CIVIL RULE.

Before C. C. Ghose and Duval JJ.

NASARUDDIN KHAN

v.

EMPEROR.*

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March 12.

Complaint—Complaint by Civil Court—Procedure on the hearing of the appeal from such Court governed by the Civil Procedure Code—Civil Procedure Code (Act V of 1908), s. 104—Order XLI, rr. 11 and 17.—Criminal Procedure Code (Act V of 1898), ss. 195 (3), 476 and 476B.

An appeal from the making or filing of a complaint by a Civil Court, under s. 476 of the Criminal Procedure Code, lies to the Court to which the former is subordinate, and the procedure relating to such appeals is governed by the Civil, and not the Criminal, Procedure Code.

Where an appeal under s. 476B from the Court of the Munsif was heard in part by the District Judge, and on the next date of hearing the appellant's pleader was not present in Court :

Held, that the District Judge was entitled to consider that the appeal had been abandoned and to dismiss it, and that there was no illegality or material irregularity, within s. 115 of the Civil Procedure Code, in his procedure, nor any ground of interference under s. 107 of the Government of India Act.

In April 1923 the plaintiff, Jagat Kishore Chowdhry, filed an ejectment suit against the first petitioner, Nasaruddin Khan, and his daughter, in the Court of the Additional Munsif of Mymensingh, alleging that the defendants were tenants-at-will. In reply, the first petitioner filed two *dakhilas* to prove payment of rent by them. The suit was heard in July 1924, and the first petitioner proved the documents. The second petitioner deposed to the payment of rent. On the 31st July the Munsif decreed the suit, holding the

* Civil Revision No. 1 of 1926, against the order of G. C. Sankey, District Judge of Mymensingh, dated Nov. 11, 1925.

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dakhilas to have been forged. On the 15th August the plaintiff applied to the Munsif to make a complaint under section 476 of the Criminal Procedure Code. The Munsif, by his order, dated the 22nd September, directed a complaint to be drawn up against the first petitioner under sections 193, 465, 467 and 471 of the Penal Code, and against the second petitioner under section 193 of the same Code, but the formal complaint was not drawn up till the 25th instant. In the meantime the petitioners appealed against the order of the 22nd to the District Judge of Mymensingh who admitted the appeal and sent for the record. It came on for hearing on the 5th December, and after being heard in part was postponed, pending the decision of the appeal in the original ejectment suit. On the 28th October 1925, the District Judge took up the appeal from the complaint under section 476 and dismissed it for default of appearance of the appellant's pleader, without perusal of the records or consideration of the merits. He refused to restore the appeal by his order of the 11th November, which was supported by an affidavit by the appellant's pleader, Mukunda Chunder Chowdhry, and was as follows :—

I was engaged as a pleader on behalf of the appellant Nasaruddin Khan, in Miscellaneous Appeal No. 280 of 1924, Babu Sarat Chandra Adhikari, pleader, was also a pleader on behalf of the appellant. The 28th day of October 1925 was fixed as the date of hearing. The said date was also fixed for the hearing of a sessions case in your Honour's Court. I was a pleader on behalf of the accused in the said sessions case. Thinking that your Honour would take up the said sessions case, and that if the hearing of the case be commenced, then the said Miscellaneous Appeal cannot be heard on that day, I was not ready for the said appeal case, ... But your Honour, instead of personally taking up the said sessions case, transferred it to the Assistant Judge's Court. I went to the said Assistan. Judge's Court, and was engaged in the hearing of the said sessions caset Sarat Babu was also engaged in a case in the Additional Munsif's Court, when the appeal was called on for hearing. I told the appellant Nasaruddin

Khan and the pleader Maulvi Ibrahim Khan to sit down in your Honour's Court, and they were sitting in your Honour's Court. A few minutes after that the said appeal was called on for hearing. At first, I asked for time from your Honour's Court, through the pleader Maulvi Ibrahim Khan, but your Honour refused to allow time and gave orders for calling me in. At that time the appellant for the first time came to call me, and the Court being informed of the matter, told the pleader, Ibrahim Khan, to call me in. The appellant and the pleader, Ibrahim Khan, appeared before me and said that I should have to argue the case. I then appeared before your Honour's Court in hot haste for making arguments in the appeal, and came to learn that the appeal has been struck off. None of us, the pleaders for the appellant, intentionally absented ourselves.

