CIVIL REVISION.

Before Suhrawardy and Costello JJ.

PURNACHANDRA DATTA

v.

DHALU.*

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May 8, 9.

Inquiry—Preliminary enquiry, when necessary under s. 476, Cr. P. C.—Revision against complaints by civil court, whether comes under s. 439, Cr. P. C.—Unauthorised person, if can make an application under s. 476, Cr. P. C.—"Such court", meaning of—Code of Criminal Procedure (Act V of 1898), ss. 439, 476—Code of Civil Procedure (Act V of 1908).

Revision applications against orders passed under sections 476, 476 (A) and 476 (B) of the Criminal Procedure Code by civil courts do not come under section 439 of the Code, but the High Court can interfere only under section 115 of the Civil Procedure Code or section 107 of the Government of India Act.

Emperor v. *Har Prasad Das* (1) referred to.

It cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under section 476 of the Code of Criminal Procedure. Each case must be judged on its own facts.

In a case where an offence has been committed outside the court and not in the presence of the judge, it would be judicious if not incumbent to hold a preliminary enquiry in order to find out for himself whether such an offence has really been committed.

Sarat Chandra Bhattacharjee v. *Hari Charan Dey* (2) dissented from.

Durga Narayan Bera v. *Bepin Behary Mitter* (3) and *Tarak Das Moitra* v. *King-Emperor* (4) followed.

Mahomed Izharul Huq v. *Queen-Empress* (5) and *Bahadur* v. *Eradatulla Mallick* (6) referred to.

Per Costello J. There is no restriction as to person or persons by whom an application may be made to the court under section 476 of the Code of Criminal Procedure. The court can take action *suo motu* without any application at all and even an unauthorised person can make an application to the court if he so chooses. Matters under section 476 are *inter partes* only to a limited extent.

"Such court" in section 476 includes the successor to the office.

CRIMINAL RULE obtained by Purnachandra Datta and others, accused.

*Civil Revision, No 20 of 1929, against the order of Bimalchandra Sen, Offg. Munsif of Dacca, dated April 8, 1928.

(1) (1913) I. L. R. 40 Calc. 477.
(2) (1929) 51 C. L. J. 45.
(3) (1911) 15 C. W. N. 691.
(4) (1916) 21 C. W. N. 125.
(5) (1892) I. L. R. 20 Calc. 349.
(6) (1910) I. L. R. 37 Calc. 642.

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The material facts are stated in the judgment of the Court.

Camell, *Nandagopal Banerji* and *Gopalchandra Mukherji* for the petitioners.

Sureshchandra Talukdar and *Sachindrakumar Ray* for the opposite party.

Cur. adv. vult.

SUHRAWARDY J. This is an application in revision by six persons against an appellate order of the District Judge of Dacca, affirming an order of the Munsif of that place, passed under section 476 of the Code of Criminal Procedure lodging a complaint against the petitioners under sections 209/120B and 210/511/120B of the Indian Penal Code. Before proceeding to deal with the merits of the case I should like to make one observation with regard to the scope of the Rule issued by this Court. This application in revision does not lie under section 439 of the Criminal Procedure Code, inasmuch as it is not a matter connected with any proceedings before any inferior criminal court within the meaning of section 435, Criminal Procedure Code. By an order made by the Chief Justice, the Bench taking criminal matters is authorised to receive and hear appeals and revision applications against orders passed under sections 476, 476A and 476B of the Code of Criminal Procedure by civil courts. If the revision application is not entertainable under section 439 in such matters, this Court can only interfere under section 115 of the Civil Procedure Code or section 107, Government of India Act: *Emperor* v. *Har Prasad Das* (1). This Rule being under section 115 of the Code of Civil Procedure is very much limited in its scope and we have not the freedom which we generally assume in dealing with criminal matters under section 439 of the Code of Criminal Procedure. The order of the lower court passed in appeal under section 476B, therefore, can only be challenged for wrong, illegal

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

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or irregular exercise of jurisdiction. I refer to this matter, as this feature of these cases is not generally kept in view when dealing with them along with cases under section 439 of the Criminal Procedure Code.

