

CRIMINAL REVISION.

Before Mukerji and Graham JJ.

MAHIM CHANDRA NATH BHOUMICK

v.

EMPEROR.*

1928.

Dec. 10.

Appeal—Jurisdiction to entertain appeals under s. 476B, Cr. P. C.—
 “Appeals ordinarily lie,” meaning of—Criminal Procedure Code
 (Act V of 1898), ss. 476B, 407 (2), 195 (3).

A Deputy Magistrate, empowered under clause (2) of section 407 of the Criminal Procedure Code to hear appeals from the sentences of subordinate magistrates, is not competent to hear appeals under section 476B of the Criminal Procedure Code from the orders of such magistrates, not being a court to which appeals from such magistrates ordinarily lie.

Sadhu Lall v. Ram Churn Pasi (1) followed.

Eroma Variar v. Emperor (2) and *Queen-Empress v. Subbaraya Pillai* (3) referred to.

No appeal lies from an appellate order under section 476B of the Criminal Procedure Code and section 439, clause (5), does not stand in the way of the validity of such order being impugned in revision before the High Court in connection with the subsequent trial.

Ahamadar Rahman v. Dwip Chand Chowdhury (4) referred to.

CRIMINAL RULE.

This Rule arose out of an appeal under section 476B of the Criminal Procedure Code from an order refusing to make a complaint under section 476.

There was a case under section 426 of the Indian Penal Code between one Naimuddin and two persons named Hanif Gazi and Jabbar Ali about a piece of land, alleged by the present petitioner to have been sold to the accused in that case. The *kabala* of sale, purporting to show Naimuddin the complainant in that case as a witness to that document, was produced by the accused in that case and the petitioner gave

* Criminal Revision, No. 891 of 1928, against the order of P. R. Bhattacharjee, Deputy Magistrate, Comilla, dated July 10, 1928 and of N. L. Hindley, Sessions Judge of Tippera, dated July 30, 1928.

(1) (1902) I. L. R. 30 Calc. 394. (3) (1895) I. L. R. 18 Mad. 487.
 (2) (1903) I. L. R. 26 Mad. 656. (4) (1927) I. L. R. 55 Calc. 735.

evidence in support of the defence, proving the execution of the deed and the signature of Naimuddin therein. There was a thumb impression near the latter's name purporting to be his, which was proved by expert evidence not to be his thumb impression at all. Naimuddin made an application to the court to take action against the persons responsible for the forgery and the trying Magistrate refused to make a complaint. An appeal from that order was preferred by the petitioner under section 476B, which was admitted by the Joint Magistrate, but was finally heard and disposed of by Mr. L. B. Das who succeeded him. Mr. Das was vested with powers under section 407, clause (2), of the Criminal Procedure Code. He directed a complaint to be lodged against the petitioner. At the trial, the petitioner impugned the validity of the proceedings as being without jurisdiction. His objection was overruled by the trying court. An application in revision to the Sessions Judge was also rejected. He, thereupon, obtained this Rule.

CRIMINAL RULE, obtained by the accused.

Mr. Akhilchandra Datta, for the petitioner. Cognizance was taken against the petitioner on the complaint on Mr. L. B. Das, who was empowered under section 407, clause (2), of the Criminal Procedure Code. He had no jurisdiction to hear appeals under section 476B. The whole proceeding based on his order was void and no court could take cognizance on that order. The court of Mr. L. B. Das was not the court to which the trying Magistrate was subordinate within the meaning of section 195, clause (3). The appeals from the sentences of such Magistrate did not ordinarily lie to Mr. Das's court. He had no independent power of his own, but exercised only a delegated jurisdiction. See the cases of *Sadhu Lall v. Ram Churn Pasi* (1) and *Eroma Variar v. Emperor* (2). The learned Judge was wrong in thinking that section 439, clause (5) of the Criminal Procedure Code

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stood in the way of this application, as the petitioner did not prefer any appeal from the order of Mr. Das. No appeal lay from that order. Cited *Ahamadar Rahman v. Dwip Chand Chowdhury* (1).

