ARUMUGHAM CHETTY v. SUBRAMANIAM CHETTI.

BURN J.

member of the right to enjoy the village. On the facts found it seems to me quite clear that the zamindar was concerned solely with the provision for maintenance and was not making a lease. If the annual income from the village had been estimated at precisely Rs. 1,200 there would have been no question of *poruppu* and it would have been impossible to suggest that the transaction was a lease. The transaction appears to me to be in its essence of the nature of a grant of inam land. The facts deducible from the documents which were executed in the case of the other members of the family indicate that the zamindar considered himself to be making an out and out grant rather than a lease.

G.R.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Owen Beasley, Kt., *Chief Justice*,
Mr. Justice Pandrang Row and *Mr. Justice King.*

1936, December 2.

IN RE MUTHU MOOPAN AND ANOTHER (ACCUSED), PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), ss. 195 (1) and 403 (1)—Acquittal of an offence for which sanction under section 195 (1) (a) necessary, but not obtained—Subsequent trial for same offence after sanction obtained—Barred, if.

Where a Magistrate, who, though empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, is prevented by section 195, Criminal Procedure Code, from taking cognizance of the offence except

* Criminal Revision Case No. 327 of 1936 (Criminal Revision Petition No. 302 of 1936).

on the complaint of the public servant concerned or of some one to whom he is subordinate, acquits the accused, after framing a charge and recording defence evidence, on the ground that the requisite complaint had not been filed, his trial, charge and judgment of acquittal are all void under section 530, Criminal Procedure Code; and section 403 (1), Criminal Procedure Code, is no bar to the trial of the accused for the same offence on a complaint filed by the public servant concerned.

Quaere as to the meaning of the word "*competent*" in section 403 (1), Criminal Procedure Code. Conflict of authority on the point noticed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Magistrate of Perundurai, dated 2nd April 1936 and made in Calendar Case No. 46 of 1936.

The material facts of the case appear from the judgment of KING J.

The case first came on for hearing before BURN J. who made the following

ORDER:—

This case should, I think, be posted before a Bench. The previous acquittal by the Sub-Magistrate, Erode, was not upon the merits, though a charge was framed and defence evidence recorded. It was based on the ground that there was no complaint by the public servant or by any one to whom the public servant was subordinate. In that case it seems clear that the Sub-Magistrate, Erode, had no jurisdiction to do *anything*; all his proceedings were null and void *ab initio* and could not be held to be a "trial" barring a second trial under section 403, Criminal Procedure Code. Vide *Ravanappa Reddi, In re*(1). The Sub-Magistrate, Erode, on this reasoning was merely wasting paper when he wrote out his order of acquittal; he could no more acquit than he could convict.

This point was not considered in *In re Ganapathi Bhatta*(2). That decision itself has been dissented from in the High Courts of

(1) (1931) I.L.R. 55 Mad. 343, 345. (2) (1911) I.L.R. 36 Mad. 308.

MUTHU MOOPAN, *In re.*

Allahabad in *Emperor* v. *Husain Khan*(1) and Patna in *Sheikh Mohammad Yasin* v. *King-Emperor*(2) and needs reconsideration in view of *Ravanappa Reddi, In re*(3).

Hence I think this case should be decided by a Bench.

The case came on for hearing before a Bench and the Court (MOCKETT and LAKSHMANA RAO JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The petitioners were charged by the police with an offence under section 353, Indian Penal Code, on the report of the Revenue Inspector of Modakurichi and they were acquitted after trial on the ground that the offence disclosed by the evidence was one under section 186, Indian Penal Code, which, under section 195, Criminal Procedure Code, cannot be taken cognizance of by any Court except on the complaint in writing of the Revenue Inspector or some other public servant to whom he is subordinate. The complaint out of which this revision petition arises was then filed by the Revenue Inspector and the question for decision is whether the previous acquittal operates as a bar to the present trial. This depends upon the competency of the Court which acquitted the petitioners to try the offence under section 186, Indian Penal Code, and, as pointed out by our learned brother BURN J. in the order of reference, there is a conflict of authority on the point. The decision in *In re Ganapathi Bhatta*(4) which is in favour of the petitioners has been expressly dissented from in *Emperor* v. *Ambaji Dhakya*(5), *Sheikh Mohammad Yasin* v. *King-Emperor*(2) and *Mohendra Nath Sahu* v. *Emperor*(6) and the Calcutta and Allahabad Courts also have taken a contrary view. In the circumstances we consider it desirable to have an authoritative pronouncement on the point. We would therefore refer the case to a Full Bench.