The facts, out of which this matter arises, are that the first petitioner, Purna, brought a suit for money against the opposite party, Dhalu, in the Munsif's court at Dacca. The other petitioners were examined as witnesses in the case. The Munsif, who heard the suit, was of opinion that the bond on which the suit was brought was a forgery. An application was made by Dhalu, inviting the Munsif, who had disposed of the suit, to take action under section 476 of the Code of Criminal Procedure. The Munsif refused to pass any final order on that application on the ground that an appeal was then pending from his decree. After the disposal of the appeal, affirming the decree of the trial court that the bond was a forgery, Dhalu again applied to the successor of the Munsif, who had disposed of the suit, for action under section 476. The learned Munsif apparently went through the record of the case and made a complaint under that section. On appeal, that order was affirmed by the District Judge.

Mr. Camell, who appears for the petitioners, has urged three points, not one of which, in my judgment, is a point covered by section 115 of the Civil Procedure Code. The first point which has been strenuously pressed is that the Munsif, not being the officer who had decided the suit, should have held a further enquiry into this matter before making a complaint under section 476 of the Code of Criminal Procedure. The section itself does not show that a further enquiry before making a complaint is imperative under the law. The section as it originally stood before its amendment in 1923 read: "After "making any preliminary enquiry that may be "necessary." These words even were construed as making it discretionary with the court to hold or not to hold an enquiry before making a complaint.

Chaudhari Mahomed Izharul Huq v. *Queen-Empress* (1). The law has now been made clearer by the amendment of 1923 and the section now reads as "after such preliminary enquiry, if any, as it thinks "necessary." So that, as a matter of law, the court is not bound to make any enquiry before making a complaint. But it is argued that in a case when the officer making the complaint is not the officer who has decided the case "it is prudent that he should make "an enquiry." That of course is not a question which comes within the purview of section 115 of the Civil Procedure Code. Reliance has been placed on some observations made in the judgment in *Sarat Chandra Bhattacharjee* v. *Hari Charan Dey* (2). The facts of that case were that, after the suit was dismissed and the order of dismissal upheld by the High Court, one of the defendants applied to the Munsif, who had tried the suit, for action under section 476 of the Criminal Procedure Code. That application was dismissed. Another defendant, a week after, made a similar application and that application was granted by the Munsif. On appeal, the learned District Judge summarily rejected it under Order XLI, rule 11 of the Civil Procedure Code. Against that order of the appellate court, a Rule was obtained from this Court. It was held that the District Judge was not right in summarily rejecting the appeal under Order XLI, rule 11 of the Code of Civil Procedure but that he should have heard it under section 476B of the Criminal Procedure Code. After disposing of the case on this ground, the learned Judges went into the merits of the case and they were of opinion that the order made by the Munsif for an enquiry by the criminal court against the petitioner was not justified on the facts of the case and they, accordingly, set aside the complaint made by the Munsif. I take it that when a matter comes up to this Court and this Court thinks that, in the interests of justice, the order of the lower court should be set aside, it can do so in its supervising jurisdiction.

(1) (1892) I. L. R. 20 Calc. 349. (2) (1929) 51 C. L. J. 45, 49.

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But in the judgment of that case, some observations have been made which seem to me to be in the nature of *obiter dicta* and from which I most respectfully dissent. It is there said: "It is true that under the "provisions of the section 476 of the Code of Criminal "Procedure a preliminary enquiry is not legally "necessary. But it has been laid down ever since the "enactment of the present section 476 that although "a preliminary enquiry may not be legally necessary, "it should, in common prudence, be held by every "court before it passes an order under section 476. "That, as we understand, is the present case law in "this Court." We asked Mr. Camell to place before us any case, where the practice referred to in the above observation has been followed or insisted upon, but we were not referred to any such case. On the other hand, we have a weighty decision of this Court in *Durpa Narayan Bera* v. *Bepin Behary Mitter* (1), where the facts were similar to those in the case before us. The learned Judges, Mookerjee and Teunon JJ., held, following the Full Bench decision in *Bahadur* v. *Eradatulla Mallick* (2), that the power to direct prosecution under section 476 of the Code of Criminal Procedure was conferred not upon any particular individual, as for instance, the trying judge, but on the "court" which might be, at the time when the order was made, presided over by another officer. The learned Judges further held that the successor of the officer before whom the original trial took place was not bound to hold any independent investigation before making an order under section 476, that the holding of a preliminary enquiry in a proceeding under that section was discretionary and that the person against whom an order was passed without such an enquiry could not complain unless he was prejudiced by the omission. Mr. Camell has not pointed out any circumstance in this case which would go to show that his clients have been prejudiced in any way by the Munsif not holding a preliminary enquiry before making the order under

