NARAYANA IYER v. MOORTHI KENDEN.

Court of law in respect of a claim provable in insolvency.

The appeal accordingly fails and is dismissed with costs—one set of costs to be equally divided between the first respondent on the one hand and respondents 3 and 4 on the other.

G.R.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1938, April 7.

PUBLIC PROSECUTOR, APPELLANT,

v.

B. V. SABAPATHY CHETTY (ACCUSED), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), sec. 207 (1) (c)—Offence under—What constitutes.

The offence under section 207 (1) (*c*) of the Madras Local Boards Act consists in the failure to comply with any direction lawfully given or any requisition lawfully made and not in the failure to remove the encroachment. If an alleged encroachment is really an encroachment, the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of an earlier notice is not a bar to his being tried for disobedience of a later notice. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice but a different and distinct offence.

Rangachariar v. *Venkatasami Chetti*(1) and *Ramanuja Chariar* v. *Kailasam Iyer*(2) disapproved.

Narayana Aiyar v. *Rakkupayal*(3), *Moidi Beary* v. *Mangalore Tk. Bd.*(4) and *Velgode Panchayat* v. *Chinna Venkata*(5) approved.

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* Criminal Appeal No. 712 of 1937.

(1) (1934) I.L.R. 58 Mad. 513. (2) (1925) I.L.R. 48 Mad. 870.
(3) 1927 M.W.N. 645. (4) A.I.R. 1932 Mad. 535.
(5) A.I.R. 1932 Mad. 537.

Ramachandra Chetti v. *Chairman, Municipal Council, Salem*(1) relied upon.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the order of the Court of the Sub-Magistrate of Orathanad dated 5th June 1937 and made in Calendar Case No. 118 of 1937 on its file.

Public Prosecutor (*V. L. Ethiraj*) for appellant.

S. Parthasarathy for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by BURN J.—This appeal raises a question of some importance, and of rather frequent occurrence, on which there are conflicting rulings of this Court. BURN J.

The respondent is a resident in Orathanad in the district of West Tanjore. He is the owner of a shop by the side of a District Board road passing through the village, and he is alleged to have made an encroachment on the road by putting up in front of his shop a tin sunshade eleven feet long and two feet broad. On 6th February 1937 he was served with a notice, dated 21st January 1937, issued by the President of the West Tanjore District Board under section 159 (1) of the Madras Local Boards Act, requiring him to remove the encroachment before 21st February 1937. Alleging that the respondent had failed to remove the encroachment, the District Board Overseer, duly authorized by the President, prosecuted him in Calendar Case No. 118 of 1937 on the file of the Sub-Magistrate of Orathanad for an offence under section 207 (1) of the Local Boards Act. When the case came on

(1) (1926) I.L.R. 49 Mad. 880.

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for trial, the respondent pleaded that he had already been prosecuted in the matter of the same encroachment in Calendar Case No. 295 of 1936 in the same Court, that the prosecution had been withdrawn by the ex-officio President, that he had thereupon been acquitted under section 248 of the Criminal Procedure Code, and that the previous acquittal was a bar to any further proceedings on the same facts. The learned Sub-Magistrate, relying on the decision of PANDRANG ROW J. in *Rangachariar* v. *Venkatasami Chetti*(1), acquitted the respondent under section 403 of the Criminal Procedure Code. The learned Public Prosecutor has preferred this appeal.

It is quite clear that the order of acquittal is wrong. If section 403 of the Criminal Procedure Code is applicable, the respondent could not have been put on his trial at all in Calendar Case No. 118 of 1937. Section 403 does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all. That however is a minor matter; the important question is whether the previous acquittal in Calendar Case No. 295 of 1936 was a bar to the prosecution in Calendar Case No. 118 of 1937.

The learned Sub-Magistrate is supported by the ruling of PANDRANG ROW J. on which he relied. He is supported also by the decision in *Ramanuja Chariar* v. *Kailasam Iyer*(2) in which the facts seem to have been exactly the same as in this case. On the other hand, as the

(1) (1934) I.L.R. 58 Mad. 513. (2) (1925) I.L.R. 48 Mad. 870.