ON THE REFERENCE—

K. Desikachari for petitioners.—The words "Court of competent jurisdiction" occurring in section 403 (1), Criminal

(1) (1916) I.L.R. 39 All. 293.
(2) (1926) I.L.R. 5 Pat. 452.
(3) (1931) I.L.R. 55 Mad. 343, 345.
(4) (1911) I.L.R. 36 Mad. 308.
(5) (1928) I.L.R. 52 Bom. 257.
(6) A.I.R. 1934 Pat. 411.

Procedure Code, refer to the character and status of the tribunal as construed in *In re Ganapathi Bhatta*(1). Sanction under section 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent to the institution of proceedings before the tribunal. The schedule to the Code of Criminal Procedure and the power given by the Legislature to the Court decide the jurisdiction of the Court. Here, the Sub-Magistrate of Erode is competent to try the offence. The want of sanction as required by section 195 (1) (*a*), Criminal Procedure Code, is only an illegality; it does not affect or take away the jurisdiction of the Court to try the offence. The accused here have been acquitted previously by a Court competent to try them and they cannot be tried again, as section 403 (1), Criminal Procedure Code, is a bar to a subsequent trial.

The other High Courts, no doubt, put a wider construction on the words "competent jurisdiction". The Madras High Court in the Full Bench case of *In re Rathnavelu*(2) does not adopt that view. Section 537, Criminal Procedure Code, as it stood before the amendment (Act XVIII of 1923), indicates that there can be a Court of competent jurisdiction even though there is prohibition against taking cognizance of the case for want of sanction under section 195, Criminal Procedure Code, and that the Legislature does not intend that the provisions of section 195 should affect the jurisdiction of the Court. So the words "competent jurisdiction" in section 403 (1) should be held to bear the same interpretation as in section 537, Criminal Procedure Code.

[KING J.—Section 537 deals with conviction. Section 403 (1) deals with acquittal. The difference between the two sections is pointed out in *Emperor* v. *Jivram Dankarji*(3). The omission of clause (*b*) in section 537 is deliberate.]

A Court may be acting illegally and against the provisions of the statute, but it cannot on that account be said to have no jurisdiction. The view adopted in *In re Ganapathi Bhatta*(1) is the correct one.

Parakat Govinda Menon for *Public Prosecutor* (*L. H. Bewes*) for the Crown:—All the other High Courts have given a wider interpretation to the words "Court of competent jurisdiction"

(1) (1911) I.L.R. 36 Mad. 308. (2) (1933) I.L.R. 56 Mad. 996 (F.B.).
(3) (1915) I.L.R. 40 Bom. 97.

MUTHU MOOPAN, *In re.*

in section 403 (1), Criminal Procedure Code. The jurisdiction of the Court does not merely refer to the character and status of the tribunal to try the offence, but also refers to want of jurisdiction on other grounds. The construction put in *In re Ganapathi Bhatta*(1) is a narrow one and it should be brought into line with the uniform view adopted by the other High Courts which is more reasonable and correct.