(1) (1911) 15 C. W. N. 691. (2) (1910) I. L. R. 37 Calc. 642.

section 476. He has argued the case upon the general principle that in every case it is prudent if not necessary that a preliminary enquiry should be held before a complaint is made under section 476 of the Code of Criminal Procedure. I am unable to accept this view of the law as following from the statute or even as reasonable for practical purposes. The true rule of law seems to me to be, as observed in *Durpa Narayan Bera's* case (1), that the court has to decide in each individual case whether in the interests of justice, a preliminary investigation is necessary. In a case where an offence has been committed outside the court and not in the presence of the judge, it would certainly be judicious, if not incumbent upon the court, to hold a preliminary enquiry in order to find out for itself whether such an offence has really been committed. But where an offence is committed in the presence of the court, or, from a perusal of the record, it is of opinion, that it is necessary, in the interests of justice, that a further enquiry into the matter should be made in the criminal court, it may make a complaint to that effect to the nearest magistrate without making any preliminary enquiry. What in short is the view which I entertain in the matter is that it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under section 476 of the Code of Criminal Procedure. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under section 476 was too hastily taken and that there should be further investigation in the matter. In the case before us, the learned Munsif, though he did not try the case, went through the record and in the concluding portion of his order says "Now, it appears to me on a careful examination of "the record that a *prima facie* case has been made "out that all the opposite parties abovenamed have "committed an offence punishable under section "209/120B of the Indian Penal Code and also under

(1) (1911) 15 C. W. N. 691.

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"section 210/511/120B of the said Code." It is difficult to see what further investigation in the matter the Munsif could have made. Nor do I think any useful purpose would have been served if the Munsif had examined the petitioners over again and probably taken some more evidence of the same kind. The suit was filed upon a bond and it was supported by the evidence of not less than six witnesses. The Munsif, who decided the suit, went thoroughly into the matter and, from the circumstances and evidence in the case, was clearly of opinion that the bond was a forgery. That decision was upheld by the appellate court. I do not think that the petitioners were in any way prejudiced by the Munsif not making a further investigation in the matter.

The second ground urged by Mr. Camell is that the pleader who moved this petition on behalf of the opposite party before the Munsif was not authorised by a fresh *vakâlâtnama* by the party and therefore the action taken by the Munsif on that petition was *ultra vires*. There is no substance in this contention, as under section 476 of the Criminal Procedure Code, the court may take action of its own motion and what the pleader did on behalf of the opposite party was to bring the matter to the notice of the court. Further, the rule is that a *vakâlâtnama* filed in a suit remains in force in all the different stages of the case. The objection, even if there is any substance in it, is highly technical and ought not to be given effect to.

It is lastly argued that the judgments of the courts below do not contain sufficient materials for making the complaint against the petitioners Nos. 2 to 6. What the Munsif held was that a false suit was brought in his court as the result of a conspiracy between the plaintiff in that suit and his witnesses. Though the false suit was brought by the first petitioner, the other petitioners helped him in prosecuting it in the court. Some of these petitioners, all of whom were witnesses in the suit, spoke to the execution of the bond by Dhalu; some others spoke to the fact that they went to Dhalu and made demand

for the payment of the debt covered by the bond and Dhalu admitted the debt and applied for time for payment. When the matter will be tried before the criminal court, these petitioners will have an opportunity of showing that they did not conspire with the plaintiff in bringing a false suit. Matters as they now stand justify the order passed by the Munsif that all these persons had conspired to make a false claim in a court of justice.

These are all the grounds urged before us and all of them having been overruled, the Rule is discharged.

