CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1909.
October 6.

EMPEROR *v.* GANESH BALVANT MODAK.*

High Court—Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), section 435—Indian Penal Code (Act XLV of 1860), sections 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.

It is the settled practice of the High Court of Bombay to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the mis-construction of documents, or the placing by that Court of the *onus* of proof on the accused contrary to the law of evidence.

Queen-Empress v. *Shekh Saheb Badrudin*[1]; *Queen-Empress* v. *Mahomad Husan*[2]; and *Queen-Empress* v. *Chagan Dayaram*[3], followed.

Under the Indian Penal Code (Act XLV of 1860) all that is necessary to constitute an attempt to commit an offence is some external act, something tangible and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted.

An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public.

In cases of sedition, the question of intention is one of fact.

APPLICATION for revision under section 435 of the Criminal Procedure Code, against conviction and sentence passed by A. H. S. Aston, Chief Presidency Magistrate of Bombay.

The accused was the manager of a newspaper selling agency called the Vartman Agency. This Vartman Agency was the sole agent for sale in India of a fortnightly periodical styled "the Swaraj," which was printed and published in London.

* Criminal Application for Revision No. 379 of 1909.

(1) (1883) 8 Bom. 197. (2) (1886) Unrep. Cr. Cas. 244.
(3) (1890) 14 Bom. 331.

One of the issues of the periodical contained an article entitled "The Ætiology of the Bomb in Bengal," which was charged as seditious within the meaning of section 124A of the Indian Penal Code.

It appeared that the accused received by post an advance copy of the issue of the periodical in question. He advertised the same and also reviewed it in a daily newspaper called the *Rashtra Mat,* which was published under his management. The sale copies of the issue were later on received by him by a steamer parcel and all of them were sold by the Vartman Agency.

The accused was under these circumstances charged with having published the seditious article in India, an offence punishable under section 124A of the Indian Penal Code, 1860. He was convicted of the offence and sentenced to suffer one month's simple imprisonment.

The accused applied to the High Court.

Baptista, with *V. V. Bhadkamkar* and *B. V. Desai,* for the accused.

Strangman (Advocate-General) instructed by *E. F. Nicholson* (Public Prosecutor), for the Crown.

CHANDAVARKAR, J. :—This is an application by Ganesh Balvant Modak for revision of the conviction recorded against and sentence passed upon him by the Chief Presidency Magistrate of Bombay under section 124A of the Indian Penal Code. The learned Magistrate has held that the petitioner has been guilty of the offence of attempting to excite feelings of disaffection towards the Government established by law in British India by the sale of copies of a periodical called the *Swaraj* containing an article headed "The Ætiology of the Bomb in Bengal," which is seditious within the meaning of the section above mentioned.

This finding of the Magistrate has been assailed before us on two grounds: first, that there has been no publication by the petitioner of the periodical in question, containing the article charged as seditious; and, secondly, that the article itself is not seditious within the meaning of section 124A of the Indian Penal Code.

1909.

EMPEROR
v.
GANESH
BALVANT
MODAK.

It is to be remarked at the outset that both the question of publication and the question of the seditious character of the article are questions of fact, which have to be determined on the evidence and by the light of surrounding circumstances. On these questions of fact, the learned Magistrate has recorded his findings with his reasons therefor in his judgment. What we are asked by the learned counsel for the petitioner to do is to appreciate the evidence and revise the Magistrate's findings of fact. But it has been the settled practice of this Court to refuse to interfere, in the exercise of our revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the misconstruction of documents, or the placing by that Court of the onus of proof on the accused contrary to the law of evidence. *Queen-Empress* v. *Shekh Saheb Badrudin*[1]; *Queen-Empress* v. *Mahomad Husan*[2]; *Queen-Empress* v. *Chagan Dayaram*[3].

On the question of publication, it is contended by the learned counsel for the petitioner that the facts proved do not constitute publication. The facts relied upon by him are these:—The petitioner received an advance copy of the *Swaraj* from London on the 2nd of July by post. The bulk of the copies of the periodical sent for sale was delivered to him on the 26th of July, and he sold a number of them on that day. But from the 2nd of July to the 26th of that month, the petitioner was occupied with other business than that of looking after the interests of the *Swaraj*, and he had no time to read the article in it charged as seditious.

