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section. In the present case, I am clearly of opinion that the act of trespass alleged was not done with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, but was done with the intention of asserting a supposed legal right.

The conviction must, therefore, be set aside, and the fine, if paid, refunded. The order under section 522 is set aside; and the possession of the house, if given under that order, must be restored.

N. J. WADIA J. I agree.

Conviction set aside.

Y. V. D.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

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August 23

NARAYAN MUDLAGIRI MAHALE (ORIGINAL ACCUSED No. 1), APPLICANT *v.* EMPEROR.*

Child Marriage Restraint Act (XIX of 1929), section 6—Child marriage—Marriage solemnized at Goa, outside British India—Marriage no offence—Parents of the child not punishable in British India—Criminal Procedure Code (Act V of 1898), section 188—Indian Penal Code (Act XLV of 1860), section 4.

The accused were charged under section 6 of the Child Marriage Restraint Act, 1929, in that they permitted or failed to prevent the marriage of their son, who was under the age of eighteen years. The marriage took place at Goa, outside British India. The accused were tried by the District Magistrate of Kanara, where the accused were residing at the time of the charge. They were convicted of the offence. A question being raised whether the conviction was legal, it was contended by the Government Pleader that by reason of the provisions of section 188 of the Criminal Procedure Code, 1898, the conviction was legal:

Held, setting aside the conviction, that the child marriage contracted outside British India was not an offence under the Child Marriage Restraint Act, 1929, and if it was not an offence under the Act, there was no offence to which section 188 of the Criminal Procedure Code could apply.

The Child Marriage Restraint Act, 1929, is limited in its operation to British India and only strikes at marriages contracted in British India.

*Criminal Revision Application No. 179 of 1935.

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Section 188 of the Criminal Procedure Code, 1898, deals with procedure and nothing else. To attract the section it must be shown that an accused has been guilty of an act or omission made punishable by some law (which must mean some law applicable to British India) for the time being in force.

Where the Court is dealing with an act committed outside British India by an Indian subject which would be an offence punishable under the Penal Code, if it had been committed in British India, section 4 of the Penal Code, as it now exists, constitutes the act an offence, and it can be dealt with under section 188 of the Criminal Procedure Code.

Queen Empress v. *Daya Bhima*[1] and *Empress* v. *S. Moorga Chetty*,[2] referred to.

CRIMINAL REVISION APPLICATION against the order passed by G. H. Salvi, Sessions Judge of Kanara, confirming the conviction and sentence against accused No. 1 passed by T. T. Kothawala, District Magistrate, Kanara.

Offence under section 6 of the Child Marriage Restraint Act, 1929.

One Narayan Mudalgiri and his wife Savitri were residing at Kanara. They had a son named Mudalgiri, who was born on August 25, 1916. They got the marriage of Mudalgiri solemnized at Goa in Portuguese Territory on March 9, 1934.

Both Narayan and Savitri were charged with the offence under section 6 of the Child Marriage Restraint Act. As the offence took place at Goa beyond the limits of British India, sanction was obtained under section 188 of the Criminal Procedure Code.

The trial of the accused was held in the Court of the District Magistrate, Kanara. The District Magistrate held that he had jurisdiction to try the case. He further found that the accused as parents had charge of their son, who was a minor at the date of the marriage, and the accused permitted the solemnization of the marriage in spite of the knowledge that the son was a minor and failed to prevent it from being solemnized. He, therefore, convicted both the accused of the offence charged and sentenced Narayan, accused No. 1, to pay a fine of Rs. 60 and Savitri, accused

(1) (1888) 13 Bom. 147. (2) (1881) 5 Bom. 338.

No. 2, Rs. 40, or in default to undergo simple imprisonment for fifteen days each. His reasons were as follows :

"It is further urged that section 188, Criminal Procedure Code, cannot give extra territorial jurisdiction under the Child Marriage Restraint Act as no provision is made in that Act for this purpose as is made under section 4 of the Indian Penal Code. The Indian Penal Code of 1860 had to make this provision for its own 'offences' till the subsequent Criminal Procedure Code of 1898 extended the application of the principle to all 'offences'. It is urged that the word 'offence' in section 4, Indian Penal Code, has a restrained meaning. It is so, but the word 'offence' is not defined there. It only is stated what it includes, which means only a part of the whole, the full definition of the word offence is to be found in section 4 (*o*) Criminal Procedure Code, which includes acts 'made punishable by any law, for the time being in force'. It is therefore obvious that if the act of the accused is an 'offence' as laid down in the Child Marriage Restraint Act then this Court has jurisdiction under section 188, Criminal Procedure Code.

