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generis with what precedes them. Then again the sum in question here, is not payable "under or by virtue of this Act," but is payable under the contract between the parties. Section 106 has no bearing on this question; it merely authorizes the leasing out of the tolls but does not make the money payable under the contract of lease, money payable under the Act.

We, therefore, set aside the order of the Town Sub-Magistrate of Berhampur in M.C. No. 44 of 1922 as made without jurisdiction.

D.A.R.

APPELLATE CRIMINAL.

1923, December 3.

Before Mr. Justice Odgers and Mr. Justice Wallace.

NATARAJA PILLAI, PETITIONER,

v.

RANGASWAMY PILLAI AND THREE OTHERS, RESPONDENTS.*

Criminal Procedure Code (Act V of 1898), sec. 195—Nature of application to High Court—Not an appeal—Effect of amendment of the section—Application to set aside order revoking sanction—Not maintainable.

No right of appeal is provided for under section 195 of the Criminal Procedure Code (Act V of 1898), and an application to set aside an order revoking sanction does not lie after the amendment of the section by Act XVIII of 1923 as the amendment affects procedure and, as such, has retrospective effect.

Bapu v. *Bapu*, (1916) I.L.R., 39 Mad., 750 (F.B.) and *Muthuswami Mudali* v. *Veeni Chetti*, (1907) I.L.R., 30 Mad., 382 (F.B.), referred to and explained.

PETITION praying the High Court to set aside the order, dated 24th April 1923, of S. N. V. RAJACHARI, Additional District Magistrate, Tanjore, in Criminal Miscellaneous Petition No. 17 of 1923, revoking the sanction accorded for the prosecution of the respondents

* Criminal Miscellaneous Petition No. 374 of 1923.

by the order of M. R. SANKARANARAYANA AYYAR, Subdivisional Magistrate, Tanjore, in M.C. No. 48 of 1921.

The facts are given in the judgment.

K. S. Jayarama Ayyar for petitioner.

A. V. Viswanatha Ayyar for respondents 1 to 3.

V. L. Ethiraj for the Public Prosecutor.

JUDGMENT.

ODGERS, J. ODGERS, J.—This is an application to set aside the order of the Additional District Magistrate of Tanjore wherein he revoked the sanction to prosecute the respondents, granted by the Subdivisional Magistrate of Tanjore. The application is under section 195 of the Criminal Procedure Code which has been amended by Act XVIII of 1923. The old section allowed the application to be made by a private party. This has now been abolished by the amended section and no Court can take cognizance of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, etc., or of the Court when such offence is alleged to have been committed in, or in relation to, any proceeding in that Court. Mr. A. V. Viswanatha Sastriyar, who appears for the respondents, takes more than one preliminary objection. We have only heard him so far on one, and that is the question whether sanction proceedings can now be entertained under the Criminal Procedure Code as amended. Mr. Viswanatha Sastriyar maintains that this is not an appeal under section 195, Criminal Procedure Code, and that the amendment of that section has effected an alteration in procedure. Now it is settled law that new procedure affects bygone transactions, and alterations in procedure are always retrospective [*Gardner* v. *Lucas*(1)]

(1) (1878) 3 App. Cas., 582 at 603.

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ODGERS, J.

It is conceded by Mr. K. S. Jayarama Ayyar for the petitioner that if this is a matter of procedure, the contention of the other side is correct. Mr. Jayarama Ayyar, however, contends that there is a right of appeal given under section 195, Criminal Procedure Code itself, and that this section is self-contained and independent of, or additional to, any other right of appeal given by the Code. If this is an appeal, then the right of appeal inhered in the parties at the time the original application for sanction was made, which was on or before the 8th December 1921, for it is clear law that you cannot deprive a suitor of a right in a pending action of an appeal to a superior tribunal which belonged to him as of right [*Colonial Sugar Refining Company* v. *Irving*(1)] so that, if this is an appeal, we can hear the petition; if this is not an appeal, but a mere matter of procedure, then, alterations in procedure being retrospective, we are not at liberty to entertain it. That this is not an appeal under the ordinary appellate chapters of the Code, chapters 31 and 32, is clear from the ruling in *Bapu* v. *Bapu*(2). That was a decision of the Full Bench where the Court said they were not prepared to dissent from the conclusion arrived at by the Full Bench, in *Muthuswami Mudali* v. *Veeni Chetti*(3). They added

"We think, however, the power conferred upon this Court by section 195 (6), Criminal Procedure Code, is not a part of the appellate and revisional jurisdiction of this Court conferred by Chapters 31 and 32 of the Code of Criminal Procedure."

