1894.

MAHA'DEV BALVANT v. LAKSHMAN BALVANT.

versation was alleged or proved, the allegation in the plaint of disputes and separate residence, and defendant's failure to support the plaintiffs are, therefore, sufficient to justify the Court in permitting plaintiffs to maintain this suit. Under these circumstances, the decision of the lower Court must be set aside; and as it recorded findings without giving reasons on the issues laid down by it, we must reverse the decree, and remand the case for full inquiry and fresh decision on the merits. Costs to follow the final decree.

One of the minor plaintiffs has in the meanwhile become a major, and has applied to have his name inserted, and to be allowed to sue in his own right, as also guardian of his minor brother, in place of the next friend. This application has been granted by this Court.

Decree reversed.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS v. GANPATRA'O RA'MCHANDRA.*

1894. *March 8.*

Penal Code (Act XLV of 1860), Secs. 109, 115, 148, 302—*Abetment—Abetment in British India of an offence committed in foreign territory—Not an offence under the Penal Code—Offence—Criminal Procedure Code (Act X of 1882), Sec.* 188.

An abetment in British India by a British subject of an offence committed in foreign territory is not an offence punishable under the Indian Penal Code (XLV of 1860), and cannot, therefore, be tried by a Court in British India.

Regina v. *Elmstone*(1) and *Empress* v. *Moorga Chetty*(2) followed.

The accused, a Native Indian subject of Her Majesty, was committed to the Court of Sessions for abetting the commission of murder or of rioting under sections 302 and 147 of the Indian Penal Code. The alleged abetment consisted of words spoken in British territory by the accused, inciting certain Portuguese subjects to kill one Bhánà if he attempted to remove the produce of certain lands situate in the Portuguese territory of Daman. A disturbance afterwards occurred at Daman in connection with this matter, in which one man was killed and another wounded. Thereupon the Governor General of Portuguese India moved the Government of Bombay to bring the accused to justice as the instigator of the murder. The Government of Bombay being of opinion that section 188 of the Code of Criminal Procedure (Act X of

*Criminal Revision, No. 11 of 1894.

(1) 7 Bom. H. C. Rep., 89, Cr. Ca. (2) I. L. R., 5 Bom., 338, 347.

1894.

QUEEN-EMPRESS v. GANPATRA'O RA'MCHANDRA.

1882) was applicable to the case, passed a Resolution in the Political Department directing the District Magistrate to take the necessary action in the matter. The District Magistrate thereupon committed the accused to the Court of Session on a charge of abetment of murder or of rioting.

Held, quashing the commitment, that the alleged abetment was not an offence punishable under the Indian Penal Code, and that, therefore, the Sessions Court had no jurisdiction to try the accused.

Held, also, that section 188 of the Code of Criminal Procedure (Act X of 1882) had no application to the present case, the alleged offence of abetment not having been committed outside British India.

THE accused Ganpatráo Rámchandra, a Native Indian subject of Her Majesty, was charged with having instigated at Tambudi, a village in the Surat district, certain Portuguese subjects of Daman to resist one Bháná to death, if he attempted to remove the produce of their fields in Daman. A riot afterwards occurred at Daman in Portuguese territory in connection with this matter in which a man was killed and another wounded. Thereupon the Governor General of Portuguese India wrote to the Government of Bombay, stating that the accused was the instigator of the murder, and asking that he should be punished.

The Government of Bombay, being of opinion that section 188 of the Code of Criminal Procedure (Act X of 1882) was applicable to the case, passed a Resolution in the Political Department, directing the District Magistrate of Surat to take the necessary action in the matter.

The District Magistrate committed the accused, for trial to the Sessions Court for abetting the commission of murder, or of rioting under sections 302 and 147 of the Indian Penal Code. The Sessions Judge amended the charge by substituting section 302 with section 115, and section 148 with section 109 of the Indian Penal Code.

The accused's pleader objected at the trial, among other things, that the Court had no jurisdiction.

The Sessions Judge held that this objection was valid, and ordered the accused to be set at liberty. His reasons are set forth in the following extract from his judgment :—

"The question for consideration is whether the charge against accused is one which can be tried by a British Court. I am of opinion that it is not, because abetment means abetment of an offence, and offence as defined in the Penal Code means

an offence committed in British India. An offence committed in Portuguese India is not an offence punishable under the Indian Penal Code. Therefore, abetment of such an offence, even if it occurs in British India, is not an offence punishable under the Indian Penal Code. It is obvious that the proper Court to try the charge of abetment of murder is the Court which tries the charge of murder. Section 188, Criminal Procedure Code, of course contemplates Courts in British India only.

