RAJAH OF VENKATAGIRI v. SUBBIAH.

ODGERS, J.

legislature as we find it. On the other hand the use of the words "tenants" and "a tenant" within a line of each other in the same clause is pointed to as suggesting the improbability of the same word being used in two different meanings. It is possible of course to say that the latter use of the word is only illustrative of the manner in which the charge is to be recovered from the individual concerned; if so, the collocation is, to say the least, unfortunate, and in the absence of authority as to the use of the word "tenant" in Indian enactments in the English law sense, I must reluctantly hold that the word "tenants" is confined to those who pay rent to the proprietor. I would therefore answer the reference in the negative.

M.H.H.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

1921, September 14, 16 and 19.

KOCHUNNI ELAYA NAIR (PETITIONER).*

Martial Law—Offence committed within area—Arrest outside area—Legality of arrest—Summary Court appointed under Ordinance—Jurisdiction outside such area—Power of High Court to issue a writ of Habeas corpus—*Section 16, Ordinance No. II of* 1921.

The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law and a police officer outside the Martial Law area has authority to arrest without warrant an offender who has committed a cognizable offence within such area.

Per KUMARASWAMI SASTRI, J.—A summary Court appointed under the Martial Law Ordinance cannot try offences committed outside the Martial Law area or hold Court outside such area. The High Court has power, apart from section 491, Criminal Procedure Code, to issue a writ of *Habeas corpus*; and the

* Criminal Miscellaneous Petition No. 409, etc., of 1921.

Ordinance No. II of 1921, section 16, which excludes the interference of other Courts does not refer to such general jurisdiction, and the High Court could issue such writ if the summary Court acted without jurisdiction.

PETITIONS praying (1) for the issue of a writ of *Habeas corpus* calling upon G. BATTY, Summary Magistrate under the Martial Law Ordinance in South Malabar, to cause the body of the petitioner to be produced for determining the legality of his detention, (2) for the issue of a writ of *Certiorari* for the purpose of quashing the proceedings of G. BATTY, a Summary Magistrate under the Martial Law Ordinance in South Malabar, ordering the arrest and detention of the petitioner, (3) for the release of the petitioner on bail pending trial of offences, if any, against him.

These were petitions praying for writs of *Habeas corpus* and *Certiorari* and in the event of refusal of such writs for bail.

The material facts are set out in the judgment of SPENCER, J.

S. Srinivasa Ayyangar and *P. Govinda Menon* for the petitioner.—The High Court has jurisdiction to issue a writ of *Habeas corpus*. In England it is the King's Bench which has such jurisdiction. In India the Old Supreme Court had power and that power was transferred to the High Court by the Charter. Reference made to *In the matter of Ameer Khan*(1), and *Bugga* v. *The King-Emperor*(2).

The petitioner was arrested outside the Martial Law area for offences committed within the area by a Magistrate appointed under the Ordinance as a summary Court. The arrest was illegal and the Magistrate had no jurisdiction to order his detention. The summary Court cannot act outside the Martial Law area.

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(1) (1870) 6 B.L.R., 392, 436. (2) (1920) 47 I.A., 129.

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The ordinary police cannot arrest outside the area for offences committed within the area. The Criminal Procedure Code does not apply. Martial Law means ousting the ordinary law. The only clauses applicable are 2, 6, 9, 10 and 12 of the Ordinance. No provision is made for sending an offender back, if he has escaped out of the Martial Law area, nor is there any duty imposed on Courts to take notice of offences committed within the Martial Law area. Reference made to *Muhammad Yusuf-ud-din* v. *Queen Empress*(1), Clode's Military Law, 1874 Edition, page 189. Mr. BATTY was appointed under clause 6 of the Ordinance which gives power to constitute summary Courts "in any administrative area." It cannot have jurisdiction outside such area and as Palghat is not proclaimed to be within the Martial Law area he had no jurisdiction to order his detention.

The Public Prosecutor for the Crown.—I do not controvert the proposition that a writ of *Habeas corpus* can be issued by the High Court but I submit that in the circumstances of this case this Court will not interfere. A Magistrate empowered by the military authorities has remanded accused and he will be committed to the Special Tribunal which has been appointed to-day. Under the Criminal Procedure Code, section 549, the Civil authority has to return an offender who escapes from the military. No special section or power is required for the return of an offender escaping from Martial Law area. Reference made to Encyclopædia of the Laws of England, Vol. 13, page 196 and *Ex parte D. F. Marais*(2).

SPENCER, J.

SPENCER, J.—This is an application for the issue of a writ of *Habeas corpus* to cause the person of Kochunni

(1) (1898) I.L.R., 25 Calc., 20 (P.C.). (2) [1902] A.C., 109.