It is a special power conferred by section 195 (6), Criminal Procedure Code. They decided that when the Judges are equally divided on a question under section 195 the matter is governed by section 36 of the Letters Patent and not by section 429 or 439 of the Criminal

(1) [1905] A.C., 369. (2) (1916) I.L.R., 39 Mad., 750 (F.B.).
(3) (1907) I.L.R., 30 Mad., 382 (F.B.).

Procedure Code. The bearing of this case on the present case will be considered in a moment. Meantime it is instructive to refer to the opinions of the referring Judges because, in the first instance, there were differing judgments and also an order of reference to the Full Bench in all of which the matter was considered in some detail. SUNDARA AYYAR, J., in his first opinion held that clauses 6 and 7 of section 195, Criminal Procedure Code, do not provide in terms that an appeal lies from an order granting or refusing sanction, nor does Chapter 31, relating to appeals, provide that an appeal shall lie from such an order, that the power of the superior Court under those clauses is similar to what it possesses in appeals and that the same may be said of the powers of the High Court in proceedings in revision. As to the language of section 429, Criminal Procedure Code, the learned Judge was of opinion that the language referring to the powers of a Court of appeal under section 195, Criminal Procedure Code, was employed,

> "only because it is the Court to which an appeal lies from the decisions of the Court granting the sanction that has got power to revoke a sanction or to give a sanction refused by an inferior Court."

SPENCER, J., also held that there was no rule of law which subjects applications made under the special provisions of section 195, Criminal Procedure Code, to the periods of limitation contained in the Limitation Act. The learned Judges, therefore, in their first judgments both concurred that an application under section 195 (6), Criminal Procedure Code, cannot strictly be regarded as an appeal. To come to the Full Bench Decision in *Muthuswami Mudali* v. *Veeni Chetti*(1) that case decided that the right of appeal conferred by section 195 (6),

(1) (1907) I.L.R., 30 Mad., 382 (F.B.).

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Criminal Procedure Code, as read with sub-clause 7, is not restricted to a right of appeal to the appellate Court to which the Court of first instance is immediately subordinate. It also decided that a revocation of a sanction is a refusal of a sanction in the same way as an order confirming a grant of a sanction is a giving of a sanction for the purposes of the section. *Muthuswami Mudali* v. *Veeni Chetti*(1) followed *Palaniappa Chetti* v. *Annamalai Chetti*(2) where it was held that under sub-section (6) a petition by way of appeal lies to the High Court in every case in which a Civil or Criminal Court, subordinate to it within the meaning of sub-section 9 (*a*), gives or refuses a sanction, whether in respect of an offence committed before it or in respect of one committed before a Court subordinate to it and in the latter case whether it gives a sanction refused by the subordinate Court, or revokes a sanction accorded by such Court. In all these three cases it is to be noted that the main question before the Court was, put shortly whether there was one right of appeal or more than one and what *Palaniappa Chetti* v. *Annamalai Chetti*(2) and *Muthuswami Mudali* v. *Veeni Chetti*(1) decided is that in such a case there is more than one right of appeal. This is the point on which *Bapu* v. *Bapu*(3) confirmed 30 Madras. As stated above 39 Madras went further and held that the power conferred by section 195 (6), Criminal Procedure Code, is not part of the appellate and revisional jurisdiction conferred by Chapters XXXI and XXXII, Criminal Procedue Code. Section 404, Criminal Procedure Code, says that "no appeal shall lie from any judgment or order except as provided for by this Code." It is therefore necessary in my opinion to find a distinct and definite right of appeal given by section 195,

(1) (1907) I.L.R., 30 Mad., 382 (F.B.). (2) (1904) I.L.R., 27 Mad., 223.
(3) (1916) I.L.R., 39 Mad., 750 (F.B.).

Criminal Procedure Code itself, before it can be assumed that any such right of appeal exists. Now sub-section 6 says that "any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate, etc." The wording itself seems to point to an original refusal or an original grant by the High Court as a superior authority itself. SADASIVA AYYAR, J., in *Panchalu Reddi* v. *Chinna Venkata Reddy*(1) at page 100 says that the power given by section 195 (*b*) of the Criminal Procedure Code to the superior "authority" is a specific statutory power. Though it is usual to call the application to the superior authority a petition of appeal, the learned Judge doubted whether it could be called an appeal. And in *Subbasari* v. *Emperor*(2) the same learned Judge was inclined to hold that the application to the appellate Court to revoke or grant a sanction, granted or refused, is not an appeal, but an original application. In *Public Prosecutor* v. *Raver Unnithiri*(3) it was said that a confirmation of sanction by the appellate Court is equivalent to a fresh grant of sanction by the Court. No doubt, section 439, Criminal Procedure Code, in speaking of the High Court's powers of revision, confers on the Court any of the powers conferred on a Court of appeal by sections 195, etc. But I am of opinion, which I think is supported by authority quoted above, that the "Court of appeal" referred to is only a designation of the superior authority to which application for revocation or grant is to be made. Further, it will be noted that section 429, Criminal Procedure Code, which provides for a difference of opinion between Judges composing the Court of appeal, is not confined to appeals under Chapter XXXI, whereas

(1) (1912) I.L.R., 42 Mad., 96.
(2) (1921) I.L.R., 44 Mad., 47. (3) (1914) 26 M.L.J., 511.

