1934

UPENDRA NATH BASU v. MUNICIPAL BOARD, BENARES

We accordingly send down the following issue to the trial court through the lower appellate court for determination in the light of the observations made above: Did the premises, which constitute one tenement, remain vacant and unproductive of rent during the periods in dispute?

As the issue is practically a new one, we direct that the parties would be at liberty to produce any fresh evidence which they may choose to offer. The findings are to be returned within three months, if practicable.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Kendall and Mr. Justice Bajpai

1934
August, 20

EMPEROR *v.* MUHAMMAD MEHDI AND OTHERS*

Registration Act (XVI of 1908), *sections* 82, 83—*Offences under the Act—Sanction to prosecute—Previous permission of registration authorities essential for prosecution—Permission subsequent to inquiry and commitment by Magistrate, although prior to the sessions trial, is invalid—Defect whether curable—Criminal Procedure Code, sections* 532, 537.

Permission of the authorities mentioned in section 83 of the Registration Act is necessary before an accused can be prosecuted under section 82 of the Registration Act.

Where no such permission had been obtained until after the accused had been committed for trial to the sessions court, and the Sessions Judge at the trial acquitted the accused on that ground, and Government appealed from the acquittal, it was *held* that permission accorded after the inquiry and commitment by the Magistrate, although before commencement of the hearing at the sessions trial, did not validate the trial, because the commitment to the sessions court was itself illegal. The defect could not be cured by invoking section 532 or section 537 of the Criminal Procedure Code; for section 532 did not apply to a case where there was no question of the competence of the particular Magistrate to make the commitment but the prosecution was illegal on the ground of want of permission to prosecute; and section

*Criminal Appeal No. 102 of 1934, on behalf of the Local Government, from an order of acquittal passed by Farid-uddin Ahmad Khan, Sessions Judge of Fatehpur, dated the 25th of September, 1933.

537 did not apply to the case, as the order of acquittal was not sought to be set aside on the ground of the omission or irregularity in the matter of the permission to prosecute.

Held, also, that the Sessions Judge should have referred the case to the High Court for the quashing of the order of commitment, and that he erred in acquitting the accused when he felt that he had no jurisdiction to try the case.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Messrs. *Mahbub Alam, S. N. Verma* and *Shankar Lal Tewari*, for the accused.

SULAIMAN, C.J., KENDALL and BAJPAI, JJ.:—Two questions have been referred to the Full Bench by the Division Bench before which the appeal came up for hearing. These are:

(1) Is permission of the authorities mentioned in section 83 of the Registration Act necessary before an accused can be prosecuted under section 82 of the Registration Act?

(2) Does the permission accorded by the Inspector-General of Registration on the 28th of August, 1933, validate the trial?

It appears that the accused persons were prosecuted under section 467 read with section 471 of the Indian Penal Code and under section 82 of the Indian Registration Act (Act XVI of 1908). The case against them was that a forged document purporting to bear the thumb-impression of another person was executed and then presented for registration before the Sub-Registrar and a false person was identified as the executant. No permission of either the Inspector-General or the Registrar or the Sub-Registrar was obtained before the inquiry was made by the Magistrate. He took action on the complaint made by a Deputy Collector who was hearing a mutation case following upon the registration of the disputed document. The learned Magistrate committed the accused to the sessions court. The order of reference

1934

EMPEROR v. MUHAMMAD MEHDI

assumes that no objection was taken on behalf of the accused before the Magistrate as to the absence of permission. The Sessions Judge appears to have accepted the commitment, and he fixed a date for the trial and then took evidence. Before the hearing commenced a letter was received, which had been signed on behalf of the Inspector-General of Registration and granted the permission. The learned Sessions Judge after concluding the trial came to the conclusion that the want of sanction was a fatal defect to the prosecution. He then acquitted the accused on the main ground that no such sanction had been obtained before the commitment to his court.

The Government have appealed from the order of acquittal, but this Full Bench is concerned with the two questions of law which have been referred to it for answer.

Part XIV of the Indian Registration Act provides penalties for certain offences. Under section 81 there is a penalty for incorrectly endorsing, copying, translating or registering a document with intent to injure some person. Then under section 82 whoever intentionally makes a false statement, whether on oath or not, or intentionally delivers to a registering officer a false copy or translation of a document, etc., or falsely personates another and in such assumed character presents any document, or makes any admission, or abets anything made punishable by the Act, is punishable with imprisonment for a term which may extend to seven years, or with fine, or with both.

