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AYLING, J.

comparison. It is arguable that the words of section 189 bear a more extended meaning and exclude from the cognisance of a Civil Court not only the suits described in the schedule, but all suits arising out of a dispute or matter in respect of which such suits might be brought. I should be loth to place such an interpretation on the sections, which might have wide and possibly undesirable consequences without some authority or very strong grounds for holding that this was the meaning intended to be conveyed thereby. No authority has been quoted and indeed the point was not taken by respondent's vakil until after I had suggested it; and in a recent case of a similar nature *Gouse Moohideen Sahib* v. *Muthialu Chettiar*(1), the learned Judges appear to have felt no difficulty in the matter. I therefore, though not without some hesitation, prefer to follow the more restricted interpretation of the section which was (by implication) applied in that case. On this view I must hold that the jurisdiction of the Civil Court in the matter of the present suit was not ousted.

The decrees of the lower Court are set aside. The Munsif will restore the suit to his file and dispose of it according to law.

The costs will be costs in the cause.

S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Sadasiva Ayyar.

1914. March 16 and 18.

Re NARAYANA NADAN (ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898), sec. 195—Sanction for false complaint, appeal against—Police report based on a judgment of Court, sufficient legal basis for grant of sanction.

Though a Court should not accord a sanction to prosecute, under section 195, Criminal Procedure Code (Act V of 1898), for bringing a false complaint, merely on the strength of a police report, yet if the report is based upon a judgment of the Court in a counter-case brought against the complainant, in connection with the same matter wherein his defence which was exactly the same as his complaint, was found to be false, such report is sufficient legal material for the Court to accord its sanction for false complaint.

(1) (1914) M.W.N., 55.

* Criminal Miscellaneous Petition No. 428 of 1913.

Queen-Empress v. *Sheik Beari* (1887) I.L.R., 10 Mad., 232 (F.B.), referred to. RE NARAYANA NADAN.

Section 195, Criminal Procedure Code, does not prescribe any rule as to upon what materials a Court should accord its sanction nor does it say that a fresh or preliminary enquiry should be held before granting sanction.

Per SADASIVA AYYAR, J.—The complainant's sworn statement, which was disbelieved by the Magistrate, was another legal material to form the basis for the grant of sanction against him.

A sanction given by the lower Court ought not to be lightly revoked by a Court of Appeal.

A third appeal to the High Court to revoke a sanction, though legally made in the form of a petition under section 195, Criminal Procedure Code, ought not to be encouraged in practice.

PETITION praying that the High Court will be pleased to set aside the order of D. G. WALLER, the Acting Sessions Judge of Tinnevelly, in Criminal Miscellaneous Case No. 61 of 1913, presented against the order of J. C. MOLONY, the District Magistrate of Tinnevelly, in Miscellaneous Petition No. 605 of 1913, presented against the order of C. RAMASWAMI, the Second-class Magistrate of Srivaikuntam, in Miscellaneous Case No. 4 of 1913.

The facts appear from the judgment of WALLIS, J.

A. Swaminatha Ayyar for the petitioner.

C. Sidney Smith for the Public Prosecutor for the Crown.

WALLIS, J.—The petitioner has been convicted of stabbing a certain person about sunset on 28th September 1912 in the course of a dispute about cattle. On that day, his father-in-law sent a telegram to the police at Tuticorin to say that the petitioner's house had been dacoited by some person unnamed. On 28th October 1912, nearly a month later, the petitioner put in a complaint in which he charged the man he has since been convicted of stabbing and others of having committed the dacoity while he was away at a distant village, and named nine witnesses. The Sub-Magistrate examined the complainant and doubting the truth of the complaint which was put in very late and appeared to be intended as a counter-charge to the charge of stabbing which was then pending against the complainant, referred it to the police for investigation and report on 28th October 1912. The police apparently did nothing until the petitioner had been tried and convicted in the stabbing charge on 13th December 1912. At the trial in the latter charge as WALLIS, J.

