1929

SHEIKH AHMED v. BABU DEVJI

Baker J.

the finding as to adverse possession will operate as *res judicata* and the present suit must therefore fail.

The order of the lower appellate Court should be reversed and the suit dismissed.

Order set aside.

J. G. R.

CRIMINAL REVISION.

Before Mr. Justice Patkar and Mr. Justice Baker.

1929

April 10.

SHANKER DATTATRAYA VAZE, PETITIONER (ORIGINAL COMPLAINANT) *v.* DATTATRAYA SADASHIV TENDULKAR, OPPONENT (ORIGINAL ACCUSED).*

Criminal Procedure Code (Act V of 1898), sections 247 and 403—Summons issued but not served—Complainant and accused absent on date fixed—Accused acquitted—Fresh complaint before another Magistrate—Fresh trial barred—Presidency Towns Insolvency Act (III of 1909), section 102.

An order of acquittal made under section 247 of the Criminal Procedure Code, 1898, is a final order and under section 403 of the Code operates as a bar to the trial of the accused on the same facts.

Under section 247 of the Criminal Procedure Code, 1898, proceedings are said to commence against an accused as soon as a Magistrate takes cognizance of an offence and an order for summons is issued; it is not necessary that summons should be served or that the accused should be present in Court before an order of acquittal is passed in his favour on account of the absence of the complainant.

In re Muthia Moopan,[1] distinguished.

In re S. E. Dubash[2]; *Kotayya* v. *Venkayya*[3]; *Re Dudekula Lal Sahib*[4]; *Guggilapu Paddaya of Palakot*[5]; *Kiran Sarkar* v. *Emperor*[6]; *Nityananda Koer* v. *Rakhahari Misra*[7]; *Emperor* v. *Dulla*[8] and *Ram Mahato* v. *Emperor*,[9] referred to.

CRIMINAL application for Revision against the order passed by I. N. Mehta, Presidency Magistrate, Bombay.

The material facts are stated in the judgment.

G. A. Phadnis, for the complainant.

P. B. Shingne, Government Pleader, for the opponent.

PATKAR, J. :—In this case the complainant filed a complaint on April 11, 1927, against the accused under

*Criminal Application for Revision No. 40 of 1929.

(1) (1911) 36 Mad. 315.
(2) (1908) 10 Bom. L. R. 628.
(3) (1917) 40 Mad. 977 *f. n.*
(4) (1917) 40 Mad 976.
(5) (1910) 34 Mad. 253.
(6) (1923) 24 Cr. L. J. 815.
(7) (1923) 24 Cri. L. J. 716.
(8) (1922) 45 All. 58.
(9) (1921) 22 Cr. L. J. 331.

1929

SHANKAR DATTATRAYA v. DATTATRAYA SADASHIV

Patkar J

section 102 of the Presidency Towns Insolvency Act alleging that the accused being an undischarged insolvent had obtained credit from the complainant. Summons was issued but was not served, and on April 28, 1927, the complainant was absent in Court. The accused was also not present. Under section 247 of the Criminal Procedure Code the learned Magistrate acquitted the accused. On April 29, the complainant appeared before the Court and requested the Court to set aside the order on the ground that he was unable to be present in Court on April 28. The application of the complainant was rejected. On May 2, 1928, nearly a year after the order of acquittal, the complainant filed a fresh complaint before another Magistrate. The learned Magistrate held that the accused having been acquitted under section 247 of the Criminal Procedure Code, a fresh trial of the accused was barred under section 403 of the Criminal Procedure Code.