These, however, are not all the facts. There is evidence on the record to show that the petitioner is sole agent for the periodical for the whole of India, that he took great interest in it (exhibits S., O. and F.) and that on the 15th of May 1909, he had written to the proprietor and editor of the periodical in London, asking for an advance copy by post that he might know what to expect and make use of his own daily paper in Bombay, the *Rashtra Mat*, for the special advertisement of the

(1) (1883) 8 Bom. 197. (2) (1886) Unrep. Cr. C. 244.
(3) (1890) 14 Bom. 331.

Swaraj. It is admitted that an advance copy was sent and that the *Swaraj* was advertised in the *Rashtra Mat*, of which the petitioner was manager. Further, on the 10th of July, an article had appeared in the *Rashtra Mat* noticing the *Swaraj* and its contents. Upon all this evidence it was competent for the Magistrate to find as a fact that the accused had read the article and knew its contents and character before the sale of the copies. It is conceded by the petitioner's counsel that, under the circumstances of the case, the *onus* lay on the petitioner to prove that he had not read the article. That *onus*, the Magistrate finds, he has not discharged. No error of law has been pointed out to us to warrant our interference with the Magistrate's conclusion of fact on this question.

But it is urged that there was no publication, because the prosecution has not led any evidence to prove that any of the buyers had read the article. In support of this contention, the petitioner's counsel, Mr. Baptista, relies upon a passage from Odgers on Libel, where it is said that an attempt to libel is not actionable unless it is effectual. That is, there must be a publication in fact. "That the third person had the opportunity of reading the libel is not sufficient, if the Jury are satisfied that he did not in fact avail himself thereof, even though it is clear that the defendant desired and intended publication." But, as the passage and the chapter in which it occurs as also the cases cited in illustration clearly show, the law stated by Dr. Odgers is applicable to actions for libel, not to criminal prosecutions. No suit can lie for damages for an ineffectual attempt to libel, because, the attempt failing, there is no injury, and in actions for libel "proved or presumed injury to reputation" is the cause of action. (Pollock on Torts, p. 245, 6th edition.) It is otherwise in criminal law. An attempt to commit an offence is under our Penal Code punishable. All that is necessary to constitute such an attempt is some external act, something tangible and ostensible, of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. In the present case the attempt was for the purposes of law complete when the petitioner sold the copies. It was

1909.

EMPEROR
v.
GANESH
BALVANT
MODAK.

none the less an attempt, though something external to him happened which prevented a perusal of the article by the buyers or any other member of the public.

The next question is whether the article is seditious within the meaning of section 124A of the Indian Penal Code. That depends on whether the article was intended to bring the Government into hatred or contempt. The question of intention in such cases is one of fact. As pointed out by Sargent, C. J., in *Dyami Naik* v. *Lingappa*(1), relying on a dictum of Lopes, J., in *Northcote* v. *Doughty*(2), where, on the construction of a document by the light of surrounding circumstances, the question is entirely one of intention, it becomes "a simple question of fact as to which the decision of the Court below is conclusive." Here it was a question *quo animo* the article on "The Ætiology of the Bomb in Bengal" was written. As such it resolved itself into a mere question of fact, on which the Magistrate's finding must be treated by this Court as conclusive, according to its settled practice in the exercise of its revisional jurisdiction, unless some error of law vitiated that finding. No such error has been so much as hinted at by Mr. Baptista, the learned counsel for the petitioner, in his full and careful argument.

But I do not wish to leave this part of the case at that point. Owing to the importance of the question, we allowed Mr. Baptista to argue the case as if it were an appeal and not a mere revisional application. I have read the article most carefully with a view to form my own judgment as to its character. I can come to no other conclusion than that its object and intention is to bring the Government contemplated by section 124A into hatred and contempt. Mr. Baptista's contention is that, though the writer has here and there used unhappy expressions, and language which is to be regretted, yet his intention, upon the whole, is to point out to Government that bombs and assassinations, described as "the outlandish methods of the West," have come into existence in what the writer regards as this land of a spiritual people, because of cer-

(1) (1889) P. J. p. 37. (2) (1879) 4 C. P. Div., 385.

