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MADRAS RECORD OFFICE

GOVERNMENT OF MADRAS

Revenue DEPARTMENT

G.O. No.
B.P. No.

962.

~~Press~~
Mis.

Dated 13-5-1875 196.

Not to be folded or roughly handled

Tahsildars.

Read the following papers:—

No. 177. Proceedings of the Board of Revenue, dated 17th December 1874,
No. 3663:—

Read the following letter from J. B. PENNINGTON, Esq., Acting Collector and Magistrate of Trichinopoly, to J. GROSE, Esq., Secretary to the Board of Revenue, dated 5th November 1874, No. 273.

With reference to Standing Order, No. 391-8 (C. O. XXXII. of 1874), I have the honor to request that I may be informed if it is intended to prohibit any preliminary inquiry being made in a case brought against a Tahsildar, &c., even when accused of a serious offence, without the prior sanction of Government or the Board, as the case may be.

2. In the recent prosecution of Setu Row, late Tahsildar of Museri Taluq, exception was taken first to my having transferred him to another taluq (simply in furtherance of the ends of justice and as a matter of administrative convenience), and, secondly, to Mr. Moore's procedure in searching his house before his prosecution had been sanctioned.

3. Now it is obvious that a search must be made without previous notice, or it is pretty sure to be fruitless; and it is also very desirable that inquiries should be made as quietly as possible, (behind the suspected criminal's back, in fact, as far as possible), until it is ascertained whether there are sufficient grounds for proceeding against him or not. It would never do to inform a dacoit beforehand that it was intended to search his house, &c., and a Tahsildar criminal is much more difficult to catch, and, in nine cases out of ten, a much greater criminal than any dacoit. But if the sanction of the Board or of Government is necessary before any of these preliminary steps can be taken, the chance of catching a dishonest Tahsildar is reduced to a minimum.

4. In G.O., No. 1220, dated 3rd July 1874, paragraph 3, I notice that Government "consider that some evidence would seem desirable to enable the Board or Government to judge whether there is a case for prosecution or not." By "evidence" the Government, of course, mean facts ascertained by an *ex parte* inquiry, because there can be no evidence (properly so called), unless the witnesses are examined in presence of the accused, and he certainly cannot be put in the position of an accused person (by the issue of process) without the sanction of Government; but it is difficult to see how even any such facts are to be set forth, unless the local authorities are authorized to make such preliminary inquiry as may appear to them to be necessary without even reporting to the Board at all.

5. The difficulty in the case seems to arise from the obscurity of some expressions in the Code. It is laid down that a "complaint shall not be entertained against a Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution, the Local Government shall not think fit to limit or reserve, and that no prosecution shall be conducted against any such Judge or public servant for any act

*Angs of the Madras Government, Judicial Department,
27th April 1875.*

purporting to be done by him in the discharge of his duty, unless with the sanction of Government;" but it is not at all clear what this means. If a Magistrate with full powers sees reason to suspect only that an offence has been committed, he would generally make inquiries before formally "entertaining any complaint," or issuing process against (*i.e.*, "prosecuting") the accused person.

6. In such preliminary inquiry a sudden search is often most essential; but such search is only legal when the Magistrate "considers that the production of any thing is essential to the conduct of an inquiry into an offence known or suspected to have been committed." Then the question arises whether it is necessary that a formal inquiry should have been *actually set on foot* before search can be made. If that is so, as of course no formal inquiry can ever be set on foot against a Magistrate without the sanction of Government, it follows that no search can be made without the prior sanction of Government, and the provision as to search becomes, therefore, in the case of Sub-Magistrates, a mere nullity as observed before. But I doubt very much if there is any authority for the contention that a formal inquiry must have been actually set on foot before search can be made.

7. It is perfectly legal, of course, for the Police to "investigate" a case without any such "formal inquiry" having been set on foot, and a search warrant would properly be issued on application by a Police Officer engaged in merely "investigating" into an offence before any formal "inquiry" had been made by the Magistrate; and, as a Magistrate must have at least the same power as a Constable to "investigate" prior to "inquiry," he must also have power to issue a search warrant prior to the commencement of proceedings.

