

tion that if nothing is said about the trees in decreeing possession of the land, it would be open to the judgment debtor to remove the trees is not supported by any authority. Ordinarily, a decree for possession of property would convey all that stands upon that property at the time of the decree; and there is no reason why in the case of coconut trees, a different principle should obtain.

I am therefore of opinion that the field in question is not a "garden", nor is a separate fee leviable upon the trees.

I am, therefore, constrained to differ from the learned judge who has held that the field should be valued as a "garden".

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APPELLATE CRIMINAL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Napier.

MAHOMED GHOUSE RAHMAN SAHIB (OF MESSRS. T. A.
RAHMAN & SONS)—(ACCUSED), PETITIONERS,

1916,
November, 9.

v.

NATHU VELLABJI (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 185—Transfer of case—Case pending in a Court outside the jurisdiction of High Court—Power of High Court to transfer to a Court within its jurisdiction or to decide by which Court such case shall be tried.

Section 185 of the Criminal Procedure Code (Act V of 1898), does not empower a High Court to transfer to a Court subordinate to its own jurisdiction a case pending in a Court subordinate to the jurisdiction of another High Court, nor does it empower a High Court to decide by which Court such a case shall be tried.

PETITION praying the High Court to direct the transfer of Case No. 571 of 1916, from the file of the Chief Presidency Magistrate of Bombay to that of the Chief Presidency Magistrate of Madras.

The petitioner was a trader carrying on business in Madras, while the respondent was carrying on business in Bombay and also at Madras through his agent in Madras. The respondent

* Criminal Miscellaneous Petition No. 392 of 1916.

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preferred a complaint against the petitioner in the Chief Presidency Magistrate's Court at Bombay, charging the petitioner with offences under sections 482 and 486 of the Indian Penal Code for using and selling goods under false and counterfeit trade-marks. The petitioner moved the High Court of Madras under section 185 of the Criminal Procedure Code to transfer the case to the Court of the Chief Presidency Magistrate at Madras, alleging that two summonses from the Bombay Presidency Magistrate's Court had been served on him to appear and answer the above charges and also to produce certain documents. The affidavit in support of the petition stated that the offences, if any, were committed at Madras, that it was very inconvenient and expensive for the petitioner and his witnesses to go to Bombay and that the complainant had his agent to represent him at Madras, and on all these grounds the petitioner prayed for the transfer of the case to the file of the Chief Presidency Magistrate's Court at Madras.

C. Rajagopala Ayyangar for the petitioner.

R. N. Aingar for the respondent.

E. R. Osborne, the Acting Public Prosecutor, for the Crown.

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SADASIVA AYYAR, J.—I agree with my learned brother that this petition should be dismissed. I am clear that section 185 of the Code of Criminal Procedure does not enable a High Court to make an order transferring a case pending on the file of a Criminal Court whether within or outside its jurisdiction to the file of another Criminal Court whether such other Criminal Court be within its own jurisdiction or without its jurisdiction. Section 185, in my opinion, has absolutely nothing to do with transfer or with a High Court's power of transfer. The power to transfer vested in the High Court, so far as the Criminal Procedure Code is concerned, is dealt with and was intended by the Legislature to be dealt with solely by section 526 of the Code of Criminal Procedure. That section gives full powers to a High Court to transfer cases pending in a Court "*subordinate thereto*" to any other "such" Court, that is, any other Court subordinate to it or even to itself. It seems to me [with the greatest respect to the decisions in *Hiran Kumar Chowdhary v. Mangal Sen*(1), and *Emperor v. Chaichal Singh*(2) which I am

(1) (1912) 17 C.W.N., 761.

(2) (1909) 2 I. C., 361.

unable to follow] to be contrary to usually accepted canons of construction to infer from the language of section 185 (which does not use the word "transfer" or any word even remotely suggesting the idea of "transfer") a power in the High Court to *transfer* cases, especially to transfer a case pending in a court outside its jurisdiction. As my learned brother points out, what power has a High Court to enforce its order transferring a case instituted and pending outside its jurisdiction? As he has further pointed out, section 527 (1) of the Code of Criminal Procedure clearly implies that it is only the Governor-General in Council that has the power to transfer a case pending in a court subordinate to one High Court to be tried by a Court subordinate to another High Court. On this short ground, this revision petition should be dismissed.

As, however, it was argued that we are, at least, entitled to "decide" under section 185 of the Code of Criminal Procedure by which Court the offence shall be inquired into or tried and that this provision means that we are entitled to express an opinion (even though it might be a mere pious unenforceable opinion) that the Presidency Magistrate's Court within our jurisdiction should inquire into this case, I shall proceed to express my opinion on the whole scope of that section (185 of the Code of Criminal Procedure).

Reliance was placed on behalf of the petitioner, on *Queen-Empress v. O'Brien*(1) and *Babu Lal v. Ghansham Das*(2). Those, however, were cases in which the High Court's opinion was expressed *against* the jurisdiction (and competency to try) of *the Court subordinate to that High Court*, which subordinate Court had taken cognizance of a criminal case (and not against the jurisdiction of a Court not subordinate to itself). Of course, every High Court has power to prevent a Court subordinate to itself from grasping at jurisdiction or from trying a case which had better be tried by another Court whether subordinate to that High Court or not subordinate to it. It has also power to decide when an accused person is found within its jurisdiction and a criminal case is pending against him in a Court subordinate to its appellate criminal jurisdiction, which of two courses is more advisable: (1) that the offence should be inquired into and tried by that

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(1) (1897) I.L.R., 19 All., 111.

(2) (1908) 5 A.L.J., 333.