The defence have cited a case under 25 Bom. L. R. 772 where the Bombay High Court has held that British Courts had no jurisdiction to try a case which alleged giving false information to a public servant and false evidence on oath, in Foreign (Baroda) Territory.

The High Court has held that the British Courts have no jurisdiction not because it was not an offence in both the jurisdiction but because, as far as the British Courts were concerned, no offence could be said to have been committed as the 'oath' is not the 'oath' required by British Codes and Courts and 'Public servants' were not the Public Servants mentioned recognised by British Codes. In other words the very ingredients necessary to constitute an offence in British India were wanting.

The case cited by the learned Pleader for the complainant is more to the point. 8 B. H. C. R. Crown Cases p. 92 where it has been held that the fact that the act may not be an offence where it was committed, is immaterial for the purposes of British Courts."

On appeal, the Sessions Judge, Kanara, upheld the conviction and sentence against Narayan, accused No. 1, and acquitted Savitri, accused No. 2, on the ground that it was not proved that she had been in charge of the boy. On the question of jurisdiction, he agreed with the District Magistrate, observing as follows :—

"It is pressed on behalf of the appellants that there is no provision in the Child Marriage Restraint Act making a parent or a guardian concerned in a child marriage solemnised outside British India punishable and that in so far as a child marriage is not punishable in the Portuguese territory, section 188 of the Code of Criminal Procedure is not applicable. It is however to be noted that section 188 makes every offence committed outside British India triable at any place within British India at which the person committing the offence may be found and that under section 4 (*o*) of the said

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Code an offence means any act or omission made punishable by any law for the time being in force. It is no doubt true that section 4 of the Indian Penal Code is practically a reproduction of a part of section 188 of the Code of Criminal Procedure. It cannot, however, be argued that that fact warrants a conclusion that a similar provision would have been introduced in the Child Marriage Restraint Act by the Legislature had they meant to make the offences under that Act committed outside British India punishable. Section 4 of the Indian Penal Code was enacted in the year 1898 when the present Code of Criminal Procedure was enacted. While giving the object of the Bill to amend the Indian Penal Code by introducing that provision, the Honourable Mr. Chalmers who moved the Bill expressly said that it was thought right and convenient in the case of a Code like the Indian Penal Code that the extent of its extra-territorial operations should appear on the face of the Code itself and it was therefore that the Bill was proposed to be introduced. In fact, that section, namely, section 4 of the Indian Penal Code, is superfluous inasmuch as it does not enact anything more than what is enacted in section 188 of the Code of Criminal Procedure. Beyond doubt it is inserted *ex majore cautulum*. The ruling in *Rambharithi's* case reported at I. L. R. 47 Bom. 907, relied on by the learned pleader for the appellants, is not at all applicable. In that case, it was found that the acts charged against the appellant did not constitute offences under the Indian Penal Code at all and it was therefore that the persons that were alleged to have committed the offence could not be proceeded against. The second proviso to section 188 of the Code of Criminal Procedure does not warrant any inference favourable to the accused. A provision is made thereby to ensure exemption from another prosecution for the same offence outside British India when once proceedings are taken under section 188 in British India in respect of any act or omission committed by him. That provision had to be made so that a man should not be subjected to prosecution for the same offence twice if the act or omission committed by him is punishable in both the territories."

Accused No. 1 applied to the High Court.

