

section of the Bombay Act itself treats the suit as having been heard, for it provides that the plaintiff may take certain steps to have the suit reheard. We, therefore, answer the question referred to us in the negative.

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Order accordingly.

APPELLATE CRIMINAL.

Before Mr. Justice Melvill and Mr. Justice Kemball.

EMPRESS v. GASPAS D'SILVA.*

April 20.

Jurisdiction—Sanction to prosecute granted by District Judge—Power of same person as Session Judge to try the offence—Criminal Procedure Code (Act X of 1872), Sections 472 and 473.

A District Judge who has, on hearing a civil appeal, sanctioned the prosecution of a party for forgery, is not debarred by section 473 of the Code of Criminal Procedure (Act X of 1872) from trying the offence in his capacity of a Session Judge.

The accused Gaspar D'Silva, a Portuguese shopkeeper in the city of Ahmednagar, was tried before W. Wedderburn, Session Judge, of having forged a receipt, and sentenced to suffer rigorous imprisonment for two years and a half.

On the 27th of August, 1876, the accused and another person executed to one Palanji a money-bond for Rs. 62-8-0, which they agreed to repay by monthly instalments of Rs. 4. They further stipulated that, in default of the payment of one instalment, interest at the rate of 2pies per rupee was to be charged, but that, in default of the payment of more than two instalments, the whole amount with interest was to become due and immediately recoverable. In November, 1878, the obligee Palanji sued the accused upon this bond in the Court of the Subordinate Judge of Ahmednagar, claiming the amount due on the bond, *minus* two instalments of Rs. 4 each—one received on the 7th of October, 1876, and the other on the 8th of November, 1876. In answer to this claim the accused put in a receipt which, on the face of it, showed a payment of Rs. 4 on the 7th of October, 1876, and a payment of Rs. 46 on the 8th of November, 1876. The Subordinate Judge

* Criminal Appeal, No. 33 of 1882..

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held the latter entry to be a forgery. It appeared to him that figure 6 had been subsequently fraudulently added to the figure 4. An appeal was made to the District Court, and Mr. Wedderburn, in his capacity of District Judge, was of the same opinion. On the 31st of August, 1881, Mr. Wedderburn, as District Judge, granted sanction for the prosecution of the accused; and Mr. Wedderburn, as Session Judge, upon the case being committed to him by Mr. Hamilton, Magistrate (First Class), tried and convicted the accused. The accused appealed to the High Court.

Branson (with him *Jefferson, Bhaishankar, and Dinsha*) for the appellant.—Mr. Wedderburn had no jurisdiction to try this case as Session Judge, he having, as District Judge, granted the sanction for instituting criminal proceedings. The District Court and Session Court are the same Court, and section 473 of the Code of Criminal Procedure says, except as therein provided, “no Court shall try any person for an offence committed in contempt of its own authority.” The word “contempt” must be understood in a wide sense as including any attempt to pervert the proceedings of a Court to an improper end. Forgery is such an attempt, and, therefore, a contempt of the Court in which the forged document was produced: *Reg. v. Navranbeg*(1); *Reg. v. Gaji kom Ranu*(2). The prohibition in section 473 is not limited to offences in Chapter X of the Code: *Reg. v. Parsapa Mahadevapa*(3). The word “Court” in that section includes both Civil and Criminal Court, and if the Court thinks that in a particular case there is sufficient ground for inquiring into a criminal charge it should not try the case itself: *Queen v. Kultaram Singh*(4); *Empress of India v. Kashmiri Lal*(5). This case overrules that part of the ruling in the former which holds that an offence against public justice is not a contempt. The object of the Legislature in enacting section 473 was obviously to prohibit the person who has formed an extra-judicial opinion on the subject afterwards trying the case judicially. The High Court of Madras has accordingly held that the word

(1) 10 Bom. H. C. Rep., 73.

(3) I. L. R. 1 Bom. 339.