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subordinate Court, or (2) that the offence should be inquired into and tried by a Court subordinate to another High Court (which subordinate Court is empowered to take cognizance of it under one of the sections 177 to 184) : in other words, I am quite clear that section 185 was intended only to apply to and provide for the following two sets of circumstances : (1) where two cases *are pending* in two Courts within the jurisdiction respectively of two separate High Courts on the same set of facts, the High Court within which the offender is found has the deciding voice *whether the Court within its own jurisdiction shall or shall not proceed against the accused* (such decision being intended to be based on grounds of *convenience, jurisdiction, fairness to both sides, etc.*); if it decides in the affirmative, the outside Court cannot proceed further as the High Court has full powers to prevent a person who is within its jurisdiction from being taken out of that jurisdiction till the case in its subordinate Court is concluded and (2) where only one case has been instituted in a Court subordinate to the High Court in whose jurisdiction the offender is, that High Court can decide whether the case should be inquired into and tried by its own subordinate Court or should be tried in a Court within the jurisdiction of some other High Court.

I am consequently of opinion that *where no case is pending in a Court subordinate to a particular High Court*, section 185 cannot be availed of by that High Court to give a decision that a Court subordinate to it should or should not inquire into or try an offence charged in a case pending in a Court not subordinate to it. I wish to add that as my opinion numbered (1) as above is not consistent with the observations in *Hiran Kumar Chowdhary v. Mangal Sen*(1) (which observations are to the effect that grounds of convenience cannot be considered in giving a decision under section 185 and that where there is no real doubt as to jurisdiction, section 185 does not apply) I respectfully dissent from that decision also.

NAPIER, J.

NAPIER, J.—This is an application by a person carrying on business in Madras to transfer to the Chief Presidency Magistrate, Madras, Case No. 571 of 1916 on the file of the Chief Presidency Magistrate, Bombay, in which the petitioner is accused of offences under sections 482 and 486 of the Indian

(1) (1912) 17 C.W.N., 761.

Penal Code on the complaint of the counter petitioner who carries on business in Bombay. The application purports to be made under section 185 of the Criminal Procedure Code, the ground alleged being that the Chief Presidency Magistrate has no jurisdiction to try the case. I express no opinion on the question whether the section applies to cases where there is a doubt as to the existence of jurisdiction in the Court that has taken cognizance, as well as to cases where there is admittedly double jurisdiction under sections 179 and 181, Criminal Procedure Code. Whether this be so or not, I am clearly of opinion that this Court has no jurisdiction to entertain the application. In terms section 185, Criminal Procedure Code, gives no power to transfer at all, but it is argued that the power to transfer must be inferred as being requisite to make the decision operative. This is not so; for dealing with Courts under our own jurisdiction we have specific powers under the Code, and we cannot possibly *infer* a power to deprive Courts not under our superintendence, of their jurisdiction. Reliance is placed on *Hiran Kumar Chowdhary v. Mangal Sen*(1), where the High Court of Calcutta made an order transferring a case pending before a Court subordinate to the Chief Court of the Punjab to one of its own Courts. I am unable to follow this precedent. Admittedly a High Court cannot enforce such an order and I have no doubt that, on the true reading of the section, there is no such power. It was pointed out in the course of argument that the conflict of jurisdiction or double jurisdiction under sections 181 to 184, Criminal Procedure Code, usually arises where offences have been committed in one jurisdiction and consequences follow in another, and not owing to the place where a person charged is. If section 185, Criminal Procedure Code, is to be given the wide meaning sought to be put on it, it would follow that the High Court, within whose jurisdiction a person charged is, could make an order where the conflict or doubt as to the jurisdiction arose between two local Courts in the jurisdiction of another High Court, that is to say, for instance, the Court of the Resident of Bangalore, in whose jurisdiction a person was living at the time a charge was laid against him in a Madras Court could decide as to which of two Courts

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under the jurisdiction of the High Court of Madras a person should be tried on the application of section 181, clauses (2), (3) and (4), or section 182, Criminal Procedure Code. It is hardly necessary to say that this could not have been the intention of the legislature. In my opinion, the Court has no power to transfer under this section. What it can do is to decide by which Court the offence shall be inquired into or tried and where a charge has been laid and the accused person is at the time within its own jurisdiction and a question arises whether it should not more properly be tried in a Court subject to the jurisdiction of another High Court, the High Court in whose jurisdiction the person is can decide that its own Court should not inquire into the matter and stay proceedings. It would be then open to the complainant to lay his charge in the other Court and any objection to the jurisdiction of that Court would be heard by its own High Court. This action has been taken on several occasions (*vide Emperor v. Chaichal Singh*(1) and *Babu Lal v. Ghansham Das*(2)). It is true that in those cases the Court did make an order that the foreign Court should try the case, but I desire to say that, even if we had jurisdiction in this case on our reading of the section above set out, we should not think it proper to make any such order because we should be unable to enforce it. It is suggested that the Magistrate of a foreign Court might act on the order and take cognizance of a Case. Even if he did, it would be open to the accused to apply to the High Court having jurisdiction over that Magistrate, and it cannot be suggested that our order would be in any way binding on that High Court. The only person who has any jurisdiction to pass orders binding on different High Courts is the Governor-General in Council under section 527, Criminal Procedure Code, and I am satisfied that the Court did not intend to vest in any High Court powers which were on the face of them infructuous or might lead to conflict with another High Court.

The petition is therefore dismissed.

Attorneys for the complainant—*Messrs. Grant and Grotorea.*

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(1) (1909) 2 I.C., 361. (2) (1908) 5 A.L.J., 333.