G. P. Murdeshwar, for the applicant. I submit that when a person contracts a child marriage outside British India, he commits no offence and his guardian is not liable to be punished for promoting such a marriage. The Child Marriage Restraint Act, 1929, extends to British India only. Reading the preamble with section 1 (2) of the Act, it is clear that the Act aims at restraining the solemnisation of child marriages in British India. If it was intended to restrain the performance of child marriages outside British India, a provision similar to that in section 4 of the Indian Penal Code would have been made in this Act. For instance the Indian Railways Act (IX of 1890), section 1 (2)

makes such a provision, as also section 1 of the Indian Telegraph Act (Act XII of 1885). Section 4 of the Indian Penal Code, while it enacts that its provisions apply to any offence committed by a native Indian subject of Her Majesty outside British India, makes it clear by an Explanation that the word " offence " in that section includes acts committed outside British India which if committed in British India would be punishable under the Code. Section 4 of the Indian Penal Code, therefore, does not apply to this case. The lower Courts have relied on section 188 of the Criminal Procedure Code as though it enacts substantive law. Section 188, however, relates to procedure only. While section 4 of the Indian Penal Code fixes the liability of the persons named therein, section 188 of the Criminal Procedure Code provides the Court and the procedure for their trial. The latter section is complementary to the former. The view that section 4 of the Indian Penal Code reproduces a part of section 188 of the Criminal Procedure Code and is thus superfluous has no basis. Section 188 occurs in a part of the Criminal Procedure Code which relates to " Jurisdiction of the Criminal Courts in Inquiries and Trials ". It does not contain any substantive law. Though the word " offence " in section 188 includes any act made punishable by *any* law in force in British India, the power to deal with the offence committed outside British India as if it took place in British India does not arise under that section, unless the act committed outside British India is made punishable by a substantive enactment.

[BEAUMONT C. J.: The other view is that when the Court is given power to deal with an act committed outside British India as if it is committed in British India, it has the power to punish the offender as if the act was committed in British India.]

The prosecution must first prove that the act in question is an " offence " punishable under some enactment and it

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is only then that the Court mentioned in section 188 can deal with it. If the act in question is punishable under the Indian Penal Code or the Railways Act or the Telegraph Act, it is an offence, to deal with which section 188 indicates the Court and the procedure. The Child Marriage Restraint Act is expressly confined to British India and the solemnisation in Goa of what would be a child marriage according to the British laws is not an offence. See *Empress* v. *S. Moorga Chetty*.[1] Nor is it an offence under any other law. The application of section 188 is therefore excluded. If the view of the lower Courts is correct, a Native Indian subject of His Majesty would be guilty under the Arms Act, if he is found in possession of a gun in Hyderabad (Deccan) without holding a license and nobody has yet suggested that he is liable to be so punished.

Dewan Bahadur P. B. Shingne, Government Pleader, for the Crown. I submit that section 188 of the Criminal Procedure Code enacts substantive law and not merely adjectival law. The word "offence" means an offence punishable by any law. A child marriage is made punishable by Act XIX of 1929 and the offence can be dealt with as if it took place in British India. In effect, the act though committed outside British India becomes liable to be dealt with as though it is committed in British India. Section 4 of the Indian Penal Code as it now stands was enacted in 1898. Prior to 1898, that section applied to Government servants only. Even so it was held in 1888 that a person who committed criminal breach of trust at Daman (Portuguese India) could be tried as if the offence took place in British India. See *Queen-Empress* v. *Daya Bhima*.[2] Their Lordships in that case relied wholly on section 188 of the Criminal Procedure Code.

[BEAUMONT C. J. The Court there assumed that the act of the accused at Daman was an offence and did not

[1] (1881) 5 Bom. 338.

[2] (1888) 13 Bom. 147.

discuss the point which had been dealt with in *Empress* v. *S. Moorga Chetty*.[1]]

In that case, the Sessions Judge had acquitted the accused on the ground that the acts attributed to the accused at Daman did not constitute an offence as the Penal Code was not in force at Daman and that section 188 had no application. The High Court set aside the acquittal on the ground that section 188 applied.

There is another ruling which takes substantially the same view. *Reg* v. *Chill*,[2] which holds that a European British subject is liable to be tried in Bombay for an offence committed in a Native State.

The case of *Empress* v. *Maganlal*[3] also supports my contention, although the point actually considered was whether the accused was "found" at Ahmedabad within the meaning of section 9 of the Extradition Act, 1879.

[BEAUMONT C. J. There also the present point and the case of *Empress* v. *S. Moorga Chetty*[1] are not noticed.]

