PISHARATH RAGHAVA PISHAREDDI,  
PETITIONER IN CRIMINAL REVISION CASE No. 67 OF 1909

v.

EMPEROR, RESPONDENT.\*

*Criminal Procedure Code, Act V of 1898, ss. 439, 476, 200—Power of High Court to interfere under s. 439 with proceedings of Subordinate Criminal Courts under s. 476.*

The High Court has power under section 439 of the Criminal Procedure Code to interfere on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476, Criminal Procedure Code.

The words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 were not intended to effect any change in the revisional power of the High Court.

*Eranhōli Athan v. King-Emperor*, [(1903) I.L.R., 26 Mad., 98], overruled.

PETITIONS, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of R. H. Ellis, Special Assistant First-class Magistrate of Malappuram, in Calendar Case No. 85 of 1908 in so far as it directs the prosecution of the fifth, sixth and third prosecution witnesses for offences under sections 211, 109 and 193 of the Indian Penal Code.

These cases first came on for hearing before Munro and Abdur Rahim, J.J., when the Court made the following Order of Reference to the Full Bench:—

ORDER OF REFERENCE TO FULL BENCH (MUNRO, J.).—These are applications to revise the orders of the Special Assistant Magistrate of Malappuram directing under section 476, Criminal Procedure Code, the prosecution of the petitioners for certain

\* Criminal Revision Cases Nos. 567, 568 of 1908 and 67 of 1909.

offences. The preliminary objection is taken that the Magistrate's orders are not open to revision by this Court.

In *Erancholi Athan v. King-Emperor*(1) the Full Bench answered in the negative the question "whether the High Court as a Court of Revision, has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere when a Court has taken action under section 476 of the Code of Criminal Procedure." The ground of the decision was that when action is taken under section 476, such action is not to be regarded as an order but as the lodging of a complaint. This view has not been accepted by any of the other High Courts, and in *Aiyakannu Pillai v. Emperor*(2) the Full Bench treated the proceedings of the Court taking action under section 476 as an order liable, if made without jurisdiction, to be revised by the High Court. As doubt is thus cast upon the correctness of the decision in *Erancholi Athan v. King-Emperor*(1) we refer to the Full Bench the question "whether the High Court, as a Court of Revision, has power under section 439, Criminal Procedure Code, to interfere, on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476 of the Criminal Procedure Code?"

ABDUR RAHIM, J.—I agree that the Full Bench ruling in *Erancholi Athan v. King-Emperor*(1), (Sir Arnold White, C.J., Benson and Moore JJ.) laying down that a Magistrate's action under section 476, Criminal Procedure Code, cannot be revised under section 439, Criminal Procedure Code, because such action is not to be regarded as an order but as the lodging of a complaint ought to be reconsidered, because the principle of this decision, it seems to me, has been clearly departed from in *Suryanarayana Row* and *Balaramayya v. Emperor*(3) (Subrahmanya Ayyar, Offg. C.J., and Boddam, J.), *Rahimadulla Sahib v. Emperor*(4) (Sir Arnold White, C.J., Wallis and Miller, JJ.) and *Aiyakannu Pillai v. Emperor*(2), (Sir Arnold White, C.J., Wallis, Miller, Sankaran-Nair and Pinhey, JJ.), for in all these cases the action taken under section 476, Criminal Procedure Code, was treated as an order liable under certain circumstances to be revised by the High Court. No doubt in those cases the proceedings of the lower Court under section 476, Criminal Procedure Code,

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(1) (1903) I.L.R., 26 Mad., 98.

(2) (1909) I.L.R., 32 Mad., 49.

(3) (1906) I.L.R., 29 Mad., 100.

(4) (1908) I.L.R., 31 Mad. (140 F.B.):

