(14) In view of what has been observed above, it is patent that the acquittal of the accused in each of these cases is contrary to law. We notice, however, that cases against the various respondents were registered as far back as 1964 and the orders of the Chief Judicial Magistrate acquitting them were announced in 1965. The offences are of a petty nature, the allegation being that the respondents had not maintained foodgrain stock registers as prescribed under condition No. 3 of the foodgrain licenses held by them and that they had not maintained the accounts correctly. In view of these circumstances, we do not consider that in the present cases a retrial need be ordered. These appeals shall stand disposed of accordingly.

A. D. KOSHAL, J.—I agree.

N.K.S.

APPELLATE CIVIL

Before D. K. Mahajan and S. S. Sandhawalia, JJ.

CHUHARIA,—*Appellant.*

versus

GRAM PANCHAYAT,—*Respondent.*

Regular Second Appeal No. 894 of 1966.

March 19, 1970.

Punjab Gram Panchayat Act (IV of 1953)—Sections 23 and 46—Order of Gram Panchayat imposing fine in absentia—*Whether void—Panchayat—Whether can impose fine without following procedure under section 46.*

Held, that the distinction between a void decision and a voidable decision is that a void decision need not be set aside—it is a nullity and is *non-est*—whereas a voidable decision is a good decision so long it holds the field and is not set aside in proceedings taken for that purpose. The prosecution of an accused *in absentia* is not merely illegal but is void. Where a Gram Panchayat imposes fine under section 23 of Punjab Gram Panchayat Act in the absence of the person accused of an encroachment on the shamlat land, it is like the trial of the accused *in absentia* and is no trial. Hence the order imposing the fine *in absentia* is void. **(Para 7).**

Held, that a Gram Panchayat cannot impose and recover fine without following the procedure under section 46 of the Act.

Regular Second Appeal from the decree of the Court of Shri Sarup Chand Goyal, Additional District Judge, Karnal, dated the 13th day of June, 1966, affirming with costs that of Shri R. P. Gaind, Sub-Judge Ist Class, Karnal, dated the 10th June, 1965, granting the plaintiff decree for perpetual injunction restraining the defendant from realising more than Rs. 500 as fine levied under section 23 of the Punjab Gram Panchayat Acts and dismissing the suit relating to the recovery of fine in pursuance of the resolution dated 2nd March, 1961 and also the suit relating to the resolution dated 5th June, 1961 as for as it relates to the fine beyond Rs. 500 and further clarifying that the recoveries under any other head were not the subject matter of the present suit and they were not effected in any way.

M. S. JAIN, ADVOCATE, for the appellant.

G. C. MITTAL, ADVOCATE, for the respondent.

REFERRING ORDER

HARBANS SINGH, J.—This second appeal has arisen out of a suit filed in rather peculiar circumstances. The facts which are necessary for the determination of the point in controversy in this second appeal, shorn of other unnecessary details, may be stated as follows:

(2) There was a *shamlat* land in the village over which Chuharia the appellant or his father had constructed some structure. The Gram Panchayat of his village Jogana Khera proceeded against him under section 21 of the Punjab Gram Panchayat Act (hereinafter referred to as the Act) in the year 1961 alleging that he has encroached upon and caused obstruction on the *shamlat* land which had vested in the Panchayat. A notice was given to Chuhria which according to the appellant was not served on him, but according to the Panchayat was refused by him. In any case, on the date fixed, that is, 2nd of March, 1961, the appellant was not prseent before the Panchayat which by its resolution of that date imposed a fine of Rs. 20 and directed him to remove the obstruction. This resolution not having been complied with the Panchayat proceeded to take action against the appellant under section 23 of the Act. Notice of this was also sent to Chuhria, but he was again absent on the date fixed, namely, 5th of June, 1961, and by a resolution of that date, recurring fine of Re. 1 per day was imposed upon him till he removes the obstruction. This order as indicated above was again passed in the absence of the appellant. On 5th of