Mr. Debendranarayan Bhattacharjya, for the Crown. There has been a change in the law by the amendment of 1923. The omission of the word "only" from section 195, clause (3), is significant. This clearly shows that appeals under section 476B can be entertained by two courts, namely, the court of the District Magistrate as well as that of the Magistrate empowered under section 407, clause (2): The judgment of Benson J. in *Eroma Variar v. Emperor* (2) and the case of *Queen-Empress v. Subbaraya Pillai* (3). In any case, if the order of Mr. Das was without jurisdiction, the case might be taken to have been instituted without any complaint and such defect is curable under section 537 of the Criminal Procedure Code.

MUKERJI J. The facts necessary to be stated for the purposes of this Rule are these: One Naimuddin was the complainant in a case under section 426 of the Indian Penal Code against one Hanif and others, which was tried by Maulvi Mir Hossain, a Magistrate of the 3rd class. The accused persons pleaded that the land concerned had been purchased by them and that the complainant Naimuddin was himself an attesting witness to the deed of purchase. The petitioner Mahim Chandra Nath Bhoumik gave evidence in support of the defence proving the execution of the deed and the signature of Naimuddin therein. Naimuddin, while the trial was pending, denied his signature in the deed and applied to the trying magistrate for the prosecution of all concerned in the forgery. The accused persons were acquitted, the trying magistrate being doubtful as to the forgery. After the case was over, Naimuddin pressed his aforesaid application. The trying magistrate,

(1) (1927) I. L. R. 55 Calc. 765. (2) (1903) I. L. 26 Mad. 656.
(3) (1895) I. L. R. 18 Mad. 487.

instead of dealing with the matter himself, as he should have done, forwarded the papers to the Sadar Subdivisional Officer for necessary action. The Sadar Subdivisional Officer returned the papers to the trial magistrate with the following remarks:—

“ The only materials are the denial of execution by the complainant, and the dissimilarity of the left thumb impression of the complainant from those on the document Ex. 1. The court too did not, on the judgment, come to any finding that it is forged. As such I would leave to complainant to move in the matter if the left thumb impression be really forged.”

What other action on the part of the complainant was contemplated by these remarks it is difficult to see. Evidently the learned Subdivisional Magistrate was thinking of sanction under section 195 as distinguished from an order for prosecution under section 476 of the Code of Criminal Procedure, forgetting for the moment the changes effected by the amendments of 1923. As the trying magistrate did not pass any final order in the matter, the complainant moved Mr. L. B. Das, a Deputy Magistrate, who had powers under section 407, clause (2) of the Criminal Procedure Code and that officer asked the trying magistrate to pass such orders. When the said order of Mr. L. B. Das arrived before the trying magistrate, he rejected the complainant's prayer in these words:—

“ Read the order of the appellate court. Looked into the connected records including the petition of Naimuddin. I have not been personally convinced about the guilt of the accused party and I do not think it quite proper to proceed under section 476, Criminal Procedure Code.”

The complainant then preferred an appeal, which was admitted by the Joint Magistrate, and, on the latter vacating his office, Mr. L. B. Das, who, it is said, succeeded him, dealt with the appeal and, being of opinion that the acquittal of the accused persons Hanif and others was wrong and that a *prima facie* case was made out against the petitioner, directed, under section 476B of the

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Criminal Procedure Code, a complaint to be lodged against the petitioner for offences under section 193 and 465 read with 109 of the Indian Penal Code. On that complaint, the petitioner has been put upon his trial. He impugned, at his trial, the validity of the proceeding taken against him on the ground that Mr. L. B. Das, though he had power under section 407, clause (2), of the Criminal Procedure Code, was not competent to pass the order under section 476B and that consequently the proceedings taken on that complaint cannot stand. The objection has been overruled by the court in which the trial is going on and the Sessions Judge, on being moved to make a reference to this Court, has declined to interfere. The petitioner has then moved this Court and obtained the present Rule.