Sub-section (1) of section 83 reads as follows: A prosecution for any offence under this Act coming to the knowledge of a registering officer in his official capacity may be commenced by, or with the permission of, the Inspector-General . . . the Registrar or Sub-Registrar in whose territories, district or sub-district, as the case may be, the offence has been committed. Sub-section (2) provides as follows: Offences punishable under this

Act shall be triable by any court or officer exercising powers not less than those of a Magistrate of the second class.

The language of the section is admittedly very unhappy and has been the source of considerable divergence of opinion. The first difficulty is caused by the use of the word "may", and it has been suggested in some cases that the section is not mandatory but only directory, and that a private person can start a prosecution under section 83 of the Registration Act even without the permission mentioned therein. The argument is that the object of insisting on permission is for regulating the conduct of the registration authorities, and the section does not prevent private individuals from prosecuting accused persons under the section. On the other hand, it has been suggested that the word "may" in the section stands for the word "must" and the section is mandatory. There is difficulty in this view, because it could not have been intended that the Inspector-General of Registration or the Registrar or the Sub-Registrar is bound to commence a prosecution. Of course, if the intention of the legislature had been that there is an absolute prohibition against the commencement of any prosecution without previous permission, the more appropriate phraseology to use would have been "No prosecution shall be commenced without the permission, etc." The language unfortunately is not so clear.

But it is obvious that sections 81 and 82 create new offences which do not necessarily come within the scope of the provisions of the Indian Penal Code. It is also clear that in some cases a higher maximum of punishment is prescribed than is the case under the corresponding sections of the Indian Penal Code. If an act amounts to an offence under any other law, it is open to a private individual to file a complaint and have the accused person convicted; but if he wishes to take advantage of the provisions of sections 81 and 82 of the Act,

1934

EMPEROR v. MUHAMMAD MEHDI

it is necessary that he should follow the procedure laid down in the Act. The necessary result of taking a contrary view would be that private persons would be entitled to file complaints against registering officers, although the higher registration authorities have inquired into the matter and are satisfied that no offence has been committed and refuse to give permission for their prosecution. The offences contemplated in these sections are principally offences committed against the registering authorities, though of course, indirectly, private persons may also be injured thereby.

So far as the rulings in this Court are concerned they are all one way. We may refer to the case of *Emperor* v. *Jiwan* (1), *Emperor* v. *Husain Khan* (2), *Emperor* v. *Husain Khan* (3), *Mohan Lal* v. *King-Emperor* (4).

In *Emperor* v. *Husain Khan* (2) RICHARDS, C.J., pointed out that section 83 was neither very clear nor grammatical, but that it should be borne in mind that the offence was the creation of the Registration Act and finds no place in the Penal Code, and that therefore an accused person is entitled to the benefit of any ambiguity in the provisions of the Act. The learned CHIEF JUSTICE considered that it was certainly not unreasonable to hold that a prosecution for an offence under section 82 should not be commenced without the permission referred to in the section. He rejected the contention that the permission mentioned therein referred to permission by a registering authority only, for the reason that the different registering authorities are the very persons who are named by the section as the persons who should grant the permission. He agreed with the view previously expressed by TUDBALL, J., in *Emperor* v. *Jiwan* (1) and held that the conviction and sentence under section 83, in the absence of the previous permission, must be set aside. At the Bar the Full Bench

(1) (1914) I.L.R., 37 All., 107.
(2) (1916) I.L.R., 38 All., 354.
(3) (1916) I.L.R., 39 All., 293.
(4) (1921) 19 A.L.J., 813.

case of the Calcutta High Court, *Gopinath* v. *Kuldip Singh* (1), was cited before him, but he did not follow it. On the other hand the Calcutta High Court, in the matter of *Gopinath* v. *Kuldip Singh*, overruling the previous decision of a Bench of that Court, expressed the opinion that under section 83 it is not necessary that some one of the officers who are mentioned in that section must have given previous permission to institute proceedings. They considered that the provisions of section 83 were not obligatory, but they rather seemed to be intended for the purpose of enabling officers of the registration department, when they saw fit, to prosecute any person under the Act. Beyond this they gave no further reason. It may be pointed out in this connection that section 83 does not merely enable officers of the registration department to institute any prosecution, but it enables private citizens to do so with the previous permission of such officers. If a mere departmental discipline were intended it could have been provided by mere rules.