February, 1963, another resolution was passed by which the Gram Panchayat sought to recover the amount of daily fine which by that date amounted to Rs. 610. Intimation of this resolution was also given to the appellant. Thereupon, the appellant filed a revision under section 51 of the Act before the Sub-Divisional Magistrate, Thanesar challenging the resolution directing the recovery of the fine. This revision was dismissed on some technical objections which are not necessary to mention here. He thereupon filed a second revision which was dismissed by the Sub-Divisional Magistrate on 22nd of June, 1963 mainly on the ground that unless the previous order of the Gram Panchayat imposing the daily fine is set aside, the resolution ordering the realisation of the amount of fine cannot be challenged. Against this order of the Sub-Divisional Magistrate, the appellant filed a petition under Article 227 of the Constitution of India (Criminal Miscellaneous No. 760 of 1963) in which after stating the facts substantially as detailed above, in paragraph 10 the appellant claimed that the Gram Panchayat had no jurisdiction to impose a daily fine and then detailed the various reasons in several sub-paragraphs. In paragraph 11, it was again repeated that the resolution of 5th of June, 1961 was illegal and *ultra vires* and was passed without notice to the petitioner and consequently the validity of the original resolution could be assailed even at the time of the realisation of the fine imposed. In the prayer clause, two reliefs were claimed, first, that the resolution of the respondent dated 5th of February, 1963 seeking to realise the fine be quashed and, secondly, the resolution dated the 5th of June, 1961 be also quashed to the extent of imposition of daily fine.

(3) This petition was dismissed by Mr. Justice Shamsher Bahadur *vide* an order dated the 14th of October, 1963, holding that (1) the objection that the Gram Panchayat had no jurisdiction to direct that the fine should be recovered as arrears of land revenue was not taken before the Sub-Divisional Magistrate, nor was it clear from the resolution that the amount was to be recovered as arrears of land revenue, and that (2) so far as the other objections raised "against the order of the Gram Panchayat" are concerned these were also not taken specifically before the Sub-Divisional Magistrate. The learned Judge then observed as follows:—

> "The revisional authority, in the impugned order, observed that unless the order of the Gram Panchayat ordering the imposition of a daily fine in case of continuity of obstruction is set

aside, the resolution ordering the realisation of the amount cannot be assailed. I do not see that this order of the Sub-Divisional Magistrate lacks the basis of jurisdiction and in this view of the matter, there is no force in this petition which fails and is dismissed."

Thereafter the appellant brought a suit, out of which the present appeal has arisen, challenging the validity of the two resolutions dated the 2nd of March, 1961 and 5th of June, 1961. The grounds of challenge were as follows:—

(a) that the plaintiff has no house and the house in question is owned by his father;

(b) that the plaintiff was never served with any notice and all the proceedings were *mala fide;*

(c) that at the time of passing of the resolution dated the 5th of June, 1961, the site was a formal *bara* of the plaintiff's father and did not vest in the Panchayat which consequently could not take any action against him.

The suit was resisted and the following issues were settled:—

(1) Whether this court has got jurisdiction to try this suit?

(2) Whether the suit is within time ?

(3) Whether the suit barred under section 108, Gram Panchayat Act?

(4) Whether the present suit is maintainable in view of the order of the High Court dated 14th October, 1963 regarding subject-matter of the present suit ?

(5) Whether the site in dispute belongs to the father of the present plaintiff and does not vest in the Panchayat?

(6) Whether the proceedings taken by Gram Panchayat against the plaintiff were illegal, without jurisdiction on the grounds mentioned in para III of the plaint?

The plaintiff just made his own statement and on behalf of the Gram Panchayat, the various resolutions and the copies of the

notices showing that the service had been effected were produced. The Courts below came to the conclusion :

(1) that the objection of the appellant that he had not received any notice about the date on which the impugned resolutions were passed by the Gram Panchayat is not correct;

(2) The plaintiff has led no evidence to support his contention that the site was not *shamilat* and belonged to his father and the mere fact that the consolidation authorities demarcated the *phirni* round it would not change the nature of the land and that the site did vest in the Panchayat.

In view of the above findings, the suit of the plaintiff was dismissed. He has come up in appeal.

(4) The main contention of the learned counsel for the appellant is that even if it be taken that the notices were issued by the Gram Panchayat and were refused by the appellant, no action could be taken under section 21 or 23 of the Act and no fine could be imposed in the absence of the appellant. Reliance was placed on *Dharman* v. *The Gram Panchayat of village Kurar* (1), wherein it was held by Mr. Justice Mahajan that the imposition of fine under section 23 without following the procedure prescribed in section 46 is illegal and cannot be recovered. Section 46 prescribes the procedure to be adopted on failure of the accused to appear. According to it, if the accused fails to appear, the Panchayat has to report the fact to the nearest Magistrate who then issues a warrant directing the accused person to appear before the Magistrate and when he does so the accused shall be asked to excute a bond with or without sureties to appear before the Panchayat and if he fails to excute such a bond he can be directed to be produced before the Panchayat in custody. Some decided cases were relied upon by the learned Judge.

