

Government { 1897 } of Madras.
JUDICIAL.

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Regd.

1897.

Enclosures

Spare copies

G.O., No. 504, 6th April 1897.

APRIL.

Authority to hear Appeals.

Communicating to all District Magistrates the opinion of the Advocate-General regarding the authority possessed by Divisional Magistrates under section 407, Criminal Procedure Code, to hear appeals in local areas to which they are transferred.

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—the following papers :—

From C. H. MOUNSEY, Esq., Acting Collector and District Magistrate, Salem,
to the Chief Secretary to Government, dated 27th March 1897, Ref. on
No. 303—M.R.

I have the honour to report the following for orders :—

M.R.Ry. Gopalan Nayar Avargal, B.A., B.L., the Divisional Magistrate of Námakal, refuses to accept any appeals made to him on the ground that he is incompetent to take them. His argument is to this effect—section 407 of the Code of Criminal Procedure is the only section in the Criminal Procedure Code which deals with the presentation of appeals from convictions on trials held by Magistrates of the second or third class; that though he is a Divisional Magistrate of the first class, and though he is empowered by the Local Government to hear appeals, yet, as the District Magistrate has not specifically empowered him under section 407, Criminal Procedure Code, to hear any appeals in his present sub-division, he is not justified in hearing any. He acknowledges that when he was originally made a first-class Magistrate and put in charge of a division, the District Magistrate empowered him to hear appeals in his then division. Since it is the custom in all the districts of the Madras Presidency, so far as I am aware, for the District Magistrate to empower Divisional officers to hear appeals in their division when they are originally created first-class Magistrates, I am of opinion that section 40, Criminal Procedure Code, providing for the continuance of the powers of officers transferred, covers the present case and renders needless specific directions of District Magistrates to hear appeals whenever the Sub-Divisional Magistrate is transferred elsewhere. The general practice is at any rate based upon this idea, and it is nowhere the custom, within my knowledge, for a District Magistrate to direct that a Sub-Divisional Magistrate of the first class on being transferred to his district shall hear appeals.

The Deputy Magistrate disputes the legality of this procedure. He maintains that section 40 only refers to powers given by the Local Government, and that while it is quite true that he carries his appellate powers granted him by the Local Government from one local area to another under section 40, Criminal Procedure Code, yet this is not enough. The District Magistrate's specific direction is necessary to enable him to exercise the appellate powers granted by the Local Government, and section 40 does not touch the fact that in every case of transfer a specific direction to hear appeals over the new local area must be given by the District Magistrate.

I am loath to specifically give the direction the Deputy Magistrate asks me to give, because if my idea of the construction of section 40, Criminal Procedure Code, is correct, there is no need for it and because it will be an admission that the general procedure of past years in many places, I think, has been utterly wrong. It is quite true that my opinion is not binding upon the Deputy Magistrate, and perhaps he may say that even the construction that Government may be pleased to give to the sections will not bind him, but I think if Government do happen to concur in my belief, the Deputy Magistrate will accept their decision. Whether my opinion be right or wrong, I respectfully request that the earliest orders possible may be issued by wire if thought advisable, as in the meantime the appeals the Deputy Magistrate receives

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From a long conversation I had with the Deputy Magistrate upon the subject, I gather that he considers the difficulty partly arises from the code containing no provision for presentation of appeals to Divisional Magistrates except under section 407, Criminal Procedure Code. This section, the Deputy Magistrate also points out, seems to show that what is not an uncommon practice may not legally be justified. I mean the practice of the District Magistrate receiving appeals himself. This is sometimes done, for instance, when a Divisional Magistrate is not easily accessible, to save the appeal being time barred; but the section seems to say that, if directions are issued under clause 2 of section 407, Criminal Procedure Code, all appeals shall then be presented to the Subordinate Magistrate. It seems anomalous that a District Magistrate in his own district should not have the powers of one of his own Subordinate Magistrates.

Opinion by the Acting Advocate-General, Madras, dated 3rd April 1897.

[Reference No. 784, Judicial, dated 1st April 1897.]

In my opinion the contention of the Deputy Magistrate Mr. Gopalan Nayar is correct. I presume that before he was transferred to the Salem district he was invested by the Local Government under section 37 with power to hear appeals from convictions by Magistrates of the second and third classes (Schedule IV, No. XI), and that, under paragraph 2 of section 12, such power extended throughout the district in which he was a first-class Magistrate when so invested. On his transfer to the Salem district as a first-class Magistrate, he would certainly under section 40 carry with him the said appellate power to be exercised in the Salem district subject to the provisions of section 407. Under section 407, the District Magistrate can direct any Magistrate of the first class subordinate to him to hear any appeal or class of appeals which would under paragraph 1 of that section, lie to the District Magistrate, provided that such first-class Magistrate had been invested by the Local Government under section 37 with power to hear appeals (Schedule IV, No. XI).

A reference to the said schedule will show that this direction is not one of the additional powers with which a District Magistrate can invest a first-class Magistrate. The direction which under section 407 was given to him by the District Magistrate of the district in which he served and to whom he was subordinate before he was transferred to the Salem district is not, within the meaning of section 40, a power with which he was invested, and which under that section he would carry with him to the new district to which he has been transferred.

This is also apparent from the language of paragraph 2 of section 407. That paragraph enables a District Magistrate to direct a first-class Magistrate who is invested with appellate authority to hear any particular appeal or class of appeals which would under paragraph 1 lie to the District Magistrate.

A class of appeals may be defined either with reference to the nature of the offence or with reference to the Magistrate or Magistrates who convicted the appellant. It is a direction by a superior to his subordinate to exercise, with reference to a specified appeal or class of appeals, the appellate jurisdiction with which such subordinate has been invested by the Local Government. Mr. Gopalan Nayar therefore after his transfer to the Salem district cannot entertain or hear appeals from convictions by Magistrates of second or third class in his sub-division in the absence of a direction given by the District Magistrate of Salem under section 407. In the absence of such direction, appeals could legally have been presented only to the District Magistrate, and any appeals hitherto presented to Mr. Gopalan Nayar's court could not be regarded as validly presented to him. But after the District Magistrate

issues the direction required by section 407, Mr. Gopalan Nayar may treat the appeals already lodged with him as presented to him on the date on which the District Magistrate's direction reaches him and if on that date the appeal time should have expired, the delay could be excused under section 5 of the Limitation Act.

(Signed) V. BHASHYAM IYENGAR,
Ag. Advocate-General.

ORDER—No. 504, Judicial, dated 6th April 1897.

The Advocate-General's opinion will be communicated to the District Magistrate of Salem and to all other District Magistrates.

(True Extract.)

J. F. PRICE,
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