The Madras High Court in *Queen-Empress* v. *Vythilinga* (2) followed the view of the Full Bench of the Calcutta High Court without giving any additional reason. But the matter was considered very carefully by a Division Bench of the Madras High Court in *Re Nadathi* (3) and both the Judges came to the conclusion that permission was not absolutely necessary. AYLING, J., pointed out that the wording of section 83 was far from clear, but, on a consideration of the section, he felt inclined to take the same view as the Full Bench of the Calcutta High Court had taken. NAPIER, J., also said that the question was one on which it was possible to arrive at a different conclusion, and admitted that he had had great difficulty in arriving at his conclusion. This case was followed by the Madras High Court in *In re Palani Goundan* (4), and by a single Judge of the

(1) (1885) I.L.R., 11 Cal., 566
(2) (1888) I.L.R., 11 Mad., 500.
(3) (1917) I.L.R., 40 Mad., 880.
(4) A.I.R., 1921 Mad., 140.

1934

EMPEROR v. MUHAMMAD MEHDI

Patna High Court in *Gobindia* v. *King-Emperor* (1), and also by the Nagpur Judicial Commissioner's court in *Indrani Bahu* v. *Mst. Rani Badi Dulaiya* (2). The question has since been re-examined at considerable length by a Division Bench of the Rangoon High Court in *Nga Pan Gaing* v. *King-Emperor* (3). Both the learned Judges have examined almost every aspect of the question, and have come to the conclusion that the view expressed previously in the Allahabad cases was correct, and they have adopted that view in preference to the view expressed by the Calcutta and Madras courts. With perhaps one exception, namely that the word "may" has been used in the section in the sense of "must be", we agree with the numerous reasons given by the learned Judges in respect of the view they have taken.

Apart from the difficulty caused by allowing private persons to drag registering officers into criminal courts in spite of the refusal of the registration authorities to grant permission, there is the fact that section 82 would make mere false statements made before a Sub-Registrar, though not on oath, punishable with imprisonment for seven years, whereas a statement made on oath may be punishable under section 193 only with three years. It is also to be noted that the provisions in the earlier Act of 1866 were far more stringent, as they provided for a prosecution to be instituted by the registration authorities only, provided that a prosecution for an offence under the Act might be instituted, in the case of a Sub-Registrar, with the sanction of the Registrar. It is also clear that if it had been the intention of the legislature that private citizens should have the right to start a prosecution, there would be no point in providing that the prosecution might be commenced by or with the permission of the registering authority. This appears to be the latest well-considered judgment agree-

(1) A.I.R., 1924 Pat., 754. (2) A.I.R., 1925 Nag., 344.
(3) (1926) I.L.R., 4 Rang., 437.

ing with the views previously expressed by three learned Judges of this Court. We see absolutely no reason to differ from that view, because in our opinion that is the only reasonable interpretation that can be put on section 83 of the Act.

The second question that has been referred to us is whether the belated permission by the Inspector-General of registration validated the trial.

As, in our opinion, it was absolutely essential to obtain the previous sanction of the registration authorities, the prosecution of the accused under section 83 of the Act was certainly illegal and contrary to the provisions of that section. The learned Government Advocate has urged before us that the defect was cured in this case because permission was obtained before the trial commenced in the sessions court. His contention is that under section 532 of the Code of Criminal Procedure it was open to the Sessions Judge to accept the commitment in spite of the defect, and that that defect must be deemed to have been cured because subsequently the permission was obtained. He further contends that the omission to obtain this permission in time was a mere irregularity and is cured by section 537 of the Code.

In our opinion section 537 can have no application to this case. So far as the High Court is concerned, section 537 can be applied against an applicant who wants to have an order or sentence passed by a sessions court set aside, and the High Court would refuse to set it aside on account of any error, omission or irregularity, etc. if no failure of justice has been occasioned. In this case the order of acquittal is in favour of the accused persons, and they do not want to have it set aside on any ground of error, omission or irregularity. The learned Government Advocate also does not want to have that order set aside on the ground of any such error, omission or irregularity. His contention really is that the learned Sessions Judge has erred in law in holding that the

1934

EMPEROR v. MUHAMMAD MEHDI

prosecution was illegal. He, however, further contends that the order of acquittal is illegal.