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appears from the judgment, the petitioner's case was that he was absent on the day in question, that his house was dacoited in his absence that day by prosecution witness No. 1 and others and that it was in the course of this affray that prosecution witness No. 1 was stabbed somehow or other. With the exception of this last addition his story was the same as that told in his complaint, dated 20th October 1912. He called several witnesses, including four of those mentioned in the complaint, and the Court found his defence to be false and convicted him on the charge of stabbing. Subsequently to his conviction, the police referred his complaint as false on the ground among others that it had been brought as a counter-charge to the charge on which he had been convicted, and a new Sub-Magistrate, on 14th January 1913, passed an order setting out the substance of the police report and dismissing the complaint under section 203 of the Code of Criminal Procedure. Sanction to prosecute the petitioner was granted subsequently on 16th April 1913 on the ground that the charge was a mere concoction intended to meet the charge on which the petitioner had been convicted, and reference was made to the order of 14th January 1913 dismissing the complaint.

On this it is argued that the Sub-Magistrate has granted sanction merely on the police report contrary to the Full Bench Ruling in *Queen-Empress* v. *Sheik Beari*(1), but, as pointed out by the District Magistrate, and the Sessions Judge in their orders confirming the sanction of the Sub-Magistrate had much more before him, because the police report refers to the conviction of the accused subsequent to the filing of the complaint as going to show that the complaint was merely concocted as a counter-charge. A reference to the judgment convicting the petitioner shows, as already pointed out, that before the police referred the complaint as false, the allegations it contains had been set up by the petitioner by way of defence in the stabbing case and investigated by the Court in that case and found to be false, and the lower Courts held that it was not necessary that the evidence in that case should be taken all over again for the purpose of deciding whether or not sanction should be granted against the petitioner.

(1) (1887) I.L.R., 10 Mad., 232 (F.B.).

In my opinion the decision of the lower Courts was right. Section 195 (*b*) of the Code of Criminal Procedure which relates to sanction for certain offences "committed in or in relation to any proceeding in any Court" does not say by what consideration the Court is to be guided nor does it prescribe as indispensable that the Court should hold a fresh enquiry and take evidence for the complainant before granting sanction, a proceeding which would be quite unnecessary in cases where the Court has acquired a knowledge of the facts in the course of the proceeding in or in relation to which the offence is alleged to have been committed. All that is decided by the Full Bench in *Queen-Empress* v. *Sheik Beari*(1) is that the Court should not grant sanction to prosecute for preferring a false complaint merely on the ground that the complaint had been referred by the police as false and dismissed under section 203 of the Code of Criminal Procedure. There are no doubt certain *dicta* in the judgments of the learned Judges which have been regarded in some subsequent cases as meaning that the order should be made on judicial evidence or legal evidence, but those *dicta* do not mean, as has been contended before us, that such evidence must have been given on the application for sanction, or even on the hearing of the complaint itself. This is clear from the order of the Full Bench with reference to the first of the three cases referred to it. There they upheld a sanction given for the prosecution of a complainant who had preferred a charge of house-breaking and theft against a constable and others which was referred as false by the police with a suggestion that the complainant should be prosecuted. Before disposing of the application for sanction, the Magistrate tried and acquitted the constable and others on a charge of assault preferred by the same complainant, her son and brother. It was held by the Full Bench that the sanction so granted merely on the strength of the police report and of the result of the investigation in the other case was not illegal. In the present case the evidence in the other case was taken by the Court before the police referred the complaint now in question as false, and the result of those proceedings was one of the chief grounds on which they referred the case as false. No doubt the Magistrate who granted the

(1) (1887) I.L.R., 10 Mad., 232 (F.B.).

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sanction was not the same as the Magistrate who tried the counter-case against the present complainant, but the Court was the same, and the judgment of the Court in that case was on record: and the result of that case was in my opinion a matter which might properly be taken into consideration in granting sanction in this case. I may add that I agree with the observations of my learned brother which I have had the advantage of reading, would dismiss the petition.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—Though this is called a Criminal Miscellaneous Petition, it is practically a third appeal from the order of the Second-class Magistrate of Srivaikuntam, sanctioning the prosecution of the petitioner for an offence under section 211, Indian Penal Code. The petitioner put in a complaint on the 20th October 1912 accusing ten persons of having committed dacoity in his house on the 28th September 1912. The complaint was a very deliberate one as his father-in-law had on the 28th September itself sent a telegram to the Assistant Superintendent of Police charging about fifty persons with having committed dacoity, and this complaint of 20th October 1912 was practically a detailed expansion of that telegram. Then he was examined by the Second-class Magistrate on the 26th October 1912 as a complainant and he deposed that the facts stated in his complaint were quite true. The Magistrate felt doubt as to the truth of the accusation on two grounds: (*a*) on account of the long delay in preferring the complaint and (*b*) as the complaint was put in as a counter-case to the Calendar Case No. 483 of 1912 against the petitioner. In that Calendar Case No. 483 of 1912 his defence was based upon almost the same allegations as formed the basis of his complaint. That defence was found false in that Calendar Case No. 483 of 1912 after an elaborate enquiry and after the examination of the witnesses whom he produced as defence witnesses in that case. His complaint of the 20th October 1912 was forwarded by the Magistrate to the police for investigation and the police reported the case to be false. The Magistrate's similar view (that the complaint was probably false) which had been arrived at by him on looking into the complaint and on examining the complainant was thus confirmed by the police report and he dismissed the complaint on the 14th January 1913. On the 10th March 1913, notice was sent to the petitioner to show cause why he should not be prosecuted