Mr. K. N. Chaudhuri (with him *Babu Kali Kinkar Chakravarti*), showed cause. An appeal under section 476B of the Code, in the case of a complaint made by a Civil Court, lies to the Court to which the former is subordinate, that is to the District Judge in this case. He hears it in civil appellate jurisdiction, and the procedure is governed by the Civil, not the Criminal Procedure Code.

Mr. Monnier (with him *Babu Jahnabi Charan Das Gupta*), for the petitioner. The first question relates to the jurisdiction of the High Court to interfere in cases of complaints by Civil Courts under section 476 of the Criminal Procedure Code. The jurisdiction is not under section 439 of this Code, but under section 115 of the Civil Procedure Code and section 107 of the Government of India Act—*Emperor* v. *Har Prasad Das* (1). The next question is by what Code the procedure is governed. I submit that section 423 of the Criminal Procedure Code applies. The matter is placed beyond doubt by section 419. "*Every appeal*" in the section includes one under section 476B; section 421 refers expressly to section 419, and, therefore, also applies to appeals under section 476B. Section 423 relates

(1) (1913) I. L. R. 40 Calc. 477.

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to the later stage of the appeal admitted under section 421, and, therefore, also applies to such appeals. The scheme and the arrangement of the sections under Chapter XXXI show that sections 419 and 423 are not limited to appeals from convictions or acquittals or from certain specified orders, *but apply to all appeals under the Code*. The heading of Part VII and Chapter XXXI refer to "Appeals," *generally*. Section 404 does not say that appeals lie only from Criminal Courts, but it only means that appeals from *such* Courts do not lie except as expressly provided. Sections 405 and 406 state that certain orders are appealable, and lay down the *forum* of appeal. Sections 407—411 deal with appeals from convictions, and prescribe the *forum*; sections 412—415 deal with certain restrictions to appeals of the same class, *i.e.*, from convictions. Section 417 relates to appeals from acquittals. Sections 405—417, therefore, deal with *appealability* and the particular *forum*. Then come sections dealing with quite different subject matters. They are *general provisions applicable to all appeals* under the Criminal Procedure Code, viz., the *grounds of appeal* (section 418, modified partly by section 449), the *filing* (sections 419, 420) and the *procedure on the hearing* (sections 421—423). Sections 424—431 are also general sections dealing with other matters applicable to all appeals. There are also certain sections, outside Chapter XXXI, relating to appealability, *e.g.*, section 515; this section determines only the *forum*, but the *grounds*, the *filing* and the *hearing* must be governed by sections 419—423. So section 476B lays down only the *forum*, but the *grounds*, *filing* and the *hearing* must be governed by sections 419—423; and, as I have already said, section 419 includes appeals under section 476B, in its wide terms, and sections 421—423 apply by reference to section 419. My contention is

not merely that there is nothing in the Criminal Procedure Code to negative its application, but that its provisions *require* appeals under section 476B to be governed thereby.

