1905 JAN. 18.

APPEAL FROM ORIGINAL CIVIL.

32 C. 379 = 9 C. W. N. 521 = 2 Cr. L. J. 106.

32 Cal. 379 (=9 C. W. N. 521=2 Cr. L. J. 106).

## [379] APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Sale and Mr. Justice Harington.*

KALI KINKAR SETT *v.* DINOBANDHU NANDY.*

[18th January. 1905.]

*Sanction for prosecution—Criminal Procedure Code (Act V of 1898) s. 195 Cl. (6)—"High Court," meaning of, in s. 195—Extension of time—Appeal, right of—Jurisdiction.*

**An appeal lies from an order which purports to extend the period of an old sanction, but in effect is an order granting a new sanction to prosecute.**

**"High Court" in s. 195 of the Criminal Procedure Code (Act V of 1898) does not mean a Judge sitting on the Original Side of the Court, but it means a Civil Appellate Bench of the Court; a Judge sitting on the Original Side has consequently no jurisdiction to entertain an application for extending the time during which a sanction under s. 195 of the Code is to remain in force. Such time cannot be extended after it has expired.**

*In re Muthukudam Pillai* (1), and *Karuppana Servagaran* v. *Sinna Goundan* (2) dissented from.

[Diss. 13 Cr. L. J. 551=15 I. C. 967=15 O. C. 177; Fol. 40 Cal. 423=14 Cr. L. J. 572 =21 I. C. 172; Ref. 44 Cal. 816=21 C. W. N. 269=25 C. L. J. 193=18 Cr. L. J. 497=39 I. C. 465.]

APPEAL by Kali Kinkar Sett and Adhar Chandra Das.

On the 27th August 1903, an order was made by Henderson J. sitting on the Original Side of the Court granting sanction to the respondent, Dinobandhu Nandy, to prosecute the appellants, Kali Kinkar Sett and Adhar Chandra Das, under s. 193 of the Penal Code. From that order an appeal was preferred, and on the 4th March, 1904, the appeal was dismissed. On the 26th February 1904, the day on which under the terms of s. 195 of the Criminal Procedure Code the sanction lapsed, an application was made not by Dinobandhu Nandy himself but by his authorised agent Nritya Gopal Roy, to the Chief Presidency Magistrate for the issue of process against the two appellants. The Magistrate directed the summons to issue, but postponed the hearing of the case until the **[380]** disposal of the appeal, on the ground that unless process was issued on that day the sanction would lapse.

After issuing the summons, the Chief Magistrate transferred the case to the Magistrate of the Northern Division for disposal. On the matter coming before the latter, the appeal having in the meantime been dismissed, a preliminary objection was taken that inasmuch as the sanction granted by the High Court had been granted to Dinobandhu Nandy, and the application for summons had not been made by him but by Nritya Gopal for him, the Court had no jurisdiction to proceed with the case. The Magistrate, thereupon, on the 14th of May 1904, postponed the case till the 4th of June to enable the accused to move the High Court to test the legality or otherwise of the order made by the Chief Presidency Magistrate on the 26th of February directing summons to issue on the application of Nritya Gopal.

The High Court did not question the proposition that a prosecution might be initiated by a person expressly authorized by one to whom sanction had been given, but it was of opinion that in such a case the

* Appeal from Original Civil, No. 55 of 1914, in Suit No. 470 of 1898.

(1) (1902) I. L. R. 26 Mad. 190. (2) (1902) I. L. R. 26 Mad. 480.

1905 JAN. 18.

APPEAL FROM ORIGINAL CIVIL.

32 C. 379 =9 C. W. N. 521 =2 Cr. L. J. 136.

authority must be a "matter of record" so that the accused might be in a position to challenge the validity of that authority before the Magistrate. When the application was made to the Chief Presidency Magistrate for process, Nritya Gopal produced no written authority, nor was he asked to do so, but it was taken upon a statement of himself or of that of his pleader that he had such authority. The High Court held that no summons should have been granted to Nritya Gopal without the production of his authority and in that view quashed the proceedings pending in the Police Court. Under these circumstances an application was made to Henderson J. for an order to extend the time for taking out process under the order of the 27th August 1903, by which sanction was accorded, or in other words, to extend the period of sanction, or in the alternative for a fresh sanction to the respondent to prosecute the two appellants.