8. It is indeed not clear to me that "inquiry" begins with a formal complaint for the issue of process. When a Magistrate sees reason to doubt the truth of a formal complaint, he can refer it for "inquiry" to any Magistrate subordinate to him, and, though no regular process would be issued in such a case, and no "proceedings" taken, it is clear, I should suppose, that the Subordinate Magistrate might legally issue a search warrant if he thought the production of anything was essential to his "inquiry." Then in a case taken up by a full-power Magistrate on suspicion, it appears to me that he would be clearly justified in issuing a search warrant and making the same preliminary inquiry (so to speak) without issuing any process (*i.e.*, "proceeding against" or "prosecuting") the suspected person at all.

9. But as doubts have been entertained as to the right of a Magistrate to issue a search warrant in such cases without the sanction of the Board or Government, I think it is very desirable that an authoritative ruling should be obtained on the point if possible, with special reference to the Government Order quoted above, *viz.*, that "some evidence should be laid before Government to enable them to decide whether there is a case for prosecution or not." In the case in question the unexplained discovery of a chest, containing Rupees 60,000 or 80,000 in cash in the Tahsildar's house, would probably have been the most satisfactory evidence that could have been laid before Government in justification of prosecution.

10. It may perhaps be observed that there is nothing in any of the orders to prevent the Head of the Department from making a preliminary departmental

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inquiry before getting sanction; but then he would certainly have no authority to search.

Submitted for the orders of Government.

(A true Copy and Extract.)

(Signed) J. GROSE,
Secretary.

Transferred to the Judicial Department with the Notes of the Honorable members of Government.

FORT ST. GEORGE,
11th Jan. 1875.

(Signed) C. G. MASTER,
Acting Secretary to Government.

No. 178. From H. G. PRICHARD, Esq., Government Solicitor, Madras, to the Hon. W. HUDLESTON, Chief Secretary to Government, Fort St. George, dated Madras, 21st April 1875, No. 204, forwarding opinion of the Advocate-General.

[OPINION.]

There is nothing in Chapter XXVII. of the Code of Criminal Procedure which, in my opinion, necessitates the sanction of the Government or the Board before issue of a search warrant in the cases to which Mr. Pennington's letter refers. Section 466 forbids, (1), the reception of a complaint against, and (2), the prosecution of an official of the class in question without previous sanction; but Section 140 clearly contemplates Magistrates acting "on suspicion" that an offence has been committed although no report or complaint has been made; and Section 368 justifies the grant of a search warrant not only, as Mr. Pennington seems to think, when the Magistrate considers the production of anything "essential to the conduct of an inquiry into an offence known or suspected to have been committed," but also when he considers it essential "to the discovery of the offender." Moreover Section 377 clearly authorizes the search of a house, which the Magistrate of a District, or of a Division or of the 1st Class, has reason to believe is used as a place for the deposit of stolen property; and Section 379 authorizes search by the Police for anything necessary to the conduct of an investigation. It appears to me, therefore, that whenever it is necessary there can be no difficulty in effecting the search without instituting a formal inquiry or making the reference to Government which a formal inquiry involves.

2. Mr. Pennington's remarks on the indistinctness of Section 466 are just. The words "prosecuted" and "proceedings" in paragraphs 2 and 3 of the section are not defined by the Act and leave it uncertain whether reference is made to the inquiry or to the trial; and in order that paragraph 2 should correspond with paragraph 1, there should be added to paragraph 2 the words "or of such officer, Court or other authority as aforesaid."

(Signed) H. S. CUNNINGHAM,
MADRAS,
19th April 1875. Advocate-General.

ORDER THEREON, 27th April 1875, No. 985.
No. 179. Communicated to the Board of Revenue, with reference to their Proceedings of the 17th December 1874, No. 3663.

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27th April 1875.*

2. The papers will also be communicated to all Magistrates of Districts and to the Inspector-General of Police.

(True Extract.)

[Signature]

Chief Secretary

To the Board of Revenue.

„ Revenue Department. ✓

„ Magistrate of

„ Inspector-General of Police.

Exd. T. O'Connor.

as per letter at Madras office

Recd: 1875: 24th
8/1692
Sobht. of 1875: 24th

JUDICIAL.

To
THE BOARD OF
REVENUE.

Dated April 21th.

Issued
May 6th
Recd
12th

G.O. 27th April 1875, No. 985.

Re: 1875: 24th
APRIL.

Nos. 177-179.

7th May. Letter from Government Secretary, Madras, forwarding Advocate-General's opinion relative to the question whether a preliminary inquiry should be made in cases of Tahsildars, &c., without the previous sanction of Government, communicated to the Board of Revenue, to all Magistrates of Districts, and to Inspector-General of Police.

Cl. 9th

Adopted 8th

130th May 1875