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BAI RAJARAM TUKARAM v. MANEKLAL MANSUKHBHAI

Tyabji J.

It seems to me, that, however extensive a meaning be given to the word *avyavaharika*, these debts do not fall within that meaning.

[After dealing with the points regarding rate of interest and the status of the appellant as agriculturist which are not material for the purposes of this report, his Lordship concluded :]

I agree that the appeal should be dismissed with costs, subject to the variations mentioned by my learned brother.

Decree confirmed.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Barlee.

EMPEROR *v.* HARI MORESHWAR JOSHI.*

1931
August 10.

Criminal Procedure Code (Act V of 1898), section 347—Indian Penal Code (Act XLV of 1860), section 124A—Sedition—Commitment to Court of Session—Discretion of Magistrate—Power of High Court.

Where an accused is charged under section 124A of the Indian Penal Code the Magistrate trying the case has a discretion under section 347 of the Code of Criminal Procedure either to try the case himself or to commit it for trial to the Court of Session. In exercising his discretion he must have due regard to the importance of the case, the maximum penalty provided by the section for the offence and the desirability or otherwise of a trial by jury or with the aid of assessors.

Although the High Court has power to review an order passed by a Magistrate in the exercise of his discretion it will only do so on definite grounds.

Emperor v. *Krishnaji Prabhakar*,[1] commented on.

CRIMINAL APPLICATION for revision praying that the First Class Magistrate at Alibag may be directed to commit the case pending in his Court against the accused on a charge of sedition under section 124A of the Indian Penal Code to the Court of Session at Thana for trial.

*Criminal Application No. 202 of 1931.

[1] (1920) 53 Bom. 611.

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EMPEROR v. HARI MORESHWAR

The petitioner (accused) was the Editor of a Marathi Newspaper called "Swadharma" and was publicist of some repute in Maharashtra. He was prosecuted before the First Class Magistrate at Alibag for having committed an offence under section 124A of the Indian Penal Code for a speech delivered at Panwel which was charged as seditious. In the course of the trial an application was made to commit the case to the Court of Session at Thana for trial, but the learned Magistrate passed an order to the effect that if, after hearing the arguments of both sides and going through the evidence, he was convinced that there was a *prima facie* case against the accused, he would frame a charge and try the case himself. Against this order the petitioner applied to the High Court in revision.

K. M. Munshi, with Messrs. *Manilal Kher and Ambalal*, attorneys, for the accused.

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

Arguments of counsel are sufficiently set out in the judgments.

BEAUMONT, C. J. :—In this case the petitioner is about to be charged under section 124A of the Indian Penal Code, the nature of the offence being that he made a speech in which it is alleged that there were seditious passages, and he now applies that the First Class Magistrate, Alibag, in whose Court the case is pending, may be ordered to commit the case to the Court of Session at Thana for trial.

Now, under Schedule II to the Criminal Procedure Code it is provided that the method of trial for offences under section 124A may be either the Court of Session, Chief Presidency Magistrate, District Magistrate or Magistrate of the First Class specially empowered by the Local Government in that behalf. In the present case the matter has been inquired into by a Magistrate of the First Class specially empowered by the Local Government at Alibag, and he has expressed the view that if he thinks a *prima facie* case

is made out against the accused he will frame a charge and try the case himself. Now, it seems to me that under the Criminal Procedure Code the Magistrate has a discretion to decide in what way the case shall be tried having regard to the alternatives given by the Schedule. No doubt that discretion must be exercised in a judicial manner. The Magistrate must have regard to the importance of the case and to the fact that the maximum penalty under the section is transportation for life, though if he tries the accused himself he cannot give a longer term of imprisonment than two years. He must consider no doubt also whether if he sends the case to the Court of Session there will be a Jury or Assessors and in that connection he may consider which of the two tribunals, his own Court or the Sessions Court, is the more satisfactory tribunal for deciding the case. No doubt also his discretion is subject to review by the High Court. But if we are asked to review the Magistrate's discretion we can only do so on certain definite grounds, and as far as I can see, no grounds are suggested in this case which would not apply to practically every case under section 124A.