After stating the facts as above, Henderson J. observed as follows :—

In the first place it has been contended that sitting on the Original Side of this Court, as I am now, I have no power to extend the time during which the sanction shall remain in force. It is said that a Judge sitting [381] on the Original Side of the Court is not a High Court within the meaning of sub-section (6) of section 195 of the Criminal Procedure Code. The contention is that the words "High Court" in the sub-section must necessarily refer to the High Court in its Appellate or Revisional Jurisdiction. An appeal under the Letters Patent lies from decrees and from certain orders of a Judge sitting on the Original Side, and it is therefore said that a Judge sitting on the Original Side is subordinate to the Court to which appeals from his decisions ordinarily lie. In all cases of sanction granted under section 195 of the Criminal Procedure Code—no matter by what Court it may have been given—the only Court which has power under any circumstances to extend the time for which sanction shall remain in force is the High Court. In my opinion the proviso to sub-section (6) only governs the sentence immediately preceding it and has no application to the sentence before that, namely, "Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate." It is impossible to read the proviso as applying to this provision which deals merely with the authority which may revoke or grant a sanction which has been given or refused. Therefore it would seem that in construing the proviso in sub-section (6) of section 195 no question of subordination arises as it does under sub-section (7) of the same section. If in this connection no question of subordination arises, then, I think, there can be no doubt that a Judge sitting on the Original Side of this Court is not only the High Court but the High Court within the meaning of sub-section (6). This view appears to be, to some extent at least, supported by the case of *Fakaruddin* (1). This disposes of the first point which is taken upon this application. I hold that sitting on the Original Side of this Court I am competent to entertain the application before me.

On the merits a number of cases have been cited. In the case of *Darbari Mandar* v. *Jagoo Lal* (2), it was held that where 6 months had expired after the grant of sanction and no prosecution had commenced within that time it was not open to the prosecutor to procure a fresh sanction and to institute proceedings upon such fresh sanction.

In another case which is relisd upon *Joydeo Singh* v. *Harihar Pershad Singh* (3) the Court expressed no opinion as to whether a fresh sanction might be granted, but it held that assuming fresh sanction might be granted it ought not to be granted unless an explanation was given why no process was taken out within the 6 months and, as in that case, no satisfactory explanation was given, the fresh sanction that had been granted was set aside.

In the case of *Mangar Ram* v. *Behari* (4) where sanction under section 195 of the Criminal Procedure Code had lapsed not having been acted upon within 6 months, it was held that there was no bar to the grant of a fresh sanction on the same grounds if a sufficient reason for the delay was given, and in that case the learned Judge expressed his inability to concur with the decision in *Darbari Mandar* v. *Jagoo Lal* (2) that fresh sanction could not be given if 6 months had expired after the grant of a

(1) (1898) I. L. R. 26 Cal. 133.
(2) (1895) I. L. R. 22 Cal. 573.
(3) (1885) I. L. R. 11 Cal. 577.
(4) (1896) I. L. R. 18 All. 358.

1905 JAN. 18.

APPEAL FROM ORIGINAL CIVIL.

32 C. 379=9 C. W. N. 521 =2 Cr. L. J. 106.

previous sanction under section 195 without any prosecution having been commenced within that period.

[382] The cases to which I have just referred, it is to be noted were all decided under the Code of 1882. In that Code there was no provision, as there is in the present Criminal Procedure Code, by which the High Court may extend the time. The proviso in sub-section (6), section 195, has been introduced for the first time under the present Code, and it may be taken, I think, that in introducing this proviso the Legislature was aware of the conflict between this Court and the Allahabad High Court. It seems to me therefore that in the present state of the law the decision in the case of *Darbari Mandar* v. *Jagoo Lal* (1) is not now an authority binding upon me. In my opinion, I have power to extend the time on a sufficient case being made out or, in the words of the section, for good cause shewn. Before extending the time, however, I must be satisfied that a sufficient explanation has been given for the delay in applying to the Magistrate for process, or for the sanction having otherwise become inoperative. The effect of the decision of the Division Bench of this Court to which I have referred, was to get rid entirely of the proceedings which were then pending before the Magistrate, the ground of the decision being, as I have already stated that it had not been made to appear at the time when Nritya Gopal Roy applied on behalf of the plaintiff for summons that he had authority for him.