Section 28, Criminal Procedure Code, describes the offences cognizable by each Court. That section begins with "subject to the other provisions of this Code", etc. Section 195, Criminal Procedure Code, mentions certain offences, cognizance of which can be taken only on the complaint of the public servant concerned or of some public servant to whom he is subordinate. The offence under section 186, Indian Penal Code, is one of such offences. To take cognizance of it, the requirements of section 195, Criminal Procedure Code, must be complied with. Without taking cognizance—which is the first step in every case—the Court can neither inquire nor try. Therefore, the order of acquittal made by a Court, before which there is no legal complaint, is not an order by a Court of competent jurisdiction. And unless the acquittal is by a Court of competent jurisdiction, the plea of *autrefois acquit* in a subsequent prosecution, is no bar.

K. Desikachari in reply.—Sections 246 and 254, Criminal Procedure Code, suggest that a Court, even though it should not have taken "cognizance" of an offence, can convict in proper cases. It supports the view taken in *In re Ganapathi Bhatta*(1). Section 530, Criminal Procedure Code, in the several clauses therein seems to differentiate between power to take cognizance and other prohibitions. It does not oust the Court's jurisdiction in this case.

[In the course of the arguments, the following cases were referred to: *Ravanappa Reddi, In re*(2); *Emperor* v. *Husain Khan*(3); *Sheikh Mohammad Yasin* v. *King-Emperor*(4); *Emperor* v. *Ambaji Dhakya*(5); *Mohendra Nath Sahu* v. *Emperor*(6); *Abdul Rashid* v. *Harish Chandra*(7); *Banerjee* v. *Bepin Behary Ghose*(8); *Shankar Tulsiram* v.

(1) (1911) I.L.R. 36 Mad. 308.
(2) (1931) I.L.R. 55 Mad. 343.
(3) (1916) I.L.R. 39 All. 293.
(4) (1926) I.L.R. 5 Pat. 452.
(5) (1928) I.L.R. 52 Bom. 257.
(6) A.I.R. 1934 Pat. 411.
(7) A.I.R 1929 All. 940.
(8) A.I.R. 1926 Cal. 691.

Kundlik Anyaba(1); *Emperor* v. *Jiwan*(2); *Emperor* v. *Menghraj Devidas*(3); *Kolandaswami Pillai* v. *Rajaratna Mudaliar*(4); *Sidh Nath Awasthi* v. *Emperor*(5); *King Emperor* v. *Krishna Ayyar*(6); and *Lalit Chandra Chanda Chowdhury* v. *Emperor*(7)].

Cur. adv. vult.

ORDER.

KING J. KING J.—On 10th September 1935 the Revenue Inspector of Modakurichi firka, Coimbatore District, made a complaint to the police under section 353, Indian Penal Code, against two accused, Mari Moopan and Muthu Moopan. A charge sheet was filed by the police before the Sub-Magistrate of Erode, who, after hearing the prosecution evidence, came to the conclusion that a *prima facie* case was made out not under section 353 but only under section 186. He thereupon framed a charge under that section and took the evidence for the defence. When the case came to be argued the plea was raised for the accused that the trial was illegal as section 195 (1) (*a*) of the Criminal Procedure Code enacts that no Court shall take cognizance of an offence under section 186, Indian Penal Code, except upon the complaint of the public servant concerned or some other public servant to whom he is subordinate. The Sub-Magistrate upheld this plea and acquitted the accused. The Revenue Inspector thereupon filed his complaint in person before the Court and the case was transferred to the file of the Sub-Magistrate of Perundurai. The

(1) (1928) I.L.R. 53 Bom. 69.
(2) (1914) I.L.R. 37 All. 107.
(3) (1919) 66 I.C. 657.
(4) (1929) 58 M.L.J. 579.
(5) (1929) I.L.R. 57 Cal. 17.
(6) (1901) I.L.R. 24 Mad. 641.
(7) (1911) I.L.R. 39 Cal. 119.