One of the grounds upon which the Sessions Judge has declined to make a Reference to this Court is that the petitioner, not having appealed from the order passed by Mr. L. B. Das under section 476B, is precluded by reason of section 439, clause (5), of the Criminal Procedure Code from invoking the revisional powers of this Court. This ground has no substance, as, apart from other reasons, no appeal lay from Mr. L. B. Das' order. *Ahamadar Rahman v. Dwip Chand Chowdhury* (1).

In support of the contention that Mr. L. B. Das, though empowered under section 407, sub-section (2) of the Criminal Procedure Code to hear appeals from the sentences of the court of Moulvi Mir Hossein, was not the presiding officer of a court to which appeals from the court of Maulvi Mir Hossein ordinarily lay within the meaning of section 195, sub-section (3), Criminal Procedure Code, so as to be competent to hear the appeal under section 476B of Penal Code. The petitioner has relied upon the decision of this Court in the case of *Sadhu Lall v. Ram Churn Pasi* (2). On the other hand, the Crown has, in the first place, relied upon the contention urged in the Magistrate's explanation, which seeks to make out that the decision

(1) (1927) I. L. R. 55 Cal. 765. (2) (1902) I. L. R. 30 Cal. 394.

is no longer of any force, because of the alteration in section 195 by the amending act of 1923. The alteration to which reference has been made in this behalf is the omission of the word "only" from sub-section (7) of that section as it stood in the Act of 1898. [vide sub-section (3) of section 195 as it stands at present]. It has been urged that because the word "only" is no longer in the sub-section, there is nothing to prevent two courts, namely, that of the District Magistrate as well as that of the Deputy Magistrate empowered under section 407, sub-section (2), being regarded as courts to which appeals ordinarily lay from the court of Moulvi Mir Hossein, and that, if that be the position, then, under proviso (a) to the sub-section, the court of Mr. L. B. Das would be the only court to which the court of Moulvi Mir Hossein would be subordinate within the meaning of section 195. In my opinion, the omission of the word "only" has no such significance, and the words "to which appeals ordinarily lie" should still be understood in the sense attributed to them in the decision aforesaid. The wording of section 407 has not undergone any change and the decision aforesaid appears to have been followed by almost all the superior courts in this country, and no dissent against it has been expressed anywhere except in the dissentient judgment of Benson J., who was in the minority in the Full Bench case of *Eroma Variar v. Emperor* (1). The Crown has, in the next place, relied upon the decision in the case of *Queen-Empress v. Subbaraya Pillai* (2). That case, however, was decided under the Code of 1882 in which the wording of section 407 was materially different, as has been pointed out by White C. J. in the case of *Eroma Variar v. Emperor* (1) and, in any event, I do not see any good reason to depart from the view which our own Court has taken of the meaning of the words "to which appeals ordinarily lie."

Finally, it has been contended, on behalf of the Crown, that if Mr. L. B. Das had no jurisdiction to

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make a complaint under section 476B, it should be held that the case has been instituted without a proper complaint and an omission of this character is curable by section 537 of the Criminal Procedure Code. This argument overlooks the bar which section 195 imposes. It also overlooks that what section 537 provides for is an error, omission or irregularity in the complaint and not the entire absence of a complaint without which no cognizance of the offence can be taken under the law.

The result is that the proceedings instituted upon the basis of Mr. L. B. Das' order, which purports to have been made under section 476 of the Criminal Procedure Code, cannot go on. They are, accordingly, 'quashed.

We should observe that, in the view that we take, the complainant's appeal from the order of Moulvi Mir Hossein refusing to make a complaint under section 476 of the Criminal Procedure Code has not yet been disposed of by a court competent to deal with it. It follows, therefore, that if the complainant desires to proceed with that appeal any further, it will necessarily have to be heard by the District Magistrate and disposed of by him in accordance with law and in the light of those well-established principles which govern appeals of this description.

The Rule is made absolute.

GRAHAM J. The true construction of the words "Court to which appeals ordinarily lie" in section 195, clause (3) of the Criminal Procedure Code, seems to be not free from doubt. But, on the whole, I see no reason to differ from the view taken by my learned brother, and I agree that we should follow the decision of this Court in *Sadhu Lall v. Ram Churn Pasi* (1), and that the Rule should be made absolute.

A.C.R.C.

Rule made absolute.