With regard to the delay the explanation is that nothing was done until the 26th February because of the appeal which was then pending. It may be said that the fact of the pending of the appeal was no bar to an application being made for process. Such an application might have been made at any time after the grant of sanction, but it would have been in the discretion of the Magistrate to stay proceedings pending the appeal. I am, not prepared, however, to say that in waiting till the 26th February, the day before the 6 months expired, the plaintiff was to blame. It is alleged that the reason why he waited till that time was that he did not wish to appear to be harassing the accused by making an application which might, if the appeal should have been allowed, have been fruitless, and I see no reason why I should not accept that statement.

It now appears that Nritya Gopal Roy had been appointed the Am-mooktear of Dinobandhu Nandy by a power of attorney executed as far back as the 27th March 1899. This power of attorney which gives him very extensive powers (amongst other powers) authorized him to appear in various Courts and offices in the town of Calcutta and to sign on his behalf plaints and petitions and to appoint pleaders and mooktears. It is true, it was not produced before the Magistrate when the original application was made for process, and because it was not then produced and recorded it has been held by the learned Judges of this Court that the Magistrate could not legally issue the summons. It must therefore, if that be the law as to which I express no opinion, be taken that no application, that is to say, that no proper application, was made upon the sanction within the 6 months. But it has been distinctly held, or at all events not questioned, that if he had sufficient authority, and it had been recorded, the Magistrate would have been competent to issue process. In my opinion the power of attorney to which I have referred would have been, if produced, sufficient authority to Nritya Gopal to make the application which he did.

[383] Having regard to all the circumstances, I am satisfied that the plaintiff really desired within the time to proceed upon the sanction which he originally obtained from this Court. That his efforts have been infructuous was due merely to the fact that his Am-mooktear, Nritya Gopal Roy, when he applied to the Magistrate, had not armed himself with the power of attorney which he held from his master. There is evidence that in the Police Court it is usual to allow application to be made by agents for their principals even when the authority is not at the time produced.

On the whole, it seems to me that a sufficient explanation of the delay and other matters in this case has been given, and I see no reason why I should not extend the time during which the sanction should remain in force. It is true that this sanction lapsed on the 27th of February last, but that circumstance does not in my opinion debar me from acting under sub-section (6) of section 195, Criminal Procedure Code, and extending the time.

In *In re Muthukudam* (2) and *Kacuppana* v. *Sinna Gounden* (3), the time was extended under somewhat similar circumstances, in each case after the period of 6 months had elapsed.

(1) (1895) I. L. R. 22 Cal. 573.
(2) (1902) I. L. R. 26 Mad. 190.
(3) (1902) I. L. R. 26 Mad. 480.

1905 JAN. 18.

APPEAL FROM ORIGINAL CIVIL.

32 C. 379=9 C. W. N. 521 =2 Cr. L. J. 106.

**I shall extend the time until the 26th August. The Rule therefore is made absolute on these particular terms, with costs.**

**Order to be drawn up at once**

Against that judgment Kali Kinkar Sett and Adhar Chandra Das appealed.

Mr. *Garth* (Mr. *S. R. Das* with him), for the respondents, took a preliminary objection that no appeal lay inasmuch as the judgment of Henderson, J. was not a decision which affected the merits of the question between the parties by determining some right or liability; this was the meaning of the word "judgment" in cl. 15 of the Letters Patent as held in *Justices of the Peace for Calcutta* v. *Oriental Gas Company* (1). The words of sub-sections (6) and (7) of s. 195 of the Criminal Procedure Code with regard to appeals do not clearly apply to this Appeal Court.

Mr. *Jackson* (Mr. *Chakravarti* with him), for the appellants. There is a right of appeal under clause 15 of Letters Patent, and the words in s. 195 show that the Court to which appeals ordinarily lie is the proper Court to go to for having a sanction revoked or granted which has been granted or refused by a Court subordinate thereto. For the purposes of this Appeal Court the Original Side of the High Court is a subordinare court: *In the matter of Horace Lyall* (2).

**[384]** [MACLEAN, C. J. We want to hear you on the point as to whether Henderson J. had jurisdiction.]

The words of s. 195 show that only an Appellate Court of some sort has jurisdiction to hear applications for extension of period of sanction. "High Court" has been defined in section 4 (*i*) of the Code to mean the highest Court of Criminal appeal or revision for any local area. It cannot be said that a Judge sitting on the Original Side is the highest Court of criminal appeal or revision. A Judge sitting on the Original Side of this Court is not a High Court within the meaning of sub-section (6) of s. 195 of the Code, and consequently he has no power to extend the time during which the sanction shall remain in force.