* * * *

"I find that this Court has no jurisdiction in this case, and, therefore, order that the bail-bonds and recognizances be cancelled, and the accused set at liberty."

The High Court in the exercise of its revisional jurisdiction sent for the record and proceedings of this case, and ordered notice to issue to the District Magistrate, as well as to the accused, to show cause why the commitment for trial should not be quashed, on the ground that the facts disclosed no offence, the act which the accused was said to have abetted in British India having been committed in foreign territory.

The Government of Bombay also applied for a revision of the Sessions Judge's order.

Ráo Sáheb *Vásudeo J. Kirtikar*, Government Pleader, for the Crown:—Abetment is a substantive offence under the Indian Penal Code, and the trial on this charge is not dependent on the conviction of the principal offender. It is immaterial whether the principal offence takes place in a foreign country or within British India. The locality of the act abetted does not affect the liability of the abettor.—*Reg.* v. *Máruti Dáda*[1]. Section 108, explanation 2, of the Penal Code shows that to constitute the offence of abetment it is not necessary that the act abetted should be even committed. Abetment being thus a separate and distinct offence by itself would fall within the definition of the term "offence" as given by section 40 of the Penal Code. It is the character of the act that determines whether it amounts to an "offence" within the meaning of section 40 of the Penal Code. If the accused in the present case had gone to Daman, and instigated the murder or riot that took place there, he would have been amenable, under section 188 of the Criminal Procedure Code, to the jurisdiction of the Courts in British India. *A fortiori* he ought to be amenable to our Courts when he instigated the selfsame offence in British India

(1) I. L. R., 1 Bom., 15.

1894.

QUEEN-EMPRESS v. GANPATRÁO RÁMCHANDRA.

—*Regina* v. *Chill*[1]; *Reg.* v. *Wallace*[2]. In the latter case it was held that the Central Criminal Court in England had jurisdiction to try accessories before the fact to the felony of scuttling a ship on the high seas, though the principal felon was not amenable to justice. In England, Stat. 24 and 25 Vic., c. 100, gives jurisdiction to try accessories to homicides beyond the seas. Under the Portuguese treaty, Act IV of 1880, schedules (*b*) and (*c*), no British subject can be delivered up to the authorities of Portuguese India for trial on a charge of murder or abetment of murder committed in Portuguese India. It follows, therefore, that in such a case our Courts alone have jurisdiction to try the offender. See also section 3 of the Penal Code. Refers to Story on Conflict of Laws, sec. 625; Clarke upon Extradition, p. 9; Wharton's International Law (3rd Ed.), p. 735.

Govardhan M. Tripáthi, for the accused, was not called upon.

JARDINE, J.:—Ganpatráo, a native Indian subject of the Queen-Empress, was committed by a Magistrate of the Surat District to the Court of Session at Surat for abetting the commission of murder or of rioting, sections 302 and 147 of the Indian Penal Code (XLV of 1860) being quoted in the charge, which the Sessions Judge amended by substituting section 302 with section 115, and section 148 with section 109. The alleged abetment consisted of words spoken in the British territory by the accused inciting certain cultivators, Portuguese subjects, to kill or resist to death one Bháná, a Portuguese subject, if he attempted to remove the produce of certain land situate in the Portuguese territory of Daman. A disturbance aferwards occurred in connection with this matter, in which one man was killed and another wounded in the Daman territory, these persons being Portuguese subjects. The Governor General of Portuguese India then moved the Government of Bombay to bring the accused to justice as the instigator of the murder.

As appears from the Government Resolution No. 7379, dated the 23rd December, 1892, in the Political Department, the Government supposed section 188 of the Code of Criminal Procedure to be applicable, and directed the District Magistrate to take the

[1] 8 Bom. H. C. Rep., 92, Cr. Ca. [2] 2 Moody's Cr. Cases, 200.

necessary action, there being no Political Agent in the Portuguese territory where the crime was committed. Section 188 has, however, no application to the case, as the accused is not charged with committing any offence beyond the limits of British India. After the Magistrate had committed the accused for trial, the accused took objection to the jurisdiction of the Magistrate and the Court of Session. The Sessions Judge held that he had no jurisdiction, and, therefore, cancelled the bail-bonds and set the accused at liberty. "The question for consideration," he wrote, "is whether the charge against accused is one which can be tried by a British Court. I am of opinion that it is not, because abetment means abetment of an offence; and offence as defined in the Penal Code means an offence committed in British India. An offence committed in Portuguese India is not an offence punishable under the Indian Penal Code. Therefore, abetment of such an offence, even if it occurs in British India, is not an offence punishable under the Penal Code." As, however, the Judge did not take the requisite steps to get the proceedings terminated by the commitment being quashed by this Court under section 215 of the Code of Criminal Procedure, we called for the case and issued notices to show cause. The Government of Bombay has since made an application to have the order of the Sessions Judge reversed, on the ground that the abetment is a substantive offence, punishable under the Indian Penal Code, and within the jurisdiction of the Court of Session. We have had the advantage of the full and learned argument of the Government Pleader on these propositions.