(2) I. L. R. 1 Bom. 331.

(4) I. L. R. 1 All, 129.

(5) *Ibid*, 625.

“ Court ” should be construed as referring, not to the office, but to the person of the Magistrate or Judge before whom an offence of the class described in section 473 of the Code was committed, and that the prohibition in that section was a purely personal prohibition. The definition of the expression “ Criminal Court ” in section 4 of the Code admits of this construction.

The Session Judge was wrong in admitting improper evidence, for the evidence in the civil case ought not to have been admitted in the criminal trial. A trained Judge might keep the civil and criminal case distinct, but not the untrained assessors. The admission of the evidence has prejudiced the accused.

Hon. V. N. Mandlik, Government Pleader, for the Crown.—The Court of Session is not the District Court. The functions of the two are quite distinct. The circumstance that both are presided over by the same officer, is accidental. The case of the *Empress of India v. Kashmiri Lal*⁽¹⁾ is one in which the offence committed was before a Magistrate. The high position of a Session Judge makes the case different. Great inconvenience would be caused if the doctrine urged by the appellant be adopted.

MELVILL, J.—No authority has been shown to us which requires us to hold that the Session Court has no jurisdiction to try an offence committed in contempt of the authority of the District Court. Section 473 of the Criminal Procedure Code does not seem to us to involve such a conclusion, for the District Court and Sessions Court are essentially distinct Courts, though presided over by the same officer. It is, no doubt, desirable, as a rule, that a trial should not be held before a Judge who has already prejudged the question of the guilt of the accused, and on this ground we have always been ready to entertain applications for the transfer of trials in cases like the present. But it would be highly inconvenient to hold that a trial for an offence committed in a civil appeal, and exclusively triable by a Court of Session, can under no circumstance be regarded as within the jurisdiction of the Judge who heard the appeal, even though, as in the present case, the accused person may be perfectly willing to be tried by him. The Legislature seems to have been impressed by the sense of

(1) I. L. R. 1 All. 129.

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this inconvenience, and, consequently, in enacting section 472 of the Code, it gave jurisdiction to the Court of Session to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his civil capacity, and certainly section 473 is not so worded as to oblige us to hold that there was any other intention.

The learned Judge then went into the merits of the case, and said no reasons existed to disturb either the conviction or the sentence, which were confirmed.

ORIGINAL CIVIL.

Before Mr. Justice Latham.

April 27.

RUNGRAV RAVJI, PLAINTIFF, v. SIDHI MAHOMED EBRAHIM AND
 EBRAHIM HOOSEIN KHAN, DEFENDANTS.*

Res judicata—Objection by a plaintiff that the matter alleged in defence is res judicata—Effect of dismissal of suit under section 381 of Civil Procedure Code (Act X of 1877) for default of plaintiff to give security for costs—Defendant precluded from pleading matter which is res judicata—Civil Procedure Code (Act X of 1877), Sections 13, 102, 103, 381.

The plaintiff sued the defendants on a promissory note. The defendants filed a written statement, alleging that the note had been obtained by the plaintiff by fraud and false representation. Previously to the filing of the present suit by the plaintiff the defendants had brought a suit against the plaintiff in which they prayed that the said promissory note might be delivered up to be cancelled. Their plaint in that suit contained allegations of fraud and want of consideration identical with those contained in their written statement in the present suit. The plaintiffs in the former suit (the present defendants) having failed to give security for costs, the suit was dismissed under section 381 of the Civil Procedure Code (Act X of 1877). It was now contended that the defendants were estopped from pleading as a defence to the present suit, the fraud and want of consideration, which had been alleged by them as plaintiffs in the former suit which had been dismissed.

Held that the defence might be pleaded, and that the question of fraud and want of consideration was not *res judicata* within the meaning of section 13 of the Civil Procedure Code. The previous suit had been dismissed by reason of the

* Suit No. 492 of 1881.