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were held to be subject to revision on the ground that such proceedings were had without jurisdiction but it strikes me that the action of a Criminal or a Civil Court under section 476, Criminal Procedure Code, could hardly be said to be without jurisdiction if it was merely a complaint and not a judicial order or proceeding. Further, though no doubt the High Court can quash or set aside proceedings taken upon a complaint, or the Court to which a complaint is made may refuse to take action upon it, how can the High Court revise the complaint itself and quash it or set it aside? I think therefore that in the decisions referred to the view enunciated in *Eranholi Athan v. King-Emperor*(1) has not found acceptance. Under the old Criminal Procedure Code a Full Bench of this Court had held (see *Queen-Empress v. Srinivasulu Naidu*(2)) that the High Court acting under section 439, Criminal Procedure Code, has the power to revise an order passed under section 476, Criminal Procedure Code, and in two cases reported in Allahabad Weekly Notes of 1908, pages 22 and 27, the learned Judges of the Allahabad High Court have decided that such power is retained under the present Criminal Procedure Code. In *Eranholi Athan v. King-Emperor*(1), however, it is laid down that the legislature has now altered the law on the point by laying down in sub-section (2) of section 476, Criminal Procedure Code, that "such Magistrate shall thereupon proceed according to law and as if upon complaint made and recorded under section 200 . . . ." But as it appears to me that the correctness of this ruling requires to be re-considered having regard to a number of later decisions of this Court especially the Full Bench case of *Aiyakannu Pillai v. Emperor*(3) proceeding upon a different view of the scope of section 476, Criminal Procedure Code, as amended, I venture with the greatest deference to suggest that the use of the words in italics does not show that the legislature intended thereby that the action of a Court under section 476, Criminal Procedure Code, should be regarded only in the light of a complaint and not as an order within the meaning of section 439, Criminal Procedure Code, but that all that was intended by those words was to indicate to the Magistrate to whom the proceedings have been forwarded, under section 476, Criminal Procedure Code, the procedure he has to adopt in dealing with the

(1) (1908) I.L.R., 26 Mad., 98.

(2) (1898) I.L.R., 21 Mad., 124.

(3) (1909) I.L.R., 32 Mad., 49.

case. And besides, upon principle, jurisdiction expressly conferred can only be withdrawn by express words or if by words of implication when the inference is irresistible.

These cases again came on for hearing in due course before the Full Bench constituted as above.

Dr. S. Swaminadhan, J. L. Rosario and S. Ranganatha Ayyar for petitioners in Criminal Revision Case Nos. 567 and 568 of 1908 and 67 of 1909.

The Public Prosecutor, *contra* in all the cases. The Court expressed the following

OPINION.—We think that the answer to the question referred for our decision must be in the affirmative.

In the case of *Queen-Empress v. Srinivasulu Naidu*(1) it was held by a Full Bench of this Court that, where action was taken by a Magistrate under section 476 of the Code of 1882, such action was to be regarded not merely as the lodging of a complaint by the Magistrate but was a proceeding which was tantamount to an "Order" of the Court and was therefore subject to revision by the High Court under section 439 of the Code.

The decision of this Court in the case of *Eranholi Athan v. King-Emperor*(2) proceeded on the ground that the legislature in 1898 by the addition of the words "and as if upon complaint made and recorded under section 200" in sub-section (2) of section 476 intended to make it clear that, when action is taken under sub-section (1) such action is not to be regarded as an order but merely as the lodging of a complaint.

We think that this view is erroneous. The addition in sub-section (2) appears to have been introduced in order to give legislative effect to the decision of the Full Bench of the Allahabad High Court in *Ishri Prasad v. Sham Lal*(3) and in order to remove the doubts which previously existed as to whether an order under section 476 could be treated as a complaint within the meaning of sections 190 and 195 (c), Criminal Procedure Code, and also as to whether the Magistrate to whom the case was sent was bound under section 200 to examine the complainant, *i.e.*, the presiding officer of the Court upon oath.

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(1) (1898) I.L.R., 21 Mad., 124.

(2) (1903) I.L.R., 26 Mad., 98.

(3) (1885) I.L.R., 7 All., 871.

BENSON, C.J.,  
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The Allahabad High Court in the case referred to held that the order of the Court "was a sufficient complaint within the meaning of section 195."

The words "as if upon complaint made and recorded under section 200" introduced in the Code of 1898 gave effect to this view, and at the same time section 200 was amended by having the words "subject to the provisions of section 476" prefixed to it. The effect of the two amendments was that the order of the Court under sub-section (1) was to be regarded as a complaint and was to be treated as having been recorded under section 200. (See the judgment of Banerji, J., *in re Bhup Kunwar*(1).)

This being, as we think, the correct view to take of the addition made in the Code of 1898, there is no reason to attribute to the legislature any intention to alter the previously existing law as to the revisional powers of the High Court. If such an intention existed, we think that so important a change would have been effected directly by including orders under section 476 among the orders which are declared by section 435 (3) not to be proceedings within the meaning of that section and, therefore, not subject to revision by the High Court, or by some other express words. We may add that the amendment made in 1898 to section 537 to the effect that no order of a competent Court shall be altered on appeal or revision *on account of any irregularity in proceedings taken under section 476* unless it has, in fact, occasioned a failure of justice, implies that if it has, in fact, occasioned such failure it is subject to appeal or revision.

For these reasons our answer to the reference made to us is that the High Court, as a Court of Revision, has power under section 439, Criminal Procedure Code, to interfere, on grounds other than want of jurisdiction, when a Criminal Court has taken action under section 476, Criminal Procedure Code.

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(1) (1904) I.L.R., 26 All., 249 at p. 262.