Elaya Nair to be brought up before the High Court for the purpose of determining the legality of his detention. The accompanying affidavit states that Kochunni Elaya Nair, the second Stanee of the Mannarghat Nair family, was arrested on September 3rd and imprisoned in the Palghat sub-jail. It is alleged that he had at the moment of arrest just arrived at his own residence situated within the limits of the Palghat municipality and that after some questions being put to him as to the Moplah outbreak at Mannarghat the Assistant Superintendent of Police directed the Inspector to take him to the sub-jail, that no warrant of arrest was shown to him and that he was not told anything about the offence with which he was charged. He was accordingly taken to the sub-jail, and on the 6th September an application for bail was put in before the Subdivisional Magistrate of Palghat and was summarily rejected. It is added that the taluk of Palghat, and the town of Palghat within which the petitioner's residence and the sub-jail are situated, are outside the Martial Law area.

The Public Prosecutor informs us that he is instructed by the District Magistrate of Malabar to say that the accused is charged with having committed offences under sections 121, 395, 431, 436 and 380, Indian Penal Code, and abetment of the same committed within the Martial Law area and that he will be sent up for trial by the Special Tribunal constituted under Ordinance No. II of 1921 of the Government of India, published in the *Gazette of India*, September 5, 1921.

Mr. S. Srinivasa Ayyangar on behalf of the petitioner contends (1) that the accused could not be legally arrested for an offence committed inside the Martial Law area when he was at the time of arrest at a place outside it and (2) that the Magistrate, Mr. BATTY, before whom he was brought and who refused to release him

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on bail was at Palghat, a place outside the Martial Law area, and had no jurisdiction to exercise his powers at that spot, seeing that clause (6) of Ordinance No. II of 1921, dated 26th August 1921, provides for the constitution of Summary Courts of criminal jurisdiction for the purposes of this ordinance in any administration area that may be proclaimed as a Martial Law area under clause (2). He argues that "in any administration area" means "within that area" and not "for that area."

The first point for which the learned vakil is contending is a very strange one. It amounts to this: that an offender has only to slip out of the Martial Law area to be immune from arrest and trial for acts done by him inside that area. The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court which has jurisdiction to try the offence—see section 177 of the Code of Criminal Procedure. Section 54 of the Criminal Procedure Code authorizes any police officer to arrest without a warrant and without an order from a Magistrate a person who has been concerned in any cognizable offence, and the offences referred to by the Public Prosecutor or some of them, are cognizable offences. Section 58 authorizes a police officer, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter (V), to pursue such person into any place in British India. Section 60 directs a police officer making an arrest without warrant to take the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case. There is no alteration of the law in this respect in consequence of the constitution of Martial Law Courts. The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law. On the contrary,

clause (12) and the other clauses of Ordinance No. II indicate that the Courts constituted under the ordinance will follow, as far as possible, the procedure laid down in the Code. Presumably the police will, as early as possible, take the petitioner into the Martial Law area and obtain the orders of a Court constituted under that ordinance. This they can do without any order of the nature of an extradition order, seeing that the whole of the Malabar district, a portion of British India, is under the administration of the British Government. It is for the petitioner's vakil to show that the police acted without jurisdiction in this instance, and as he has not succeeded in doing this, the first point raised by him fails.

I now proceed to deal with the second contention raised. The powers vested in this Court to issue Writs of *Habeas corpus* in the Presidency town are contained in section 491 of the Criminal Procedure Code. Analogous powers are given us by section 456 in respect of European British subjects in any part of our jurisdiction, whether in the city of Madras or in the muffassal. In *In re Nataraj Iyer*(1), SUNDARA AYYAR and SADASIVA AYYAR, JJ., expressed an opinion, following *In the matter of Ameer Khan*(2), that the High Court has by virtue of clause (8) of the Charter Act power to issue Writs of *Habeas corpus* even outside the city of Madras and in respect of all British subjects whatsoever. Assuming that those learned Judges were right in this view, if we attempt to issue a Writ of *Habeas corpus* in the present case we are confronted with clause (16) of Ordinance No. II of 1921, which declares that no Court shall have authority to make any order under section 491 of the Code of Criminal Procedure, or to revise any

(1) (1913) I.L.R., 36 Mad., 72. (2) (1870) 6 B.L.R., 392.