learned Public Prosecutor points out, there are three decisions of single Judges against this view, and one decision of a Bench of two Judges expressly disagreeing with one of the reasons for the decision of SRINIVASA AYYANGAR J. in *Ramanuja Chariar* v. *Kailasam Iyer*(1). SRINIVASA AYYANGAR J. held that a prosecution under section 207 (1) must be launched within three months after the disobedience of the notice under section 159 (1), and that if this had not been done, the Local Board could not extend that period of three months by the device of issuing a fresh notice in respect of the same encroachment. This view was overruled by DEVADOSS and WALLER JJ. in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*(2), where the learned Judges (dealing with the precisely similar provisions of the District Municipalities Act) pointed out that the offence under section 207 (1) " consists in the failure to obey a requisition issued by the competent authority ". This was followed by WALLACE J. in *Narayana Aiyar* v. *Rakkupayal*(3) and referred to by PAKENHAM WALSH J. in *Moidi Beary* v. *Mangalore Tk. Bd.*(4) and in *Velgode Panchayat* v. *Chinna Venkata*(5). In both these cases PAKENHAM WALSH J. held that a previous acquittal or conviction does not bar a prosecution for disobedience of a fresh notice under section 159 (1) even if the encroacher and the encroachment remain the same. As PANDRANG ROW J. observes in *Rangachariar* v. *Venkatasami Chetti*(6), this point was not decided by DEVADOSS

(1) (1925) I.L.R. 48 Mad. 870.
(2) (1926) I.L.R. 49 Mad. 880.
(3) 1927 M.W.N. 645.
(4) A.I.R. 1932 Mad. 535.
(5) A.I.R. 1932 Mad. 537.
(6) (1934) I.L.R. 58 Mad 513.

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and WALLER JJ. who expressly reserved it, saying :

> "If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but the question does not arise here."

With great respect to PANDRANG ROW J., we think that the correct view is that taken by WALLACE and PAKENHAM WALSH JJ. in the cases quoted. The offence is failure to comply with any direction lawfully given or any requisition lawfully made ; it is not strictly speaking correct to say that the offence consists in failure to remove the encroachment. Nobody commits an offence under the Local Boards Act by mere failure to remove an encroachment. He only commits an offence under section 207 (1) when he fails to comply with a direction lawfully given. As WALLER J. observed in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*(1), if a particular direction or requisition is not enforced, there is nothing in the Act that prevents the President from issuing another, and if a prosecution is then launched, it is for failure to comply with the second requisition and not for failure to comply with the first. If this is borne in mind, it follows, as PAKENHAM WALSH J. held, that it makes no difference whether there has or has not been any previous prosecution. PANDRANG ROW J. fears that there is grave risk of persons being repeatedly harassed for the same offence, but this is, we think, not so. The respondent, when he was prosecuted for failure to obey the requisition issued in 1937, was not in fact or in law being again harassed for the offence which he was alleged to have committed

(1) (1926) I.L.R. 49 Mad. 880.

in 1936. He was being prosecuted for disobedience of the 1937 requisition, and it was no answer to that charge to say that he had been acquitted of the charge of disobedience of a requisition issued in 1936. We do not know why the prosecution in the case of 1936 was withdrawn ; it might have been for any one of many conceivable reasons having nothing to do with the merits of the case. The learned Public Prosecutor says that according to his instructions it was withdrawn because the Collector, as ex-officio President, had given a licence for the encroachment. If that is correct, and if the Board as at present constituted has decided that the encroachment must be removed, it is obvious that the respondent ought not to be able to avoid a prosecution merely because he was acquitted in the earlier case. If, on the other hand, the former prosecution was withdrawn because the District Board could not prove that an encroachment had been made, the Magistrate could have dealt with the matter under section 250 of the Criminal Procedure Code. The view of SRINIVASA AYYANGAR J. that the real offence in such cases is the encroachment [*Ramanuja Chariar* v. *Kailasam Iyer*(1)] was expressly dissented from in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*(2), and we are of opinion that the reasoning in the latter case is against the view of PANDRANG ROW J. in *Rangachariar* v. *Venkatasami Chetti*(3). If it were correct to say that the offence is complete once there is failure to disobey the notice, and that "another separate and distinct offence is not brought into being by the issue of a subsequent

(1) (1925) I.L.R. 48 Mad. 870. (2) (1926) I.L.R. 49 Mad. 880.
(3) (1934) I.L.R. 58 Mad. 513.

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notice when that notice is by the same authority to the same person and relates to the same encroachment", the learned Judges who decided *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*(1) could hardly have held, as they did, that the Municipal Council was entitled to issue a second notice, more than three months after the disobedience of the first. Their decision is clearly based on the point that the offence consists in the failure to obey the requisition. All difficulties vanish, we think, if this is kept in mind. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice but a different and distinct offence. If the encroachment is really an encroachment the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other. The Magistrate to whom such a complaint is made must take the evidence and ascertain whether the direction or requisition has been lawfully given or made, and whether it has been disobeyed. If he finds that the direction has not been lawfully given, the fact that there has been a previous prosecution and acquittal in respect of the same encroachment will be of great assistance to him in deciding whether he will or will not use his powers under section 250 of the Criminal Procedure Code.

We set aside the order of acquittal and direct the Sub-Magistrate to dispose of the case according to law.

V.V.C.

(1) (1926) I.L.R. 49 Mad. 880.