(5) Before this matter can be considered, the point has been raised on behalf of the respondent that these matters cannot be gone into because of the previous decision in the petition under Article 227 of the Constitution. It is contended that the correctness of the order dated the 5th of June, 1961 imposing the daily fine

(1) 1968 Cur. L.J. 938.

under section 23 of the Act was specifically challenged in the petition under Article 227 of the Constitution and *inter alia* the ground taken was that the order was passed in the absence of the appellant. Question arises that if once the appellant comes to this Court under Article 227 of the Constitution challenging the legality of a particular order and that application is dismissed, can the same order be challenged later by filing a suit ? The contentions on behalf of the learned counsel for the respondent is that irrespective of the fact whether the decision given in the petition under Article 227 of the Constitution deals with all the points raised, the decision would be *res judicata* and no further suit can be filed challenging the same order. Reliance in this respect is placed on the decision of the Supreme Court reported in *Union of India* v. *Nanak Singh* (2). In that case, in the writ petition under Article 226 of the Constitution, two points were taken for challenging the correctness of the order of termination of services. The High Court considered the first ground and dismissed the petition. The second that the officer who had passed the order of dismissal was not competent to do so was not gone into. The employee thereafter filed a civil suit seeking a declaration that the order terminating his employment was made by an authority lower than the authority competent to pass that order. Their Lordships of the Supreme Court held that once the petition was dismisseed, the dismissal of the petition operated as a rejection of both the grounds on which it was founded irrespective of the fact that the High Court did not deal with the second ground. The learned counsel, therefore, contended that the argument of the learned counsel for the appellant in this case that the decision in the petition under Article 227 of the Constitution would not operate as *res judicata* because the learned Judge did not go into the grounds that had been urged in the petition for declaring the order dated the 5th of June, 1961 as invalid, has no force. I feel that the point raised is of considerable importance and it would be in the fitness of things if this is decided by larger Bench in the first instance. I would, therefore, direct that the records of this case may be put before my Lord the Chief Justice for necessary order.

JUDGMENT

D. K. MAHAJAN, J.—It is not necessary to state the facts giving rise to this second appeal because they have been very lucidly

(2) 1968 Cur. L.J. 864.

set out in the referring order of Harbans Singh J. which should be read as part of this order.

(7) The only point that has been canvassed before us is whether the orders of the Gram Panchayat dated 2nd of March, 1961 and 5th of June, 1961, are void or not. The contention of the learned counsel for the appellant is that these orders are void because the provisions of section 46 of the Punjab Gram Panchayat Act, 1952 (hereinafter referred to as the Act) were not followed and the fine was imposed *in absentia* and so also the recurring fine. So far as the question whether a fine can be imposed or recovered without following the procedure laid down in section 46 is concerned, there are three decisions of this Court, namely *Dharman* v. *The Gram Panchayat of village Kurar* (1), *Bhagwan Singh* v. *The Gram Panchayat village Balona* (3), by S. B. Capoor J. the decision of my Lord the Chief Justice in *Mula Singh* v. *Gram Panchayat Saga* (4). This straightaway poses the question whether a criminal Court can convict a person *in absentia* and whether such a decision would be decision with jurisdiction? There can be no dispute that if the decision is without jurisdiction it is void. It is only a decision with jurisdiction but otherwise wrong which can be said to be voidable. The distinction between a void decision and a voidable decision is that a void decision need not be set aside it is nullity and is *non-est* whereas a voidable decision so long it holds the field and is not set aside in proceedings taken for that purpose. If this distinction is kept in view no difficulty is presented in deciding cases where these complicated questions of want of jurisdiction and of a Court deciding a matter with jurisdiction but illegally, arise. In the present case, the fine was imposed as well as recurring fine imposed *in absentia.* No decision has been cited before us which has taken the view that any prosecution of an accused *in absentia* would be prosecution with jurisdiction and not merely an illegal prosecution. Therefore, we must proceed on the simple ground that the trial of an accused *in absentia* is not trial or a void trial. Having cleared this ground, the question of *res judicata* to determine which Harbans Singh J. referred the case to a larger Bench present no difficulty.

(8) In the first instance, I may mention that Mr. Justice Shamsher Bahadur did not either impliedly or expressly decide the

(3) C.R. 365 of 1966 decided on 9th Dec., 1966.