Section 188 of the Criminal Procedure Code reproduces the provision of section 9 of the Extradition Act and therefore this case is relevant to my contention that section 188 contains a substantive provision of law. Section 9 of the Extradition Act was repealed when section 188 of the Criminal Procedure Code was enacted.

[BEAUMONT C. J. What has happened to section 8 of the Extradition Act? If it is still in force, the act of the present accused would amount to an offence. It is clear that that section enacts substantive law and section 9 deals with procedure only.]

Section 8 seems to have been repealed when its provisions were re-enacted in the present section 4 of the Indian Penal Code in 1898.

[1] (1881) 5 Bom. 338.

[2] (1871) 8 Bom. H. C. (Cr. C.) 92.

[3] (1882) 6 Bom. 622.

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[BEAUMONT C. J. The position then is this. Section 8 of the Extradition Act is repealed and its provisions are re-enacted in the present section 4 of the Penal Code which does not apply to the present case. Section 9 of the Extradition Act which relates to procedure is now section 188 of the Criminal Procedure Code.]

The acquittal of the accused in this case would lead to serious consequences. It would be very easy to evade the provisions of the Act XIX of 1929 by performing marriages in Native States or French or Portuguese India. The object of the Act would thus be wholly frustrated.

My second point is that the accused permitted in British India an act which would be an offence under Act XIX of 1929 and was therefore guilty under section 9. The evidence shows that he made all preparations in British India for the marriage at Goa. He has done "an act to promote the marriage".

G. P. Murdeshwar, in reply. The case of the prosecution has always been that the offence took place in Goa. The accused were never called upon to meet the case now made, namely, that the offence took place in British India. Apart from that, promotion in British India of a marriage at Goa which is not an offence under Act XIX of 1929 cannot be an offence under that Act. Section 6 begins with the words "Where a minor contracts a child marriage". Having regard to the preamble and section 1 of the Act, these words mean "Where a minor contracts in British India a child marriage the solemnization of which in British India the Act seeks to restrain". The promotion is accessory to the principal act, the performance of the marriage, which is not an offence. I rely on the observations of Sargent J. on page 347 and of Melvill J. on page 350 in *Empress* v. *S. Moorga Chetty*.[1] The case of *Queen-Empress* v. *Ganpatrao Ramchandra*[2] is also in point.

[1] (1881) 5 Bom. 338.

[2] (1894) 19 Bom. 105.

BEAUMONT C. J. The accused in this case were prosecuted under section 6 of the Child Marriage Restraint Act, XIX of 1929, in that they permitted, or failed to prevent, the marriage of their son, who was under the age of 18 years. The marriage in question took place at Goa, outside British India, and the accused were tried by the District Magistrate of Kanara, where the accused were residing at the time of the charge. The question which we have to determine is whether the conviction was legal.

In general the subject of trials in British India for offences committed outside British India is dealt with by section 4 of the Indian Penal Code, and section 188 of the Criminal Procedure Code. It is instructive to note the history of those two sections. They are taken substantially from sections 8 and 9 of the Foreign Jurisdiction and Extradition Act, 1879. Section 8 provides :

"The law relating to offences and to criminal procedure for the time being in force in British India shall, subject as to procedure to such modifications as the Governor General in Council from time to time directs, extend—

(*a*) to all European British subjects in the dominions of Princes and States in India in alliance with Her Majesty; and

(*b*) to all Native Indian subjects of Her Majesty in any place beyond the limits of British India."

This section deals with the subject matter of section 4 of the Indian Penal Code as it now exists, though the wording is by no means identical. Then section 9 provides that such persons may be dealt with as if the offences had been committed in the place in British India where they may be found. Section 9 seems to me to deal purely with procedure, and to be a corollary to the substantive enactment contained in section 8. Section 9 was repealed in 1882, and was re-enacted in section 188 of the Criminal Procedure Code of that year, which is in the same terms as the corresponding section in the present Code. In 1898 section 4 of the Indian Penal Code was amended and enacted in its present form. Up till that date the section had applied only to Government

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servants, but the amended section comprised also the two classes of persons covered by section 8 of the Foreign Jurisdiction and Extradition Act, 1879, namely, Native Indian subjects in any place beyond British India, and British subjects within Native States.