for having brought a false complaint of dacoity. He appeared on the 28th March 1913 to show cause and he was heard. The Magistrate considered that the petitioner's allegation that without a proper enquiry he (the Magistrate) had dismissed his complaint was not accurate and that it was only after proper enquiry he dismissed the complaint as false and he therefore granted the sanction on the 16th April 1913.

As I said before, this Criminal Miscellaneous Petition before us is a sort of third appeal from the Second-class Magistrate's order, a petition to the District Magistrate to revoke the sanction and a petition to the Sessions Judge to revoke the District Magistrate's order refusing to revoke the sanction having been unsuccessful.

While I admit that under the law, as now settled, the petitioner has a right to come up on a sort of third appeal to the High Court, I am strongly of opinion that such petitions by way of third appeal should, as a matter of practice, be rejected, unless the records show not merely a mere technical illegality or irregularity, but that a palpably innocent man is sought to be prosecuted out of private grudge by his enemies. Here the police have obtained the sanction to prosecute the petitioner. The facts stated in his complaint have been enquired into in the counter-case brought against the petitioner and have been found to be false; the petitioner's complaint was after his examination as complainant, strongly suspected to be false; it was found by the police also to be false when it was referred to them for investigation, and the improbabilities in his case were set out by the Magistrate in his order dismissing the case as false. Even supposing that the three lower Courts did not strictly act according to the instructions given for the guidance of the lower Courts in some decisions of the High Courts, I do not think that this is a fit case in which the High Court should interfere on a petition. When the Criminal Procedure Code says in section 195, clause 6, that a sanction given may be revoked by the appellate authority, I do not think it was intended that the higher authority was bound to revoke the sanction whenever irregularity or even illegality is shown in the proceedings of the lower authority giving sanction.

Even if I am wrong in this above view, I am not satisfied that in this case any illegality has been committed in the

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granting of the sanction though the petitioner's learned vakil, Mr. A. Swaminatha Ayyar, argued the case of his client with much persistency and ability and raised several nice points of law. One of his arguments was that because section 476 of the Criminal Procedure Code refers to a preliminary inquiry before any steps are taken under it, there ought to be also a preliminary inquiry before sanction is granted under the analogous section 195 of the Criminal Procedure Code. Even as regards section 476 of the Criminal Procedure Code, the words of the section are, "after making any preliminary inquiry *that may be necessary*." This shows that a preliminary inquiry is not essential in all cases even when the Court takes action under section 476.

In *Abdul Ghafur* v. *Raza Husain*(1), it was held that no such preliminary inquiry was necessary. *A fortiori* of course, under section 195 in which there is no reference at all to "preliminary inquiry" is such an enquiry unnecessary. In fact, it has been held in *In the matter of Govindu*(2), that even want of notice to the accused does not invalidate the grant of sanction under section 195 of the Code of Criminal Procedure.

The next contention was that under the Full Bench ruling in *Queen-Empress* v. *Sheik Beari*(3) the sanctioning of the prosecution of a man for an offence is a judicial act and that that act must be performed after forming a judgment upon legal evidence. In that case it was held, as I understand the points on which all the learned Judges were agreed, that the Magistrate should not substitute the judgment of the police for his own judgment and cannot accord sanction merely upon the police report. This case in *Queen-Empress* v. *Sheik Beari*(3) was considered by SPENCER, J., in *Audimulam* v. *Krishnien*(4). I adopt his reasoning so far as this point is concerned. I think that it is impossible for us to discriminate and say how far the Magistrate's order was based upon the patent unreliability of the statement made by the complainant when he was examined by the Magistrate (which statement is legal and material evidence) and how far it was based upon the police report or upon the fact that the facts mentioned in the complaint were found to be false in the