As far as section 532 is concerned, it appears to us that that section does not apply to a case where the prosecution is illegal on the ground of want of such permission. In the first place, section 537 used to have a subsequent clause (*b*) dealing with the want of, or any irregularity in, any sanction required by section 195, etc. This has been deleted. The deleted clause suggests that want of sanction was not contemplated in section 532. Section 532 deals with cases where a Magistrate, purporting to exercise powers of commitment which are not so conferred upon him, commits an accused person for trial before the sessions court. In the present case there was no question as to the competence of the Magistrate. He was a Magistrate of the first class who was perfectly competent to inquire into a criminal case and to commit the case to the sessions court. The main defect was that the prosecution was illegal for want of sanction. We agree with the view expressed by the Bombay High Court in *Emperor* v. *Madhav Laxman* (1) that section 532 does not apply to a case where there is no question that the Magistrate who committed the accused for trial to the court of session had the power to do so, but the only defect is that there was no previous sanction. In such a case the Sessions Judge had no power to quash the commitment and direct a fresh inquiry, but the proper procedure was to make a reference to the High Court.

That this is necessarily the correct interpretation is obvious from sub-section (2) of section 532 which provides that if the sessions court considers that the accused was injured or if such objection was so made it shall quash the commitment and direct fresh inquiry by a *competent Magistrate*. Where the Magistrate who has committed an accused is not competent to commit an accused, the Sessions Judge may either accept the commit-

(1) (1918) I.L.R., 43 Bom., 147 (153)

ment if there is no injury to the accused and if no objection had been taken before the Magistrate, or may quash the commitment and then direct that another Magistrate who is competent to commit the accused should inquire into the case. Obviously, where there is a defect of want of previous permission there can be no other competent Magistrate who can inquire into the matter. Section 532 therefore would not be applicable to such a case.

The learned Sessions Judge, therefore, should not have gone on with the trial when he was satisfied that the Magistrate had acted illegally in committing the accused to his court in the absence of proper permission, and he felt that he himself had no power to try the case and convict the accused; he should have reported the case to the High Court for the quashing of the order of commitment. The learned Sessions Judge has erred in acquitting the accused when admittedly he had no jurisdiction to try them.

A Magistrate can take cognizance of an offence on a complaint filed before him; but a Sessions Judge can take cognizance of a case only when a case has been properly committed to his court. If the commitment is wholly illegal and is not merely irregular, so that the defect can not be cured by him, the Sessions Judge has no option but to refer the case to the High Court. The learned advocate for the accused has contended before us that section 215 cannot apply to this case because the Magistrate who committed the accused to the sessions court was not a competent Magistrate. We are unable to accept this contention. There was no question of incompetence of the Magistrate in this case. He was perfectly competent under section 206 to commit the accused to the sessions court within the meaning of section 215 of the Code of Criminal Procedure, but his commitment was illegal as it was contrary to law. The High Court therefore has ample powers under the

1934

EMPEROR v. MUHAMMAD MEHDI

section to quash the commitment on a question of law. When a matter is brought before the High Court and it appears that the order of commitment was illegal, the High Court will, of course, quash the commitment, and may either drop the proceedings altogether or act under section 439 read with section 423 of the Code and order a fresh inquiry.

Our answers to the two questions referred to us are as follows:

1. Permission of the authorities mentioned in section 83 of the Registration Act is necessary before an accused can be prosecuted under section 82 of the Registration Act.

2. The permission accorded by the Inspector-General of registration on the 28th of August, 1933, did not validate the sessions trial because the commitment to the sessions court was itself illegal.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Collister

1934
August, 22

TULSHI PRASAD (PLAINTIFF) *v.* JAGMOHAN LAL AND OTHERS (DEFENDANTS)*

Hindu law—Widow's estate—Alienation by widow—Sale by widow to discharge time barred debts of her husband

A sale by a Hindu widow of property inherited by her from her husband, for the purpose of discharging the debts of her husband, even if they are time barred, is valid and binding on the reversioners.

Messrs. *P. L. Banerji* and *K. Verma*, for the appellant.

Mr. *Panna Lal*, for the respondents.

NIAMAT-ULLAH and COLLISTER, JJ.:—This is a plaintiff's appeal. The plaintiff is a daughter's son of one Ganga Ram, who died on the 5th February, 1904. He left a widow, by name Mst. Mohani Kunwar, who died on the 1st February, 1922, leaving a daughter Mst.

*First Appeal No. 374 of 1931, from a decree of J. N. Dikshit, Additional Subordinate Judge of Etah, dated the 20th of July, 1931.