COSTELLO J. I entirely agree with what has fallen from my lord. I think, however, that I ought to add a few words of my own with regard to this matter, because reliance has been placed upon the case of *Sarat Chandra Bhattacharjee* v. *Hari Charan Dey* (1), from some of the observations in which I respectfully dissent. I cannot altogether accept the view of the case law which seems to be enunciated in the judgment of C. C. Ghose J. With the greatest respect to him and all due deference to his experience in matters of this kind, I cannot help coming to the conclusion that the proposition laid down on page 49 of the report is far too wide. The passage to which I refer reads as follows: "But it has been "laid down ever since the enactment of the present "section 476 of the Code of Criminal Procedure that "though a preliminary enquiry may not be legally "necessary, it should in common prudence be held by "every court, before it passes an order under section "476. That, as we understand, is the present case law "in this Court." If that statement really represents the present case law on this point, I can only say that personally I think the case law goes considerably farther than the words of the statute themselves warrant. It is to be observed, in the first place, that there are a number of decisions (to some of which my brother Suhrawardy has already referred) which

(1) (1929) 51 C. L. J. 45.

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unquestionably make it clear that, even under the old corresponding section of the Criminal Procedure Code, a preliminary enquiry was in no sense obligatory. The previous words of the section were "such court after making any preliminary enquiry "that may be necessary." So, even under that phraseology it was not a necessary condition precedent to the making of an order under section 476, that there should be any preliminary enquiry at all. The section did not say so and, therefore, to hold that there was any rigid rule of law on the point is to my mind to go beyond the intent of the section. The section says "that may be necessary," thus assuming, that there were cases in which an enquiry might be necessary and cases in which an enquiry might not be necessary. It follows, therefore, that an order made under the terms of the old section was not necessarily bad, because no enquiry at all had in fact been made before the court concerned made an order.

Now when one looks at the words of the present section one can only take the view, in my judgment, that *a fortiori* no preliminary enquiry is necessary as a matter of law, because the words of the section now run thus on this point: "Such court may, after such "preliminary enquiry, if any, as it thinks necessary." It follows from the form of words used that it is entirely a matter for the discretion of the court concerned whether any enquiry is necessary or not. It is quite true that the circumstances of a case may require as a matter of caution or to use the words which my brother C. C. Ghose used in the judgment to which I have referred "as a matter of prudence"—that the court in dealing with the matter should hold some kind of enquiry before making an order under section 476. But, as my brother Suhrawardy has already pointed out, it cannot be necessary or even a matter of prudence, that any enquiry should be held in cases where for example all the facts, which are material to the charge which is to be made, have already come out in the course of the hearing of the

case itself or where they have already been brought to the notice of the court in such a form that the court can rely on the information before it. In this connection, I refer to a judgment of this court in the case of *Tarak Das Moitra* v. *King-Emperor* (1), in which Chief Justice Sanderson said this: "It may be "that in a case where the judge is trying the case and "all the facts which are material to the charge have "been brought to the notice of the learned Judge, or "have come out during the course of the hearing of the "case, it would be mere waste of time and quite "unnecessary to hold a preliminary enquiry, because "the learned Judge is already in possession of all the "material facts on which it is necessary for him to "form the judgment." The learned Chief Justice went on to say, with reference to the facts of the case then before him, "But in such a case as this, "where the incident took place outside the court, and "as to which the learned Judge himself could have "no knowledge and as to which evidence must be "called for, in my judgment, unless he does hold such "a preliminary enquiry as may be necessary to enable "him to determine whether or not there is any case, "fit to be sent to the Magistrate, he has no jurisdiction "to send the accused under section 476." I respectfully agree with what the learned Chief Justice said and it seems to me that his observations draw a reasonable line of demarcation between cases where an enquiry is not necessary and cases where the enquiry is at any rate prudent, if not altogether necessary. If we were to hold that in all cases an enquiry, if not absolutely necessary, is, at any rate, desirable as a matter of common prudence, we should, in my opinion, be travelling a very long way outside the scope of the words of the section itself and at the same time we should be opening the door to a flood of unfounded and unwarranted applications to this Court on matters arising out of orders made by virtue of the terms of section 476.

(1) (1916) 21 C. W. N. 125, 127.