On behalf of the complainant it is urged that the order of acquittal passed on April 28 is not a legal order, and that the order of acquittal does not bar the trial of the accused under the fresh complaint. It is urged that though summons was issued, it was not served upon the accused and the trial of the accused had not commenced in the previous proceedings. The wording of section 247 is against the contention of the applicant. Section 247 of the Criminal Procedure Code says :—

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

In *In re S. E. Dubash*,[1] where in the absence of the complainant the Magistrate struck off the complaint, it

[1] (1908) 10 Bom. L. R. 628.

was held that the proper order under section 247 was an order of acquittal. Under section 403 of the Criminal Procedure Code:—

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

It is clear that the previous order of acquittal has remained in force and has not been set aside by any order of a superior Court. The word "tried" in section 403 does not necessarily mean tried on the merits. The composition of an offence under section 345 of the Criminal Procedure Code, or a withdrawal of the complaint by the public prosecutor under section 494 of the Criminal Procedure Code would result in an acquittal of the accused even though the accused is not tried on the merits. Such an acquittal would bar the trial of the accused on the same facts on a subsequent complaint. Under the explanation to section 403 "the dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section." The composition of an offence under section 345, the withdrawal under section 494, or an acquittal under section 247 of the Criminal Procedure Code is not included in the explanation to section 403 of the Criminal Procedure Code. It is urged, however, on behalf of the applicant that though the word "tried" may not mean trial on the merits, yet the trial must commence before an order of acquittal is passed, and that unless a summons is served in a summons case against the accused the trial cannot be said to have commenced against the accused. We are of opinion that as soon as a Magistrate takes cognizance of an offence and an order for summons is issued, the proceedings have commenced against the

1929

SHANKAR DATTATRAYA v. DATTATRAYA SADASHIV

Patkar J.

accused, and under section 247 it is not necessary that the summons should be served, or that the accused should be present in Court before an order of acquittal might be passed in his favour on account of the absence of the complainant. Reliance is placed on the decision in *In re Muthia Moopan*,[1] which was a case under section 107 of the Criminal Procedure Code and was not a case of an offence in which the accused could be acquitted under section 247 of the Criminal Procedure Code. In *Kotayya* v. *Venkayya*,[2] on which reliance was placed on behalf of the applicant, it was held that the trial of an accused in a summons case cannot be said to begin until the particulars of the offence are stated to the accused under section 242 of the Criminal Procedure Code. The view in *Kotayya* v. *Venkayya*[2] has been dissented from by the Madras High Court in *Re Dudekula Lal Sahib*,[3] where it was held that the withdrawal of a case by the public prosecutor under section 494 followed by the acquittal of the accused was sufficient to bar the further trial of the accused for the same offence, and that though the accused was not tried on the merits the withdrawal of the prosecution by the Public Prosecutor after the summons was issued but before it was served on the accused was sufficient to bar the subsequent trial of the accused. In *Guggilapu Paddaya of Palakot*[4] it was held that when a case was disposed of under section 247 of the Criminal Procedure Code, the complainant and accused both being absent, the order under section 247 operated as a bar to further proceedings. The accused who was, however, served with process in that case was held entitled to the benefit of an acquittal under section 247. In *Kiran Sarkar* v. *Emperor*,[5] it was held by the Patna High Court that the important matter for an order

[1] (1911) 36 Mad. 315.
[2] (1917) 40 Mad. 977 *f. n.*
[3] (1917) 40 Mad. 976.
[4] (1910) 34 Mad. 253.
[5] (1923) 24 Cri. L. J. 815.

under section 247 of the Criminal Procedure Code is the presence or absence of the complainant, that it is not necessary that the accused must be present or must have been summoned to the Court, and that the order under section 247 is a final order of acquittal which operates as a bar under section 403 of the Code to the trial of the accused for the same offence. To the same effect is the decision of the Calcutta High Court in *Nityananda Koer* v. *Rakhahari Misra*[1] where it was held that an order of acquittal passed under section 247 of the Criminal Procedure Code, so long as it is not set aside by a competent Court is a bar to the fresh proceedings in respect of the same offence. To the same effect is the decision of the Allahabad High Court in *Emperor* v. *Dulla*.[2] In *Ram Mahato* v. *Emperor*,[3] it was held that the provision contained in section 403 of the Criminal Procedure Code is imperative and bars a second trial of a person who has once been acquitted on the same charge, that the section does not make any distinction between acquittals after trial and acquittals under sections 247, 345 and 494 of the Code, and that so long as an order of acquittal under section 247 stands, section 403 bars a second trial on the same charge, no matter whether the order of acquittal is good or bad, legal or illegal. The intention of the Legislature is quite clear for it appears from section 205 of Act X of 1872 that the Magistrate could only dismiss the complaint under the Criminal Procedure Code of 1872 whereas under the Code of 1882 and the subsequent Codes the Magistrate was empowered to acquit the accused. The statutory acquittal was intended to operate as a final bar to further proceedings. The order of acquittal in this case has remained in force and has not been set aside. On these grounds we think that

(1) (1923) 24 Cri. L. J. 716. (2) (1922) 45 All. 58.
(3) (1921) 22 Cri. L. J. 331.