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section 428 (1), Criminal Procedure Code, deals with appeals under "this Chapter." This distinction is important in relation to the decision in 39 Madras which held that clause 36 of the Letters Patent applied, and not section 429, Criminal Procedure Code, on a difference of opinion between the Judges composing the superior Court to which application is made under section 195 (6), Criminal Procedure Code. Further I am of opinion that the alterations made by the amendments to the Code are merely alterations of procedure. Prosecutions for various offences committed in relation to proceedings before public servants or Courts are still punishable, but those proceedings are to be initiated on complaints either of the public servants or the Courts concerned themselves, and not on the application for sanction to prosecute by a private party. The public servant or Courts will still generally be set in motion by the party aggrieved though of course it will be open to either to take proceedings *suo motu*.

For these reasons I am of opinion that no appeal is provided for in the Code under section 195, Criminal Procedure Code, and further that the amendments made affect only procedure. We have, therefore, since the amendment, no power to entertain this petition, which must be dismissed.

WALLACE, J.

WALLACE, J.—This is a petition to set aside an order of the Additional District Magistrate, Tanjore, revoking the sanction granted by the Subdivisional Magistrate, Tanjore, for the prosecution of the respondents for an offence under section 188, Criminal Procedure Code.

A preliminary legal point is raised by the respondents, namely, that, since the new amended Criminal Procedure Code has abolished such sanctions and since that is now the law in force in this case, this petition does not lie. The petitioner rejoins that the right to

move this Court for sanction is of the nature of a substantive right, such as a right of appeal, which cannot be taken away by any alteration of the processual law. I think the respondent's contention must be upheld for two reasons: first that there is no substantive right now taken away; and the right conferred by the old section 195 (6) of the Criminal Procedure Code is not a right in the nature of a right of appeal. And secondly, to comply with the petitioner's request and grant a sanction now, would be a futile proceeding, since no Court can now take cognizance of complaints under any such sanction.

To take the first point, the substantive right which the petitioner possesses is the right of setting up a criminal prosecution in train against a party who has committed a breach of an order under section 144, Criminal Procedure Code. The necessary preliminary, under the old section 195 (1), to such a prosecution was the obtaining by the party of a sanction, or the presentation of a complaint by a public servant named therein. Now the method of proceeding by first obtaining a sanction has been abolished. Clearly, the change is a change in the processual law and does not deprive the petitioner of his substantive right to set the criminal law in motion. The petitioner still has a method under the new procedure for setting the law in motion, since he may apply to the public servant, or any authority to whom that public servant is subordinate, to present a complaint.

Such an application as is now before us is not defined anywhere in the old Criminal Procedure Code as an appeal, nor do any provisions of Chapter XXXI extend to it. The petitioner points out that under section 439, old Criminal Procedure Code, it was laid down that the High Court may in proceeding under

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that section exercise any of the rights conferred on "a Court of appeal" by sections 195, etc., which seems to imply that section 195 confers some powers of the nature of appellate powers on a superior Court and the omission of section 195 in the new section 439 emphasises the fact that the phrase "Court of appeal" as hitherto used had reference to the powers conferred on Courts in the matter of sanctions now abolished. However, the question whether in taking proceedings under the old section 195 (6), this Court is a Court of appeal has been fully discussed in the Full Bench case of this Court reported in *Bapu* v. *Bapu*(1) which lays down that the power exercised under the old section 195 (6) is neither an appellate nor a revisional power but a special power. The previous rulings of this Court which used the words "appeal" and "appellate Court" with reference to these powers, for example, *In re Paree Kunhammed*(2), *In re Muthukudam Pillai*(3), *Palaniappa Chetti* v. *Annamalai Chetti*(4), *Muthuswami Mudali* v. *Veeni Chetti*(5), *Jamna Doss* v. *Sabapathy Chetty*(6) must therefore be taken to have been using these words loosely and not with strict technical accuracy. Section 439 also indicates plainly enough that the powers of this Court as a Court of appeal under the old section 195 (6) are to be found in that section alone and are limited to the terms of that section. It is significant that there was no other section which laid down that the powers of the High Court under the old section 195 (6), Criminal Procedure Code, consisted of any of the powers which were under the old sections 423, 426, 427 and 428, the other sections quoted in section 439, conferred on it. Another significant fact is that nowhere was any period of