The question is whether the definition of abetment in the Indian Penal Code must be understood as containing a territorial term. On this question we are not without authority. In delivering the judgment of a Full Bench (Westropp, C. J., Bayley and Green, JJ.) in *Regina* v. *Elmstone*(1), Sir Michael Westropp said, p. 118: "Inasmuch as the crime here abetted was committed on the high seas, and not within the territories vested in Her Majesty by the Statute 21 and 22 Victoria, c. 106, and, therefore, not an offence made punishable by the Penal Code, the abetment

(1) 7 Bom. H. C. Rep., 89 Cr. Ca.

1894.

QUEEN-EMPRESS v. GANPATRÁO RÁM-CHANDRA.

thereof is not punishable under section 109 of that Code, so far as the Code itself, standing alone and unaided by any other enactment, is concerned." The learned Chief Justice then points out the special provision in sections 121, 125 and 236 of the Penal Code for the punishment of abetment in British India of criminal acts elsewhere. A similar question about the definition of the words "stolen property" in section 410 was fully considered in *Empress* v. *Moorga Chetty*[1] by a Full Bench, where Sargent, C. J., says, p. 347 : "The presumption in construing a Penal Code which by section 2 is confined to acts and omissions within the territories of British India would rather be, that an offence such as receiving and retaining stolen property, which is in its very nature accessory to the principal act, should be confined to those acts which are made criminal by the Code itself." This reasoning is applicable to the present facts, the fact that the homicide or rioting was later in time than the accessory act of abetment being immaterial. It is clear from the report that the majority of the Bench (Sargent, C. J., and Melvill, J.) considered the definitions of offences in the Indian Penal Code to contain a limitation to locality in British India in their application to ordinary cases, we mean those to which special extra territorial provisions, like section 188 of the Code of Criminal Procedure, do not apply and those where no special provision for punishment is made, such as we find in section 236 of the Penal Code. The reasoning is not touched by *Regina* v. *Chill* [2], or *Regina* v. *Máruti*[3], which the learned Government Pleader has referred to. They are not interpretations of section 40 of the Indian Penal Code, which defines the word "offence." The Government Pleader admits with learned candour that this Full Bench decision is against his contention. It meets the argument for the Crown that abetment consists in the intention of the abettor, and not in the personal legal capacity of the individual abetted. This argument, based on section 108, explanations 2 and 3, is the same as the dissenting member of the Bench, West, J., uses at p. 354 of the report. The views expressed by Sargent, C.J., and Melvill, J., may *a fortiori* be applied by us in the case before us, seeing that

(1) I. L. R., 5 Bom., 338. (2) 8 Bom. H. C. Rep., 92 Cr. Ca.
(3) I. L. R., 1 Bom., 15.

although the Legislature has extended the definition of stolen property in section 410 by adding the words "within or without British India" by Act VIII of 1882, section 9, it has refrained from doing the same to the definition of "offence" and of "abetment," refrained from making the particular circumstances punishable, independent of locality. This is sufficient answer to the arguments from inconvenience and from the enlightened tendency of jurisprudence in England. To give effect to these, would, as Sir C. Sargent remarks, at p. 348 of the report of *Empress* v. *S. Moorga Chetty*, be to travel out of the legitimate province of judicial construction. The proper remedy is in fresh legislation.

In England the Statute 24 and 25 Vict., c. 100, sections 4 and 9, would give jurisdiction to try a case like the present. But it does not extend to India; and the Indian Legislature has not thought it necessary to pass such a law. Nor, except as regards murder and incitement to murder, has the criminal law of England gone so far as the contention of the Crown asks us to go. The case of *Regina* v. *Kohn*(1) seems to be one where the conspiracy "contemplates" the scuttling of the ship in territorial waters.

The questions raised in *Empress* v. *Moorga Chetty* and in the present case are like those raised in *Regina* v. *Bernard*(2). Bernard was tried at the Central Criminal Court in 1858 as an accessory before the fact to the murder, in Paris, of several persons killed by a shell thrown by Orsini at the carriage of Louis Napoleon. Forsyth in his Cases and Opinions on Constitutional Law, p. 236, refers to this trial and to Chief Justice Best's remarks in *De Witz* v. *Hendricks*(3), in connection with plots in England against foreign sovereigns and States, which he thinks the common law punishes as misdemeanours.