tain reactionary policy and repressive measures of Government; and that the writer comments on that policy and those measures with a view to secure their alteration by Government. But this contention ignores the leading ideas and the prominent *innuendoes* of the article. The article begins with the statement that the people have become helpless against their "oppressor or opponent," *i. e.*, the Government; it contrasts the European as "material, gross, mean, degrading," with the people of this country as being endowed with instincts "emotional, spiritual, refined and uplifting." The Government is charged with, on the one hand, bringing into existence "the scoundrel patriot," "the self-seeking loyalist who sells his conscience and his country for a post under the Government or a retainer in Crown cases or for the mere refined bribe of an honorary title," and with, on the other, either deporting "the Nationalist" or compelling him by its policy to go into "exile." To petition Government for any relief or right is practically represented as "old mendicancy." The insinuation is that petitioning Government for any right or relief is not only useless but degrading. The Executive is charged with having first resorted to "excesses" "either to terrorise the people or to exasperate them to any acts of counter-violence"; and when that failed, with having taken no action to protect Hindus against Mahomedan lawlessness, out of "secret sympathy" for "the acts of Moslem rowdyism." All this, according to the writer, steeped the people in a sense of helplessness, with the result that the newspaper *Sandhya* advised the people to resort to the use of the bomb for self-protection. The writer characterises that advice as "a lawful appeal," and winds up with the observation that, when the *Sandhya's* advice was followed and the bomb appeared, "it was a great achievement for people who had never received any regular training."

The intention and meaning of all this is obvious. In short, the Government, according to the writer, is composed of a race which is materialistic and mean; it has proved the people's oppressor; it is demoralising them by turning out scoundrel

1908.

EMPEROR v. GANESH BALVANT MODAK.

patriots; it is irritating them by repressive measures; it has exasperated them to acts of violence; it has secretly allowed Mahomedan "rowdies" to attack Hindus; and all this has served to bring the bomb into existence. The rise of the bomb is represented by the writer as "lawful," and "not criminal" under the state of things portrayed by him. Throughout the attempt is to create the impression that the Government exists for the satisfaction of its own cupidity, and has not a single redeeming feature. Even the peace of the country, enjoyed under the Government, is referred to ironically. Such writing cannot but have been meant by the writer to bring the Government into contempt and hatred and to excite feelings of disaffection against it. I agree with the learned Magistrate that the article is seditious within the meaning of section 124A of the Indian Penal Code.

Accordingly the conviction and sentence must be confirmed and the rule discharged.

HEATON, J.:—This is a revisional application; it has been argued at a great length, and all that is to be said has been said on both sides. What we have to decide is whether there has been any miscarriage of justice. I do not think there has. The article has been read and commented on, and I have read it again very carefully. I summarize it very briefly by saying that the writer tells us that the grievances of the people in Bengal are so pressing; that the Government is so bad; that the chance of redress of their grievances is so remote, that the people in self-defence have been driven to the use of the bomb. If that is a correct description of this article, and it seems to me that it is absolutely correct, I can only infer that the writer is animated by the most virulent hatred of the Government in Bengal and that it was his object to spread that feeling of hatred to others. That brings the article and the writer of the article within the terms of section 124A of the Indian Penal Code. We only have to consider whether the distributor (the accused) also comes within that section. There is no doubt that he did distribute this article; and if he did so consciously, consciously, that is, of the nature and purport of this article,

1909.

EMPEROR v. GANESH BALVANT MODAK.

then he also comes within this section. I can find no good reason for supposing that the Magistrate has not correctly decided that the accused had read the article; that he was in a position to appreciate its meaning and that he did consciously take part in disseminating that wicked and seditious publication. Therefore I concur that the conviction and sentence should be confirmed.

Application rejected.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Chandavarkar and Mr. Justice Batchelor.

1909. *October* 14.

DAYALDAS LALDAS WANI (ORIGINAL DEFENDANT No. 2), APPELLANT, v. SAVITRIBAI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Succession—Stridhan—Anvadheya—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha.

A Hindu female, governed by the Mayukha, died leaving property which she inherited from her father, under a deed of gift, subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen:—

Held, that the property being *anvadheya* stridhan, should be divided equally among the son and daughters: with this difference, however, as to the latter, that the unmarried should have preference over the married.

Ashabai v. *Haji Tyeb Haji Rahimtulla*(1) and *Sitabai* v. *Wasantrao*(2), followed.

SECOND appeal from the decision of C. C. Dutt, Joint Judge of Thána, confirming the decree passed by S. A. Gupte, Subordinate Judge at Dáhánu.

Suit to recover possession of property.

The property in question belonged to a Hindu female, Varubai, who received it from her father by way of gift subsequent to her marriage. She had three daughters and one son.

* Second Appeal No. 665 of 1907.

(1) (1882) 9 Bom. 115 at p. 126. (2) (1901) 3 Bom. L. R. 201.