(4) C.R. 375 of 1966 decided on 23rd March, 1967.

contentions that have been raised in the present suit. The only passage on which reliance has been placed for the proposition that his decision will operate as *res judicata* so far as the present suit is concerned, has been reproduced in the referring order of Harbans Singh J., and if that passage is read along with the decision of the Sub-Divisional Magistrate, against which the writ-petition before Shamsher Bahadur J. was preferred, it would appear that no decision either by implication or expressly was given by the Sub-Divisional Magistrate which can be said to have been affirmed by Shamsher Bahadur J. The order of the Sub-Divisional Magistrate is reproduced below for facility of reference:—

> "The facts of the case briefly are that the applicant was imposed a penalty and a daily fine by the Gram Panchayat Jogna Khera under section 23 of the Gram Panchayat Act. As the petitioner did not remove the obstruction, the daily fine went on accumulating and ultimately amounted to Rs. 610. The Panchayat ordered its realisation,—*vide* its resolution No. 6 dated 3rd February, 1963. It is against this order that the present petition has been filed.
>
> Notice of the petition was given to the Gram Panchayat, who contested the petition. I have heard the learned counsel for the petitioner as well as the learned counsel for the Gram Panchayat. The learned counsel for the Gram Panchayat raised preliminary objection that unless the original order of the Gram Panchavat.—*vide* which it ordered to impose daily fine in case of continuity of obstruction, is set aside, the resolution ordering the realisation of the amount cannot be assailed on any valid ground. I also agree with this contention. The revision petition, therefore, cannot proceed and is hereby dismissed."

(9) It was observed by their Lordships of the Supreme Court in *Union of India* v. *Nanak Singh* (2) in what circumstances a decision in writ proceedings can be *res-judicata*. Reference in this connection may be made to paragraphs 5 and 6 of the report at page 867 which are reproduced below:—

> "5. This Court is *Gulabchand Chhota Lal Parikh* v. *State of Gujarat* (5), observed that the provisions of section 11 of the

(5) A.I.R. 1965 S.C. 1153.

Code of Civil Procedure are not exhaustive with respect to an earlier decision operating as *res-judicata* between the parties on the same matter in controversy in a subsequent regular suit, and on the general principle of *res-jud cata* any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as *res-judicata* in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as *res-judicata* in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. The Court in *Gulabchand's case* (5), left open the question whether the principle of constructive *res-judicata* may be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding but was not so raised therein, must still be deemed to have been decided.

6. If the order of the High Court in appeal from the order in the writ petition operated constructively as *res-judicata*, it might have been necessary to consider the question which was left open by the Court in *Gulabchand's case* (5). But in our view the judgment in the previous case operates by express decision as *res-judicata*. It is true that in order that the previous adjudication between the parties may operate as *res-judicata*, the question must have been heard and decided or that the parties must have an opportunity of raising their contentions thereon. In the present case, Gurdev Singh J., dealt with the question in some detail and held that Mr. Kane had no authority to terminate the employment of Nanak Singh. The High Court in appeal thought that the appeal could be disposed only on the first ground and they recorded no express finding on the second ground. But once the appeal was

allowed and the petition was dismissed, the dismissal of the petition operated as a rejection of both the grounds on which it was founded. The judgment of the Privy Council on which reliance was placed by counsel for Nanak Singh—*Abdullah Ashgar Ali Khan* v. *Ganesh Dass* (6) has, in our judgment no application. In that case a suit was dismissed by the Court of the Judicial Commissioner on the view that its constitution was defective and no opinion on the merits of the dispute between the parties was expressed. The judgment of the Judicial Commissioner was held not to operate as *res-judicata* in a subsequent suit between the parties to the previous suit because the dispute was not decided on its merits in the previous suit expressly or even by implication. It is unnecessary on that view to adjudicate upon the question whether Mr. Kane had authority to determine the employment of Nanak Singh."

The requirements of the aforesaid *ratio* of the decision of the Supreme Court are not satisfied in the present case. Therefore, we must hold that the decision of Shamsher Bahadur J., does not operate as *res-judicata*. If that is so, then on the basis of the decision in *Dharaman's case* (1), and the decisions taking that line, it must be held that the orders of the Panchayat, dated 2nd March, 1961 and 5th of June, 1961, are void orders.

(10) Before parting with this judgment, we may also mention that the findings of fact on other matters given by the lower appellate Court are final and nothing said by us can be taken to have in any manner affected those findings. We also make it clear that it will be open to the Panchayat to have recourse to the proceedings under sections 21 and 23 of the Act in accordance with the provisions of the Act, particularly section 46, if it is so advised.

(11) For the reasons recorded above, we allow this appeal to the extent indicated above, that is, no recovery can be made of the fine imposed under the two orders from the appellant. There will be no order as to costs.

S. S. SANDHAWALIA, J.—I agree.

N. K. S.

(6) A.I.R. 1917 P.C. 201.