(1) (1912) I.L.R., 34 All., 267. (2) (1903) I.L.R., 26 Mad., 592.
(3) (1887) I.L.R., 10 Mad., 232 at p. 239 (F.B.).
(4) (1912) 22 M.L.J., 419 at pp. 427, 428 and 430.

counter-case. In the present case the records show, I think, that the Magistrate did not substitute the judgment of the police for his own judgment, and that one of the material facts which induced him to grant the sanction was that, in *his own judgment*, after he had examined the petitioner as complainant, he thought that the case was false. Even if there was any irregularity in his referring to the police report and to the fact that the petitioner's case was found false in the counter-case, that irregularity has not, in my opinion, occasioned any failure of justice and under section 537, Criminal Procedure Code, even if we were deciding an appeal, we cannot interfere with his order on that ground. I might, however, be permitted to say that in my opinion section 195 of the Criminal Procedure Code does not state that the authority giving sanction should act only upon legal evidence. So far as the Madras cases go, while they say that if the authority giving sanction is a judicial authority it should not grant sanction unless there is some legal evidence in support of the falsity of the complaint those cases ought not to be treated as enunciating the much wider proposition that if other probabilities based on evidence which would not be admissible at the trial of the petitioner are also referred to by the authority giving sanction, the grant of sanction becomes wholly illegal and ought to be revoked. I am not sure that for the purposes of coming to a conclusion whether the complaint was *primâ facie* false, the finding in the connected case will not be evidence under section 11, clause 2, of the Evidence Act, though it may not be evidence in the case instituted on that sanction. I do not think that we should be astute to impose more restrictions on the discretion of the sanctioning authority in the grant of sanctions than are contemplated by the legislature. The legislature itself in section 195, Criminal Procedure Code, has given no indications whatever as to the materials on which the Court can be justified in awarding sanction and has imposed no such restrictions as are contended for. In *Queen-Empress* v. *Sheik Bzari*(1), the learned Judges refer without disapproval to the sanctioning Magistrate in one of the cases having taken into consideration the fact that the complainant was unsuccessful in a connected case. I think

(1) (1887) I.L.R., 10 Mad., 232 at p. 239 (F.B.).

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that we ought not to interfere with the discretion of the subordinate Courts in the matter of the grant of sanction unless there is some *primâ facie* strong ground for holding that there is no reasonable probability of having a conviction on the sanction or that it is otherwise inexpedient to award the sanction on the facts of the particular case or that the party against whom sanction was granted was probably innocent. In the result I would dismiss this petition.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Tyabji and Mr. Justice Spencer.

1914. March 23 and 24.

KUNHAMBI AND SIX OTHERS (DEFENDANTS NOS. 15 TO 21), APPELLANTS,

v.

KALANTHAR AND THIRTY-SIX OTHERS (PLAINTIFF'S LEGAL REPRESENTATIVES AND DEFENDANTS NOS. 1 TO 14, 22, EIGHTH DEFENDANT'S LEGAL REPRESENTATIVES), RESPONDENTS.*

Mappillas of North Malabar—Law applicable—Question of fact—Custom, requisites of a valid—Judicial notice—Reasonableness or legality—Question of law—Custom derogating from the Muhammadan Law—Madras Civil Courts Act (III of 1873), sec. 16.

The law applicable to the parties to a suit is the law which the parties as a matter of fact by their customs and usages have adopted, not the law which the Courts by a consideration of the historical circumstances relating to the parties or of their religious books or otherwise consider to be the law that they ought to have adopted. If that law being sufficiently certain and not opposed to public policy is of such a nature that the Courts can give effect to it, then the principles underlying section 16 of the Madras Civil Courts Act require that they should give effect to it.

Jammya v. *Diwan* (1901) I.L.R., 23 All., 10, *Muhammad Ismail Khan* v. *Lala Sheomukh Rai* (1902) 17 C.W.N., 97 and *Hirbae* v. *Sonabae* (1847) Perr. O.C., 1105, referred to.

The question whether the particular parties are governed by the Marumakkattayam or the Muhammadan Law, is one of fact.

George v. *Davies* (1911) 2 K.B., 445, *Assan* v. *Pathumma* (1899) I.L.R., 22 Mad., 494 and *Kunhimbi Umma* v. *Kandy Moithin* (1904) I.L.R., 27 Mad., 77, referred to.

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* Second Appeal No. 1498 of 1911.