Sir J. F. Stephen, in his History of the Criminal Law of England, Vol. 2, p. 13, makes the following remarks on Bernard's trial:—

"There were three Judges, and the case was left to the jury, but with an intimation that in case of a conviction the question

(1) 4 F. and F., 68. (2) 1 F. and F., 240.
(3) 2 Bing., 314.

1894.

QUEEN-EMPRESS v. GANPATRÁO RÁM-CHANDRA.

whether the prisoner had committed a crime against English law would be stated for the Court for Crown Cases Reserved. The jury acquitted the prisoner.

"As regards the particular case of murder, an incitement to commit murder, the matter is now set at rest by 24 and 25 Vict., c. 100, sections 4 and 9. These sections provide, in substance, that persons who conspire in England to murder foreigners abroad, or in England incite people to commit murders abroad, or become in England accessories (either before or after the fact) to murder or manslaughter committed abroad, shall be in the same position in every respect as if the crime committed abroad had been committed in England. The question, however, still remains unsettled as regards all offences except murder. I do not think it proper to give a decided opinion upon this subject, because it is by no means unlikely to be raised judicially; but I will make one or two observations upon it. One strong argument against the criminality of such acts is that the law of England does not deal with crimes committed abroad at all. The law of England does not forbid a Frenchman in France to rob another Frenchman in France. This being so, it seems difficult to say that it forbids an Englishman to incite in England a Frenchman to commit a robbery in France. The argument on the other side is that in all common cases it would be highly expedient that all civilized countries should recognise offences committed in each other's territories as offences for the purpose in question. But to this it may be replied that this is an argument for the Legislature and not for the Judges.

"The law as to conspiracies to commit crimes abroad stands on a footing rather different from the question as to accessories. A crime committed abroad is morally as bad as a crime committed in England, and there is authority for saying that any agreement to do an act of that nature is indictable. Whatever may be the merits of the case legally, it seems to me clear that the Legislature ought to remove all doubt about it by putting crimes committed abroad on the same footing as crimes committed in England, as regards incitement, conspiracy, and accessories in England. Exceptions might be made as to political offences, though I should be sorry if they were made wide."

These observations of a great authority on the Law of Crimes are such as may fitly be considered by the Legislature, while they show the present undetermined state of the law of England on questions of abetments there of criminal acts in foreign States.

1893.

QUEEN-EMPRESS v. GANPATRÁO RÁMCHANDRA.

We may express a hope that our judgment following the principles of two judgments of full Benches (about which we may add we have consulted our learned Chief Justice) will help to make clear the law of British India. The subject is, in our opinion, one of interest to the Government, which, if it took the matter into consideration, would be able, among other matters of expediency, to form an opinion as to the means possessed by our Courts of obtaining evidence of acts done in territories outside of British India, and of finding out the position, character and motives of witnesses.

For the above reasons the Court quashes the commitment to the Court of Session under section 215 of the Code of Criminal Procedure.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

BADARICHÁRYA (ORIGINAL PLAINTIFF), APPLICANT, v. RÁMCHANDRA GOPA'L SA'VANT AND OTHERS (ORIGINAL DEFENDANTS), OPPONENTS.*

1893, January 23.

Dekkhan Agriculturists' Relief Act (XVII of 1879), Secs. 73, 74—Review of first Court's order—Finding that a party to a suit is an agriculturist—District Judge—Assistant Judge.

An Assistant Judge having found that the defendants in a suit pending before him were not agriculturists, the defendants presented a petition of review of that finding, and in review the Assistant Judge came to a contrary conclusion.

Held, that as section 74† of the Dekkhan Agriculturists' Relief Act (XVII of 1879) only makes the Civil Procedure Code (Act XIV of 1882) applicable to suits before the Subordinate Judge, the conduct of proceedings before a District or Assistant Judge when sitting in revision under section 53 of Act XVII of 1879 is within his own discretion, and the granting of a review on the ground of mistake as to the nature of a defendant's income is a reasonable exercise of such discretion.

* Application No. 130 of 1892 under Extraordinary Jurisdiction.

† Sections 73 and 74 of the Dekkhan Agriculturists' Relief Act (XVII of 1879):—

73. The decision of any Court of first instance that any person is or is not an agriculturist shall for the purposes of this Act be final.

74. Except in so far as it is inconsistent with this Act, the Code of Civil Procedure shall apply in all suits and proceedings before Subordinate Judges under this Act.