1929

SHANKAR DATTATRAYA v. DATTATRAYA SADASHIV

the order of acquittal passed by the Magistrate on April 28 bars a fresh trial of the accused on the same facts under section 403.

On these grounds we discharge the rule.

Paikar J.

BAKER, J.:—I agree. The balance of authorities is in favour of the view we have taken. The Madras High Court had at one time expressed a different view, but ultimately the view taken by Abdur Rahim J. in *Guggilapu Paddaya of Palakot*[1] has been accepted in *Re Dudekula Lal Sahib*.[2] The learned Chief Justice in dealing with the question has pointed out that the English rule of recording decisions on the merits has not been adopted by the Indian Legislature which has provided for certain statutory acquittals. It is obvious in view of these particular sections, namely, sections 247, 345 and 494, that the word "trial" or "tried" in section 403 cannot mean a trial in the ordinary sense of the word, that is, a decision on the merits, because each of these sections provides for an acquittal even when no evidence whatever has been recorded against the accused. I can find no reason why and how the definition of "tried" does not exist in the section we should insert it in the Code. Section 247 says:—

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused . . ."

It is to be noticed that it does not say "upon the day on which the accused appears" but only "the day appointed for the appearance of the accused," and if it had been intended that the appearance of the accused to answer the charge was necessary, there is no reason why the legislature should not have said so. I would, therefore, with respect agree with the view taken by the Madras High Court in *Re Dudekula Lal Sahib*.[2]

[1] (1910) 34 Mad. 253. [2] (1917) 40 Mad. 976.

1929

SHANKAR DATTATRAYA v. DATTATRAYA SADASHIV

Baker J.

There is another point in this case. This order of acquittal was passed long ago and no proceedings by way of revision were taken by the complainant in order to get it set aside, and any such application for revision of that order would now be rejected as out of time. But the complainant tried to do by a side way what he could not do directly and filed a fresh complaint on the same facts. I do not think that this should be encouraged and that is an additional reason for rejecting the application. But on the law as it stands I am quite clear in my mind that the order of acquittal passed by the Magistrate under section 247, although the accused had not been served with a summons, is a good order and such an acquittal operates as a bar to any such trial on the same facts.

I agree, therefore, that the rule should be discharged.

Rule discharged.

J. G. R.

PRIVY COUNCIL.

RADHOBA BALOBA WAGH AND OTHERS (PLAINTIFFS) *v.* ABURAO BHAGWANTRAO SHIROLE AND OTHERS (DEFENDANTS).*

J. C.*
1929
June 14.

[On Appeal from the High Court at Bombay]

Indian Limitation Act (IX of 1908), Schedule I, Article 127—Hindu Law—Partition—Exclusion from joint family—Voluntary non-residence with family—Maintenance and education not contributed to—Absence of intention to exclude.

In 1898 a member of a joint Hindu family, whose father and mother had both died and who was then twelve years of age, went to reside with his maternal uncle, and never afterwards returned to the joint family residence. The joint family did not contribute to the expenses of his maintenance, education or marriage, nor were they asked to do so. He came of age in 1904, and not till 1920 did he sue for partition. The facts above stated were proved. The defendants also alleged, but failed to prove, that in 1906, and again in 1909, the plaintiff had demanded a share of the family property but had been definitely refused.

Held, that the facts proved did not establish an intention to exclude the plaintiff from the joint family, and that the suit therefore was not barred by

Present: Lord Carson, Sir Lancelot Sanderson and Sir Binod Mitter.