We were much pressed with the decision of this Court in *Emperor* v. *Krishnaji Prabhakar*.[1] In that case the seditious statement had been published in the accused's newspaper which had a very wide circulation, and, therefore, on the facts the case is distinguishable from the present case. Both the learned Judges who decided that case disclaimed the intention of laying down a rule that in every case under section 124A the proper tribunal was a Sessions Court. But with all deference to the learned Judges I am bound to say that some of their reasons seem to me to tend to that result. They rely, for instance, on the fact that under section 124A the maximum penalty is transportation for life, and they express the view that a Jury is the more appropriate tribunal for cases under the section. We

[1] (1929) 53 Bom. 611.

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Beaumont C. J.

have, however, to face the fact that the Legislature has not seen fit to provide that in every case in which the trial at Sessions will enable the accused to have a Jury he is to be entitled to that privilege. It seems to me that if we interfere with the discretion which the learned Magistrate has exercised in this case we shall in effect be striking out of the Schedule of the Code the provision that offences under section 124A may be tried by a Magistrate. We have no jurisdiction to do that, and in my opinion there is no ground on which we can interfere with the discretion of the Magistrate. The application is, therefore, dismissed.

BARLEE, J.:—I agree. Mr. Munshi's first argument was that the accused, who is an editor of a newspaper and a publicist of some distinction in Maharashtra, should be given the benefit of a Jury trial on that account. I cannot agree with him that the position in life of an accused person should weigh with us in any way.

His second argument was that a Jury will be better able to understand the case since its decision will depend upon the interpretation of speeches and an estimate of the probable effect which the words used by the accused, if they are proved to have been used by him, must have had on the general public. This argument, too, I cannot accept. It seems to me, from my experience of juries in the mofussil, that a trained First Class Magistrate of experience is far more likely to be able to understand the evidence and to interpret it correctly than a chance collection of gentlemen who have no training in such matters.

The real question in these matters is, in which Court will there be the fairer trial, or rather, as the onus is on the applicant, whether it is likely that the trial before the First Class Magistrate, Alibag, will be at all unfair. This, I take it, is the real reason for his application. Mr. Munshi very properly has not said anything against the Magistrate, but after all the Magistrate is a Government servant, and in

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a case in which Government are peculiarly concerned, naturally an accused person may have some apprehension that there will be some bias in favour of Government in the mind of the Magistrate. This view I can sympathize with, but in my opinion it cannot prevail. We must take the law as it stands and the law is that a case of this nature may be tried by a First Class Magistrate, a Government servant, in spite of the fact that in all such cases Government are directly interested. There is no provision for a jury trial as no doubt there would have been, had the Legislature thought that in such cases an accused person should be given the benefit of trial by a jury of his own countrymen. For this reason I agree with his Lordship the Chief Justice that we cannot accede to the request of the applicant.

Rule discharged.

B. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Wadia.

RAICHAND DHANJI *v.* JIVRAJ BHAVANJI AND OTHERS.*

1930
December 3

Indian Succession Act (XXXIX of 1925), sections 57, 213—Will—Probate—Person claiming under a will of the class specified in section 57 of the Act should obtain probate—Suit—Decree—Practice—Bombay High Court.

Under section 213 of the Indian Succession Act the grant of probate of a will is not a condition precedent to the institution of a suit for claiming a right as executor or legatee under the will. A legatee or executor can file a suit without obtaining probate, but he will not be entitled to a decree unless probate is granted to him before the passing of the decree.

Chandra Kishore Roy v. *Prasanna Kumari*[1]; *Meyappa Chetty* v. *Supramanian Chetty*[2]; *Jamsetji Nassarwanji* v. *Hirjibhai Naoroji*[3] and *Charu Chandra Pramanik* v. *Nahush Chandra Kundu*,[4] followed.

The practice, which has grown up in the Bombay High Court, under which the Court passes a decree in a suit by an executor or a legatee, and gives a direction that the decree is not to be sealed until probate is granted or representation is taken out, is not correct.

*O. C. J. Suit No. 2594 of 1924.

(1) (1910) L. R. 38 I.A. 7, s.c. 38 Cal. 327.
(2) (1916) L. R. 43 I. A. 113.
(3) (1912) 37 Bom. 158.
(4) (1922) 50 Cal. 49.