Mr. *Garth*. The saving clause of s. 4 "unless a different intention appears from the subject or context," with which it begins, makes the definition inapplicable to s. 195. The word "High Court" there has been used in its ordinary sense, and a Judge sitting on the Original Side has jurisdiction to hear applications for extending the time during which a sanction granted by him is to remain in force.

The judgment of the Court (MACLEAN, C.J., SALE AND HARINGTON, JJ.) was delivered by

MACLEAN, C. J. The first question which arises on this appeal is whether an appeal lies. We think it does under section 15 of the Letters Patent. In the circumstances, the order made was in effect one granting a new sanction and not extending an old one. Such an order is appealable.

The second question is whether Mr. Justice Henderson, sitting on the Original Side, had jurisdiction to make the order, and this depends upon what is the true meaning of the words "High Court" in section 195, sub-section (6) of the Criminial Procedure Code. According to the definition of "High Court" (section 4, sub-section (*j*) it means "the highest Court of Criminal Appeal or Revision for any local area" unless a different intention appears from the subject or context.

We think such a different intention does so appear. Section 195 is apparently the only section which gives the Civil Court **[385]** any

(1) (1872) 8 B. L. R. 433.

(2) (1902) I. L. R. 29 Cal. 286.

1905 JAN. 18.

APPEAL FROM ORIGINAL CIVIL.

32 C. 379=9 C. W. N. 521 =2 Cr. L. J. 106.

jurisdiction in *quasi* criminal matter; it is the Civil Court which is to grant or refuse the sanction. Then the sanction may be revoked or granted by any authority to which the authority giving or refuing it, is subordinate: this again must be a Civil Appellate Court: then the High Court for good cause shown, may extend the time. This must, we think, mean, regard being had to the definition which points to the High Court in its *Appellate* jurisdiction, the Appellate Side of the High Court; and seeing that the section indicates clearly that the Civil Courts are to deal with these questions, the context would seem to show an intention that the Appellate Side of that Court, sitting in the exercise of its Civil Jurisdiction was the proper Court to extend the time. The Legislature could scarcely have intended that when all the other applications in this connection are to be heard by the Civil Court, an application for extension of time was to be heard by the Criminal Appellate Bench of the High Court. A Judge sitting alone on the Original Side of the High Court, is not subordinate to a Division Bench of that Court, though the latter can sit in appeal from a decision of the former. "High Court" in section 195 cannot, we think, mean a Judge sitting on the Original Side of the Court, but for the reasons given above we do not see why it should not mean a Civil Appellate Bench of the High Court. Mr. Justice Henderson consequently had no jurisdiction to hear the application.

The other questions do not, in this view, become material: but as they have been argued we may say that we do not agree with the view that the time can be extended when it has expired. If the time has expired, there is nothing to extend. The cases in the Madras High Court, upon which the Court of first instance relied, were heard *ex-parte*, apparently without the question being argued, and can scarcely be treated as authorities. Any way, we respectfully differ.

The appeal must be allowed with costs in both Courts.

*Appeal allowed.*

Attorneys for the appellants: *Swinhoe & Co.*
Attorney for the respondent: *O. C. Gangooly.*

---

**32 C. 386 (=9 C. W. N. 249=1 C. L. J. 1.)**

## [386] FULL BENCH.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Harington, and Mr. Justice Brett.*

RAM MOHAN PAL AND OTHERS *v.* SHEIKH KACHU.*

[20th January, 1905.]

***Occupancy right, transfer of—Co-sharer, acquisition by—Bengal Tenancy Act (VIII of 1885), s. 22, cl. (2).***

*Held* by the Full Bench (RAMPINI, J., dissenting), that by the transfer of the occupancy right to person jointly interested in the land as proprietor or permanent tenure-holder, the holding does not cease to exist, but only the occupancy right is terminated; and that the cases of *Jawadul Huq* v. *Ram Das Saha* (1), *Miajan* v. *Minnat Ali* (2) and *Sitanath Panda* v. *Pelaram Tripati* (3) were rightly decided.

---

* Reference to Full Bench in Appeal from Appellate Decree No. 2072 of 1901.

(1) (1896) I. L. R. 24 Cal. 143.
(2) (1896) I. L. R. 24 Cal. 521.
(3) (1894) I. L. R. 21 Cal. 869.