

APPELLATE CRIMINAL—FULL BENCH.

*Before Mr. Charles Gordon Spencer, Officiating
Chief Justice, Mr. Justice Kumaraswami Sastri and
Mr. Justice Krishnan.*

1924,
October 16.

VEERAPPA NAIDU (PETITIONER), PETITIONER,

v.

AVUDAYAMMAL AND OTHERS (RESPONDENTS),
RESPONDENTS.*

*Criminal Procedure Code (Act V of 1898), ss. 148, 423 (1) (d),
435, 439 and 561-A—Order of Magistrate under Chapter
XII—Revision by High Court—Costs—Power of High Court
to award costs of revision proceedings—Inherent powers—
Incidental or consequential orders.*

The High Court, when exercising its powers of Criminal Revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code, has no inherent power to award to the successful party the costs incurred in the Revision Proceedings; *Sankaralinga Mudaliar v. Narayana Mudaliar* (1922) I.L.R., 45 Mad., 913 (F.B.), applied; nor can the award of costs be regarded as incidental or consequential to the disposal of the revision petition within the meaning of section 423 (1) (d) of the Code, for it does not necessarily follow from an order passed in revision. See *Mehi Singh v. Mangal Khandu* (1912) I.L.R., 39 Calc., 157 (F.B.).

Costs referred to in section 148 of the Code are those incurred in the magisterial proceedings under Chapter XII; but the High Court, sitting in revision, is not exercising the powers of a Magistrate under this chapter, and therefore the costs in the revision proceedings cannot be included under this head.

PETITION under sections 435 and 439, Criminal Procedure Code, 1898, and section 107 of the Government of India Act, to revise the order of the Court of the Subdivisional Magistrate of Sivakāsi in Possession Case No. I of 1923.

This is a criminal revision case from the order of a Subdivisional Magistrate in a possession case. The

* Criminal Revision Case No. 937 of 1923 (Criminal Revision Petition No. 754 of 1923).

material facts and contentions appear from the following order of WALLACE, J., in directing the case to be laid before the CHIEF JUSTICE for reference to a Full Bench :—

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ORDER.

The question has been raised in connexion with this petition whether the High Court can grant costs to the successful party and to the Public Prosecutor in a matter coming up before it in revision from an order passed by a Magistrate in proceedings under Chapter XII of the Criminal Procedure Code. It must be conceded that there is no specific provision in the Code which allows the High Court to grant such costs and I am referred to the Full Bench ruling in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1), for the proposition that the High Court has no jurisdiction to grant costs in criminal cases except in those cases where the Code of Criminal Procedure makes express provision. In that ruling, however, it was pointed out that section 148, one of the sections under Chapter XII of the Code, does provide for the award of costs; so that the granting of costs in proceedings under Chapter XII was not under consideration by the Full Bench in that case. Section 148 lays down that, when passing his decision in the case, a Magistrate may direct costs to be paid. Mr. Ethiraj, in an ingenious argument, contended that the awarding of costs in such proceedings is an incidental order within the meaning of section 423 (d), and that the High Court has the power of exercising it by force of section 439, which empowers a High Court, in revision, to exercise any of the powers conferred on it by section 423. I am clear that the High Court, in revision, could pass any order which the Magistrate himself could have passed: that is, the High Court could, in revision, direct the costs before the Magistrate himself to be paid by one party to another. But that is not the same thing as the High Court directing costs before it in revision to be paid by one party to another. As the learned CHIEF JUSTICE has said in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1) "The whole machinery of revision is the creature of statute and has to be found within the four walls of the Criminal Procedure Code". It is obvious that Chapter XXXII of the Criminal Procedure Code does not specifically provide for costs incurred in the High Court by parties in revision petitions. I hesitate to hold that any

(1) (1922) I.L.R., 45 Mad., 913 (F.B.).

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exception was intended to be made in a case where the first Court was itself empowered to award costs, and that the power conferred on the first Court was intended to extend to the High Court also, and form thus an exception to the general rule that no costs are awardable in criminal revision petitions.

I may refer to certain cases of this Court in which costs in the High Court have been awarded in criminal revision cases, relating to orders under Chapter XII of the Criminal Procedure Code, one of which is a judgment of my own. These are Criminal Revision Cases Nos. 519 of 1916, 51 of 1922, 352 of 1922 and L.P.A. No. 2 of 1915. The two cases of 1922 are later than the Full Bench decision. In none of these cases has authority been quoted for the award of costs.