MUTHU MOOPAN, *In re.*

KING J.

accused petitioned the District Magistrate to withdraw the prosecution, urging that having already been acquitted of the offence they could not under the provisions of section 403 (1), Criminal Procedure Code, be tried for it again. The District Magistrate refused to withdraw it. They then raised their plea of *autrefois acquit* before the Sub-Magistrate. He naturally, with the District Magistrate's order before him, refused to entertain it. The accused have accordingly filed this revision petition in the High Court, and, as there is a conflict of authority on the point in issue, the petition has been referred to a Full Bench.

The material portion of section 403 (1) runs as follows :

> "A person who has once been tried by a Court of competent jurisdiction for an offence and . . . . . acquitted of such offence, shall, while such . . . . . acquittal remains in force, not be liable to be tried again for the same offence . . . . ".

The conflict of authority is concerned with the expression "Court of competent jurisdiction". In Madras it has been held [vide *In re Ganapathi Bhatta*(1)] with reference to the similar expression "competent to try" in sub-section (4) of section 403, that it refers only to the character and status of the tribunal, which means that a Second-class Magistrate, like the Sub-Magistrate of Erode, is always "competent" to try a "second-class case", such as an offence under section 186, Indian Penal Code. Four other High Courts on the other hand, Bombay, Calcutta, Allahabad and Patna, take the wider view that a Court which tries an offender on a complaint which it is forbidden by

(1) (1911) I.L.R. 36 Mad. 308.

the Code to entertain unless certain conditions are satisfied acts without jurisdiction.

I do not think it necessary to examine these cases, or to come to any final conclusion on the meaning of the word "competent" in section 403, Criminal Procedure Code. I prefer to approach the problem from a slightly different direction. The accused in this case are being prosecuted for an offence. They say they have already been acquitted of that offence. Is that acquittal valid; does it "remain in force"; has it ever had any force; can a Court take any notice of it?

The answer to these questions is in my opinion clear and is apparent at once on a perusal of section 530 of the Code. According to that section, if any Magistrate "not being empowered by law in this behalf" tries an offender his proceedings shall be void. The Sub-Magistrate of Erode was certainly empowered by section 28, Criminal Procedure Code, to try an offence under section 186, Indian Penal Code, but was he empowered to try these offenders for this particular offence? Clearly not, for section 195, Criminal Procedure Code, prevents him from taking any notice whatever of the offence until a proper complaint is filed. His trial was therefore void. His charge was void. His judgment of acquittal was void. There is nothing which the accused can compel the Court to recognise in support of a plea under section 403.

I accordingly hold that the order of the Sub-Magistrate of Perundurai refusing to drop the proceedings against the accused is right, and would dismiss this petition.

MUTHU MOOPAN, *In re.*

PANDRANG ROW J.

BEASLEY C.J.—I agree.

PANDRANG ROW J.—I agree and wish only to add that the conclusion we have come to is in consonance with the rule of English law on the subject laid down in *Rex* v. *Marsham. Pethick Lawrence, Ex parte*(1) by AVORY J. as follows :

"It is clear that in order to plead such a plea effectually—either a plea of *autrefois acquit* or *autrefois convict*—it must appear that the defendant has been legally convicted or legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd Edition, Volume I, page 455, that 'the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him'."

V.V.C.

APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

1937, January 20.

AMINA BIBI (PLAINTIFF), PETITIONER,

v.

KADIR BATCHA ROWTHER (DEFENDANT), RESPONDENT.*

Court Fees Act (VII of 1870), *sec.* 7 (*v*)—*Sec.* 7 (*iv*) (*c*)—*Applicability—Insolvent—Gift prior to insolvency in favour of his wife by—Property covered by, and taken possession of by Official Receiver as part of insolvent's estate—Donee's suit for declaration of her title to, and for possession of—Relief of possession—Mode of valuing—Court-fee payable in respect of.*

The plaintiff sued for a declaration that a certain property gifted to her by her husband, who subsequently became an insolvent, was her property and for possession of the property

(1) [1912] 2 K.B. 362, 365.

* Civil Revision Petition No. 1413 of 1935.