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order or sentence or to transfer any case from a Summary Court or have any jurisdiction of any kind in respect of any proceedings of the Summary Court. But Mr. Srinivasa Ayyangar contends that if a Magistrate vested with the powers of a Summary Court in a Martial Law area steps outside that area and attempts to exercise his functions outside the territorial jurisdiction assigned to him by the Ordinance, his acts will be illegal and subject to our control and revision. We understand that Mr. BATTY is the Subdivisional Magistrate of Palghat division and that he ordinarily exercises the powers of a First-class Magistrate in Palghat, which is outside the Martial Law area. If, then, the petitioner was brought before him by the police as being the nearest Magistrate referred to in section 167 of the Code of Criminal Procedure, he would, as Subdivisional Magistrate, have authority to authorize the detention of the accused in such custody as he might think fit for a term not exceeding 15 days; or, if he had no jurisdiction to try the case, he might order the accused to be forwarded to a Magistrate having such jurisdiction. If, on the other hand when the prisoner was brought before Mr. BATTY, he was purporting to act as a Court of summary jurisdiction constituted by the Martial Law Ordinance, what would be the proper order he should make upon an application being made to him? The proper course to be taken by a Magistrate who has no jurisdiction would be to decline jurisdiction and to reject the application on that ground. We must now see what is the illegal act which Mr. BATTY is alleged to have committed, according to the affidavit attached to the petition. This affidavit states that when an application for bail was put in before the Subdivisional Magistrate on 6th September, he summarily rejected application without even hearing the vakil. To summarily reject an application would

be the only course open to a Magistrate who finds he has no jurisdiction to deal with it; and in this view there was nothing illegal in the procedure of Mr. BATTY and no act committed by him with which we could interfere assuming that we have the power to do so. It is not stated in the affidavit that Mr. BATTY ordered the petitioner to be remanded to prison, but it is alleged that it was the Assistant Superintendent of Police who said "Better shove him in the Fort to-day" and directed the Inspector to take him there.

The result is that this point also fails and the application is dismissed.

There is a connected Criminal Miscellaneous Petition No. 410 of 1921, applying for the issue of a writ of *certiorari* which fails and must be dismissed for the same reasons.

As regards Criminal Miscellaneous Petition No. 411 of 1921 which is an application to release the petitioner on bail, the information that we have is that the petitioner is arrested in connexion with non-bailable offences. No further details are before us and in the absence of such details we would not in any case exercise a discretion in petitioner's favour. That petition also is dismissed.

KUMARASWAMI SASTRI, J.—This is an application for the issue of a Writ of *Habeas corpus* by the petitioner, who is charged with having committed offences under sections 121, 395, 431, 436 and 380 of the Indian Penal Code, alleged to have been committed by him within the area proclaimed to be under Martial Law. He was arrested by the police while he was in Palghat, a place outside the area, and was remanded to jail by Mr. BATTY (who is the Subdivisional Magistrate of the Palghat division and also a Magistrate invested with summary

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powers of trial under the Martial Law Ordinance under orders of the Military Commander, for the purpose of the petitioner being sent for trial before the Special Tribunal constituted under Ordinance No. II of 1921. The grounds urged on petitioner's behalf are (1) that the police had no power to arrest a person who commits an offence within the Martial Law area, but is found outside, (2) that the jurisdiction of Summary Courts, and of Magistrates empowered to try offences, conferred by Ordinance No. II of 1921, is purely territorial and that consequently Mr. BATTY who purported to act as a Martial Law Magistrate outside the Martial Law area was without jurisdiction, thus making the detention in jail illegal. It was also contended that the Special Tribunal constituted under Ordinance No. II would have no power to try offenders who are found outside the Martial Law area, even though the offences were committed within the area. I do not think it necessary to go into this question which is one to be decided by the Tribunal when the petitioner is placed before it for trial.

The power of the High Court, as an abstract question of law, to issue a Writ of *Habeas corpus* in the present case is not contested by the Public Prosecutor though he contends that the facts of the case will not justify the High Court in issuing the Writ. It has been held in *In re Nataraja Iyer*(1) and *In the matter of Amir Khan*(2), that the Court has jurisdiction, having inherited the power from the Supreme Court. This jurisdiction is apart from the power conferred by section 491 of the Code of Criminal Procedure and is in no way curtailed by the provisions of the section. The Martial Law Ordinance excludes powers conferred by section 491 and does not refer

(1) (1913) I.L.R., 36 Mad., 72. (2) (1870) 6 B.L.R., 392.

to the general jurisdiction to issue the writ. Moreover, clause (16) cannot apply to cases where the acts of the Martial Law Magistrate are wholly without jurisdiction, for example, when he proceeds to places outside the Martial Law area and tries persons or passes sentences. It only applies to acts done within the jurisdiction and powers conferred by the Ordinance, however illegal or irregular such acts may be, and not to proceedings passed wholly without jurisdiction.