Mr. Ethiraj has argued further that the term "Magistrate" in section 148 will include the High Court, and quotes the Privy Council Ruling in *Clarke v. Brajendra Kishore Roy Chowdhury*(1), an *obiter dictum* stating that, in the Criminal Procedure Code, the term "Magistrate" and "Court" are convertible. The question there, however, was only whether the Magistrate in doing a certain act was acting as a Court or not. To hold that wherever the term "Magistrate" is used, the term "High Court" can be substituted is obviously an untenable proposition, which would *inter alia* extend the original criminal jurisdiction of the High Court throughout the whole Presidency. Where the Code means the High Court it uses the term "the High Court."

It appears to me as at present advised that the High Court has no power to award costs incurred before it on the hearing of a criminal revision petition against an order passed under Chapter XII of the Criminal Procedure Code; but, as the practice of the Court is not uniform and the point as a question of jurisdiction has not been considered, I direct that the case be laid before the CHIEF JUSTICE for reference to a Full Bench.

K. Balasubrahmanya Ayyar for petitioner.—The High Court has no power to award costs to the successful party in a criminal revision case. The matter is concluded by the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana Mudaliar*(2). There is no specific provision in the Criminal Procedure Code to award such costs. Section 148 of the Code empowers only the

(1) (1912) I.L.R., 39 Cal., 953 at 966 (P.C.).

(2) (1922) I.L.R., 45 Mad., 918. (F.B.).

Magistrate to award costs incurred in the proceedings before him. Costs incurred in the proceedings before the High Court are not included under section 148.

V. L. Ethiraj and A. Srivanga Achariyar for respondents.—Costs are incidental to orders under section 439 of the Code. See section 423 (1) (d) of the Code; *Ediga Thimmiah, In re*(1). There is a right of action by suit for damages in respect of costs incurred; *Nemai Chundra Ghose v. Ajahar Chowdhury*(2). The High Court, in a revision from an order, under Chapter XII of the Code, can exercise the same powers as the Magistrate has under section 148; power is given to award costs under that section: see *Clarke v. Brajendra Kishore Roy Chowdhury*(3).

R. N. Aingar for Public Prosecutor.—Inherent power is given under section 561 A, which is a new section added to the Code after the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana Mudaliar*(4); section 148 specifically authorizes the Courts to award costs in proceedings under Chapter XII, and the powers of the High Court in revision from such an order attracts the power to award costs in such proceedings.

K. Balasubrahmanya Ayyar in reply.—An order to pay costs is not incidental to an order in revision. See *Mehi Singh v. Mangal Khandu*(5).

The Court delivered the following

OPINION.

We are agreed in thinking that the question whether the High Court, when exercising its powers of criminal revision, has inherent power to award costs to the successful party, has been settled by the decision of the Full Bench in *Sankaralinga Mudaliar v. Narayana*

(1) (1924) 20 L.W., 293.

(2) (1903) 8 C.W.N., 178.

(3) (1912) I.L.R., 39 Calc., 953 at 965 (P.O.).

(4) (1922) I.L.R., 45 Mad., 913 (F.B.). (5) (1912) I.L.R., 39 Cal., 157 (F.B.)

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Mudaliar(1). Meanwhile the amendment of the Criminal Procedure Code has not made any difference, since the Legislature has not acted upon the suggestion thrown out by COURTS TROTTER, J., who sat upon the above-mentioned Full Bench, that in order to check the activities of private prosecutors in revision proceedings the Court should be invested with power in proper cases to award costs. It is true that section 561-A of the Code of Criminal Procedure which deals with the inherent power of the High Court is new. But as observed by the learned CHIEF JUSTICE in *Sankaralinga Mudaliar v. Narayana Mudaliar*(1), the Court cannot by invoking its inherent powers extend the powers given to it by statute. Nor can the award of costs be treated as incidental or consequential to the disposal of the revision petition within the meaning of section 423 (1) (d), for it does not necessarily follow from an order passed in revision [compare *Mehi Singh v. Mangal Khandu*(2)].

Magistrates have power under section 148 to direct by whom any costs incurred by parties in proceedings before them under Chapter XII are to be paid, but the costs referred to in this section are evidently the costs incurred in the magisterial proceedings. When the High Court sits in revision, it is not exercising the powers of a Magistrate under this chapter and therefore the costs in the revision proceedings cannot be included under this head.

We consider that WALLACE, J., who made this reference, was right in holding that he had no power to make an order for costs in the two petitions which were before him and they will therefore be returned to him with our opinion for passing the necessary orders.

K.R.

(1) (1922) I.L.R., 45 Mad., 913 (F.B.). (2) (1912) I.L.R., 39 Cal., 157 (F.B.)