In the case of complaints under section 476 by Civil Courts, appealability is created by the Criminal Procedure Code, and there is no anomaly in a Civil Court when vested with criminal jurisdiction being governed by the same Code in other *cognate appellate matters*, viz., the *grounds*, the *filing* and the *hearing*. On the other hand, if appeals from Civil Courts under section 476 are to be governed by the Civil Procedure Code, and appeals from Criminal Courts, under the same section, by the Criminal Procedure Code, there would be an anomaly. I next submit that the Civil Procedure Code does not apply. Section 104 of that Code refers to "*orders*" which must, in the first place, mean orders *ejusdem generis*, that is, orders of a civil nature, and not *complaints* to Criminal Courts; then, again, the drawing up of a formal "*complaint*" under section 476 is not the drawing up of an "*order*". The appeal under section 476B is from the judicial act of complaining or making a complaint, not from an *order directing* the *drawing up of* a *complaint*. A "*complaint*" has to be made under section 476, and not any "*order*" passed. There is no appeal from any "*order*" under section 476. This is obvious from section 476 (*1*), under which the complaint itself (and not an order) must be forwarded to the Magistrate, and from section 476B, which requires the Appellate Court to "withdraw the *complaint*". Then, again, the Magistrate takes cognizance under section 190 (*1*) (*a*) on a *complaint* of facts, which is not an "order"; the definition of complaint [section 4 (*h*)] also excludes the notion of an "order". Even if section 104 of the Civil Procedure Code and Order XLI apply, there

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was no default under rules 11 and 17, as the appellant was present, and the Court has thereunder to hear the "appellant" who is distinguished from the "pleader" in rule 11. The affidavit of the pleader and the conduct of the appellants in rushing out of Court to bring their pleader, though they were unsuccessful, and their application for restoration show a great determination to proceed with the appeal. These facts cannot amount to abandonment of the appeal in any sense of the word. Besides, an Appellate Court dismissing an appeal must record a judgment on the merits—*Patinhare Tarkatt Rama* v. *Vellur Krishnan Menon* (1)—and the omission to do so is at least a material irregularity within section 115 of the Civil Procedure Code. Lastly, the pleader's affidavit shows that the appeal was dismissed without consideration of the merits through no fault of the appellant, and he was gravely prejudiced, and this Court ought to interfere under section 107 of the Government of India Act, and order a re-hearing of the appeal.

GHOSE AND DUVAL JJ. This is a Rule calling upon the District Magistrate of Mymensingh to show cause why the orders of the District Judge of Mymensingh, dated the 28th October 1925, and 11th November 1925, should not be set aside or such other or further order made as to this Court may seem fit and proper on the ground that the District Judge had no jurisdiction whatever to dismiss the appeal of the petitioners, under section 423 of the Code of Criminal Procedure, without looking into the record and considering the same.

In order to understand the precise significance of the ground taken in this Rule, it will be necessary to set out briefly the facts giving rise to the appeal, the

(1) (1902) I. L. R. 26 Mad. 267.

dismissal of which has led to the present application being made to us. The facts are as follows. It appears that the Additional Munsif, Sadar, in the district of Mymensingh, decreed a suit in ejectment brought by Raja Jagat Kishore Acharya Chowdhry against the petitioners. Thereafter, the learned Munsif, at the instance of the plaintiff, filed a complaint before the Magistrate against the said petitioners—Nasaruddin Khan and Madan Sheikh—for having committed certain offences punishable under sections 193, 465, 467 and 471 of the Indian Penal Code. This complaint was one which was made under section 476 of the Criminal Procedure Code. Thereafter, an appeal was filed before the District Judge against the order of the Munsif making or filing the said complaint. It was registered as Miscellaneous Appeal 280 of 1924. The appeal was admitted by the District Judge on the 24th September 1924, and it came on for hearing, after service of notice on the respondents and after the record had been called for, before the District Judge on the 5th December 1924, when, it appears, the pleader for the appellants, after arguing the appeal for some time, stated that he could not proceed further with the appeal on that date as he was engaged otherwise and as the arguments would take some time. The hearing of the appeal was adjourned, and it appears that the matter did not come on again before the District Judge till the 22nd December 1924, when it was thought desirable that the appeal, which the appellants, that is, Nasaruddin Khan and Madan Sheikh, had filed against the decree of the Munsif in the said suit, should be heard along with the appeal against the order of the Munsif filing or making the complaint under the provisions of section 476 of the Criminal Procedure Code. The hearing of this appeal, that is to say, the appeal against the

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order of the Munsif filing or making the complaint, was accordingly adjourned. It next came on for hearing on 28th October 1925, before the District Judge, when the pleaders for the appellants were absent and the pleader for the respondent was present. The District Judge, after looking into the record, found that the hearing by the Magistrate of the complaint made by the Munsif had been delayed for more than a year; he came to the conclusion that no further time could be allowed, and he thereupon dismissed the appeal. An application for revival of the appeal was filed, and that came on for hearing before the District Judge on 11th November 1925. The District Judge, after hearing the parties, was of opinion that he was unable to re-admit the appeal, and he, accordingly, affirmed the order which had been previously made by him and rejected the application for revival of the appeal. Against the two last mentioned orders the present petition was filed and the present Rule obtained.