The Explanation to the section provides that the word "offence" includes every act committed outside British India which, if committed in British India, would be punishable under this Code. It is clear that celebrating a child marriage is not punishable under the Indian Penal Code, and the present case cannot therefore be brought under that section, but the Government Pleader has argued that section 188 of the Criminal Procedure Code is not confined purely to procedure, but makes it a substantive offence for anybody to do an act which would be an offence if committed in British India. This view prevailed in the lower Courts, but I am unable to accept that construction of the section. It seems to me that a consideration of the history of the section and the language employed shows that it deals with procedure and nothing else. So far as material for the present purpose, what the section enacts is that when a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found. "Offence" is defined by section 4, clause (*o*), as any act or omission made punishable by any law for the time being in force. To attract the section it must be shown that an accused has been guilty of an act or omission made punishable by some law (which must mean some law applicable to British India) for the time being in force. In support of his argument the Government Pleader has relied strongly on *Queen-Empress* v. *Daya Bhima*,[1] where it was held before the amendment to section 4 of the Indian

[1] (1888) 13 Bom. 147.

Penal Code, that native Indian subjects who committed in Portuguese territory acts which would have amounted to criminal breach of trust if committed in British India could be prosecuted under section 188 of the Criminal Procedure Code of 1882 at the place in British Indian territory where they were subsequently found. The reasoning of the Court is not given in full, and the Judges seem to have assumed that an offence had been committed, although generally an act constituted an offence by the Indian Penal Code would not be an offence if committed outside British India (see *Empress* v. *S. Moorga Chetty*[1]). The assumption, however, may have been justified on the language of section 8 of the Foreign Jurisdiction and Extradition Act of 1879, which was then in force, but has since been repealed.

Where the Court is dealing with an act committed outside British India by an Indian subject which would be an offence punishable under the Indian Penal Code if it had been committed in British India, section 4 of the Indian Penal Code, as it now exists, constitutes the act an offence, and it can be dealt with under section 188 of the Criminal Procedure Code. Cases arising under other Statutes which contain a provision similar to section 4 of the Indian Penal Code (cf. the Railways Act, 1890, and the Indian Telegraph Act, 1885) can be similarly dealt with. But the Child Marriage Restraint Act, XIX of 1929, contains no such provision, and the prosecution must prove that the Act makes penal a child marriage performed outside British India. By section 1 (2) it is provided that the Act extends to the whole of British India, including British Baluchistan and the Sonthal Parganas. Section 2 defines a "child marriage" as meaning a marriage to which either of the contracting parties is a child, and "child" is defined as a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age. Sections

[1] (1881) 5 Bom. 338.

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3 and 4 make it punishable for a male to contract a child marriage; section 5 makes it punishable to perform a child marriage; and section 6 makes it punishable for any person having charge of a minor who contracts a child marriage, whether as parent or guardian or in any other capacity, to promote the marriage or permit it to be solemnised or negligently fail to prevent it from being solemnised. It is to be noticed that the Act is not confined to child marriages contracted between members of any particular race or community, and if it be penal for a Hindu father to promote the marriage in Goa of his son aged seven years, it is equally penal for an English father to promote the marriage of his son aged seventeen years in London. In my opinion, the Act is limited in its operation to British India and only strikes at marriages contracted in British India. I am of opinion, therefore, that the child marriage contracted in this case outside British India is not an offence under the Act, and if it is not an offence under the Act, there is no offence to which section 188 of the Criminal Procedure Code can apply.

It was lastly argued by the Government Pleader that even if a child marriage celebrated outside British India did not constitute an offence, still permitting within British India such a marriage would be an offence, and that such permission was proved in the present case. Apart from the fact that this was not really the charge made against the accused, I am of opinion that section 6 only aims at permitting or failing to prevent a marriage which is made penal under the earlier sections, and does not impose a penalty for permitting a marriage which is lawful.

The application must, therefore, be allowed and the conviction set aside. Fine, if paid, to be refunded.

N. J. WADIA J. I agree.

Conviction set aside.

J. G. R.