As regards the first contention, I do not see anything in the Martial Law Ordinance which prohibits the arrest of persons who commit offences inside the Martial Law area but escape outside. The Penal Code has not been abrogated within such areas and so far as the arrest of such offenders is concerned the provisions of the Code of Criminal Procedure will apply so far as the arrest outside is concerned. Section 54 of the Code of Criminal Procedure gives the police the power to arrest without a warrant a person who is charged with the offences with which the petitioner is charged and it seems to me that it makes no difference where the offence was committed so long as it was within British India. Section 60 directs that the person arrested should be produced without unnecessary delay before a Magistrate having jurisdiction in the case, or before the officer in charge of a police station. Under section 167 a Magistrate, whether he has jurisdiction or not to try the case, can order detention of the accused in custody for a period not exceeding 15 days and if he has no jurisdiction to try the case he can order the accused to be taken to the Magistrate having jurisdiction. Mr. BATTY, as Subdivisional Magistrate, had power to remand the petitioner.

As regards the second objection it must be borne in mind that under clause (6) of the Ordinance it is only persons who are already Magistrates under the provisions

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of the Code of Criminal Procedure that are appointed to exercise the power of Summary Courts. It is a specific power conferred on one who had the other ordinary powers of a Magistrate. There can be little doubt that their powers to sit as Magistrates trying offenders brought before the Summary Courts for trial are purely territorial and that they cannot exercise their powers of trial outside the Martial Law area. Clause (2) provides that Martial Law shall be in force and the provisions of the Ordinances shall apply in the area specified in the schedule and such other area as the Governor-General in Council may by notification direct. Clause (3) refers to the administration of Martial Law in any area in which Martial Law is in force. Section 6 provides for the establishment of Summary Courts in any administrative area. Section 7 directs that no Summary Court shall try any offence unless such offence was committed in the administration area in which the Court is constituted. These provisions make it clear that a Magistrate appointed under clause (6) cannot try offences committed outside the area or hold Court outside. There is however nothing in the Ordinance to show that as Magistrates appointed under the Code of Criminal Procedure, he cannot exercise the functions assigned to such Magistrates outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate. When a Divisional Magistrate is also appointed to try offences under clause (6), there is nothing to prevent his exercising the ordinary powers of a Magistrate outside the area and arresting or remanding persons who are charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

Even if Mr. BATTY was technically wrong in acting in his capacity of Special Magistrate, I think the defect would only be an irregularity as his act would have been perfectly legal if he had acted as Subdivisional Magistrate. When a Magistrate vested with more than one power under one of which only he has power to order a remand purports to act in the exercise of another power which gives him no authority to do so the case is one of irregularity which can be cured by the amendment of the order, where there is no prejudice to the accused. It is not shown that the accused would be in a better position if Mr. BATTY had issued the order in his capacity of Subdivisional Magistrate.

In cases like the present, when the arrest itself is not illegal and the offences are not non-bailable, I do not think the High Court will be exercising a proper discretion in directing the issue of a Writ and directing the accused to be brought before it. Even assuming that the remand is irregular, there is nothing to prevent the police from arresting the accused the moment after his release is ordered and taking him before the nearest Magistrate and getting a remand. If it is brought to the notice of the Court that the Magistrate ordering the remand ought to have acted in one capacity rather than in another the proper course will be for the High Court to direct the Magistrate to remand the accused according to law.

There is also another reason why I do not think I ought to interfere at this stage. While the case was being argued the Government constituted the Special Tribunal before which the petitioner would be sent for trial. Clause (6), sub-clause (1) of Ordinance No. II of 1921, dispenses with the committal of the accused for trial and all that has to be done is for petitioner to be taken before it for trial. He can apply for bail to the Tribunal

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as it has all the powers of a Court of Sessions having original jurisdiction and as appeals from the Tribunal lie to the High Court he can move this Court if bail is wrongly refused. He has therefore an adequate remedy. I dismiss the petition for a *Habeas corpus*.

The petition for the issue of a writ of *certiorari* is not pressed and is dismissed.

I do not think that I ought, at this stage and on the scanty materials before me, to direct the release of the petitioner on bail, and I accordingly dismiss the petition without prejudice to his applying later on if he is so advised.

M.H.H.

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastri.

1921, September 28.

THYARAMMAL (ACCUSED IN CALENDAR CASE NO. 7998 OF 1921 ON THE FILE OF THE HONORARY PRESIDENCY MAGISTRATE'S COURT, MADRAS).*

City Police Act (Madras Act III of 1888), sec. 71 (xi)—Petty bazaar—Obstructing a thoroughfare.

Section 71, clause (xi) of the Madras City Police Act covers cases of obstructing a thoroughfare in any manner, for example, by keeping a petty bazaar, and is not limited to obstruction caused by vehicles and animals. In the case of vehicles and animals the act and the obstruction caused by the act are sufficient to prove the offence. In other cases the fact of obstruction as well as the intention must be proved.

CASE referred for the orders of the High Court under section 432, Criminal Procedure Code, by the President of the Honorary Presidency Magistrate's Court, Egmore, Madras.

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* Criminal Revision Case No. 374 of 1921 and Case Referred No. 43 of 1921.