Mr. Chaudhuri, who appears for the Crown, argues that by the terms of section 476B, the appeal against the order of the Munsif, filing or making the complaint under seciton 476 of the Criminal Procedure Code, lay to the Court to which the Court making the order or filing the complaint was subordinate within the meaning of section 195 (*3*); in other words, Mr. Chaudhuri's contention is that the appeal from the order of the Munsif making or filing the complaint lay to the District Judge, and the appeal was one which was governed by the provisions of the Code of Civil Procedure, and not by the Code of Criminal Procedure. Mr. Monnier, who appears in support of the Rule, argues that the appeal is one which is allowed by and under a section of the Code of Criminal Procedure, namely, section 476B, and that there is nothing whatsoever in the Code of Criminal Procedure negativing

the contention that the appeal is governed by the provisions of the Code of Criminal Procedure. In the second place, he argues that the Code of Civil Procedure has no application whatsoever to an appeal of this description, and that, having regard to Chapter XXXI of the Code of Criminal Procedure, it must follow that the appeal is one governed by the provisions of the Code of Criminal Procedure, and if that is so, then under section 423 of the Criminal Procedure Code the learned Judge who disposed of the appeal was in error in disposing of the same without considering the matters on the record in the appeal.

These being the respective contentions of the parties, it is now our duty to examine the same. No doubt the appeal in this case is one which is given by section 476B of the Criminal Procedure Code, but the very words used in section 476B of the Criminal Procedure Code indicate with sufficient clearness that the Court to which the appeal lies is one to which the Court making or filing the complaint is subordinate; in other words, if it is a Civil Court which has made an order under section 476 of the Criminal Procedure Code, the appeal against such an order must lie to and be heard by the authority or tribunal to which such Civil Court is subordinate. It follows, therefore, that the original order, having been made by a Munsif in a civil suit, the appeal against an order by the Munsif under section 476 of the Criminal Procedure Code lay to the District Judge to whom the Munsif was subordinate. Therefore, it would follow that, although the appeal itself is one which is allowed by the Code of Criminal Procedure, the appeal must be heard by the District Judge to whom the Munsif is subordinate, *i.e.*, by an Appellate Court exercising civil appellate jurisdiction. It follows, therefore, that the procedure governing an appeal of this description is one which is to

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be sought for within the four corners of the Code of Civil Procedure. It follows also that the provisions of the Code of Civil Procedure being applicable to an appeal of this nature, the District Judge was in our opinion fully competent in making the orders which he did on the two dates referred to above. The relative provisions governing appeals in matters of this description are to be found in Order XLI of the Code of Civil Procedure. It was a part-heard appeal. The appeal was admitted in September 1924. It came on for hearing for the first time in December 1924. It stood over from time to time till it was reached on the 22nd June 1925. It stood over for a further period, and was not reached till the 28th October 1925, when, as stated above, the learned pleaders who had been engaged to appear in support of the appeal were found to be absent. Under these circumstances, the District Judge was in our opinion fully entitled to consider that the appeal had been abandoned by and on behalf of the appellants. Under these circumstances, we do not see that the District Judge has been guilty of any illegality or of any material irregularity within the meaning of section 115 of the Civil Procedure Code, nor does it seem to us that there has been anything done by the District Judge to which exception can be taken, and in respect of which our powers of superintendence under the provisions of section 107 of the Government of India Act can be invoked.

The result, therefore, is that there is absolutely no substance in the present Rule, and it must be discharged.

E. H. M. *Rule discharged.*