(1) (1916) I.L.R., 39 Mad., 750 (F.B.).
(2) (1903) I.L.R., 26 Mad., 116.
(3) (1903) I.L.R., 26 Mad., 190.
(4) (1904) I.L.R., 27 Mad., 223.
(5) (1907) I.L.R., 30 Mad., 382 (F.B.).
(6) (1913) I.L.R., 36 Mad., 188.

limitation fixed for petitions under section 195 (6), whereas a regular right of appeal has always a defined period fixed within which it must be exercised. Old section 195 (6), to my mind, indicates that in a case like the present, the power of the Court as a "Court of appeal," to adopt the phraseology of old section 439, is limited to granting a sanction refused by the lower appellate Court, which sanction is a fresh sanction and is not a revival or resuscitation of the original sanction granted by the original Court which had been revoked by the lower appellate Court. No reported case controverting this view has been quoted to us. There is no reported case in this Presidency, so far as I know, which, e.g., lays down that when a sanction has been granted and revoked and again granted, the six months are to date from the date of the original grant as if that had been resuscitated. The case reported in *In re Muthukudam Pillai*(1) is not in point, as there the original sanction had never been interfered with.

The same result will be obtained by considering the matter from another point of view. Assuming, without deciding, petitioner's contention that for the purposes of a petition under old section 195 (6) the District Magistrate as a public servant is, within the meaning of section 195 (1), subordinate to this Court, it is clear that petitioner might have applied, in the first instance, in this Court for the sanction he now seeks. It follows that his right to move this Court does not depend on there being in existence an order against him against which he can "appeal." Such right as was given him by the section was a right to apply to this Court for a sanction, irrespective of what had happened to similar applications in any Court subordinate to this Court.

(1) (1903) I.L.R., 26 Mad., 196.

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For the above reasons I hold that petitioner's right to apply for a sanction is purely a matter of processual law and not a right of the nature of a right of appeal.

As to the second point, it rests on petitioner's contention that the grant of sanction by this Court will restore the sanction of the original Court so as to enable the prosecution already instituted on that sanction to continue from where it left off when the sanction was revoked; that is, in his view, the revocation of sanction has not destroyed the sanction but merely held it in abeyance if, and while, an appeal is pending. The petitioner goes further and contends that, since the Criminal Procedure Code does not contemplate a case once begun ending merely because a requisite sanction had not been obtained or because the sanction on which it was instituted has been revoked, no subsequent discovery of absence of sanction, or revocation of sanction can interfere with its jurisdiction. Such a position I must hold to be untenable, since it would imply that the right to have a sanction revoked would be quite futile, if a complaint based on a sanction had already been put in, since on this theory any subsequent revocation would not affect the jurisdiction of the Court to proceed with the trial of the complaint already filed. The petitioner appeals to section 537 of the Criminal Procedure Code for his position; but it does not really help him since that section has no application to cases under trial when it is discovered that no sanction exists or that the sanction given has been revoked. Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if, in the course of the trial and before judgment is pronounced, it is brought to its notice that no sanction has been obtained, and I can see no difference between such a case and a case where the sanction on which the trial is proceeding

has been set aside during the trial. Revocation of a sanction must have some legal effect and can only imply, to my mind, that the prosecution started under the sanction can proceed no further and has come to an end.

WALLACE, J.

For reasons already given, I have held that the petitioner can now ask, and is now asking, this Court only to grant a fresh sanction and that this is not a petition of appeal against, or a petition to revise, any order of the lower Court, and, for reasons now given, hold that the original sanction given has, by the revocation, been swept away for ever and cannot be revived by any order on this petition.

The new Criminal Procedure Code has abolished the right to present such a petition and this petition must be heard under the existing processual law. That law now forbids any prosecution being instituted merely upon a sanction granted to a private party. It follows, then, that even if this Court does grant the petitioner the sanction that he seeks, such a sanction would be of no avail for instituting any prosecution; and this is an additional reason for refusing to grant the petitioner the sanction which he seeks, since to grant it would be a merely empty formal proceeding of no use whatever to the petitioner.

As I have already pointed out, the petitioner is not left without a remedy, since it is still open to him to move the authority to whom the Additional District Magistrate is subordinate within the meaning of section 195 (1) to present a complaint on which the respondents may be prosecuted for their disobedience of the order passed by the original public servant.

I therefore agree that the petitioner's petition is not maintainable and must be dismissed.

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