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With regard to the actual case now before us I ought to add one or two observations. This case manifestly falls within the class of cases referred to by Chief Justice Sanderson, where all the facts material to the making of the decision as to whether there should be a complaint or not, were before the learned Munsif to whom the application was made. It is true that the particular Munsif, who made the order which is now impugned, was not the Munsif who had heard the case out of which the charge arose, but he had before him the official record of the proceedings from which he could see that his predecessor in office in that particular court and also the District Judge to whom an appeal had been taken had both come to the conclusion that the document, on which the plaintiff's case was based, was not a genuine document and that the persons against whom the complaint was made were all jointly implicated in putting it forward in the course of the case if not actually fabricating it for the purpose. Therefore the learned Munsif, before whom the application was made, in my opinion, could not do otherwise than to accept the records as being correct and they set forth the considered opinion of the two judicial officers who had heard and considered the whole of the evidence and had come to a finding upon the facts as presented in course of the case.

A point was sought to be made by Mr. Camell on behalf of the present petitioners that it was not competent to the learned Munsif, who made the order, to deal with the matter in the way he did, because, in fact, he was not the Munsif who had heard the original case. My learned brother has already referred to one authority, *Durpa Narayan Bera* v. *Bepin Behary Mitter* (1), where it was held that the successor of the officer before whom the original trial took place is not bound to hold an independent investigation before making an order under section 476 of the Code of Criminal Procedure, for the reason that the power to direct a prosecution

(1) (1911) 15 C. W. N. 691.

under that section is conferred on "the court" and not merely on the individual judicial officer who happens to hold office at the time of the original trial. In other words, as I pointed out in the course of the argument before us, it is not a question of the particular incumbent in office at the time when the application is made, but it is a question of the particular court to whom the application is made. In this connection I would refer to the case of *Tara Chand* v. *King-Emperor* (1), where it was held that the court of a Subordinate Judge is a permanent court, and therefore a Subordinate Judge is competent to continue an enquiry under section 476 begun by his predecessor. See also *Maung Shwe Phe* v. *Ma Me Hmoke* (2). A court of law may be presided over by a different official at any particular moment, but it is a permanent institution and, therefore, any judicial official who sits in the court is just as competent to deal with the matters coming before the court as any other incumbent of the office. Therefore the words in the section "such court" include the successor to the office. See *Girish Chandra Ray* v. *Sarat Chandra Singh* (3).

One other point I desire to refer to and it is this. Mr. Camell sought to make something of the fact that the application in this proceeding was made to the learned Munsif by a pleader who is said not to have been properly authorised by any client to make the application which he did. My learned brother has already dealt with one aspect of that matter. I may also add that, under the wording of the section itself, there is no restriction made as to the person or persons by whom an application can be made to the court under section 476 of the Criminal Procedure Code and, therefore, even if the pleader is in one sense an unauthorised person, he is none the less competent to make an application to the court if he so chooses. He does nothing more than to bring the matter to the attention of the court. Clearly, in my

(1) (1922) 23 C. L. J. 451. (2) (1924) I. L. R. 3 Ran. 48.
(3) (1914) I. L. R. 42 Calc. 667.

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opinion, it is then open to the court, if it thinks fit, in the interests of justice, to take action in the matter in the same way as it might take action *suo motu* without any application at all. As the section definitely contemplates action on the part of the court of its own initiative, it seems to me impossible to hold that because an application is made irregularly that of itself debars the court from acting in the matter at all. If the court can act on its own motion, the court cannot be prevented from acting merely because it was prompted to take action by some application which might be said to have been irregularly made. What is overlooked, I am afraid, in connection with matters arising under section 476, is that all the offences referred to, that is to say offences mentioned in section 195 of the Criminal Procedure Code, are offences against public justice and therefore I think that any court which, from any source, acquires knowledge that there is a probability that any such offence has been committed ought then, as a public duty, in suitable cases, make a complaint as contemplated under section 476. To my mind it is very much to be deprecated that the idea should become prevalent that matters under section 476 are mainly matters *inter partes*. In the particular case with which we are now concerned, I observe that the learned Munsif treated the applications before him as if they were contests as between two private parties and the applications were accordingly denominated as Miscellaneous Cases Nos. 61 and 62. It may be that for the purpose of record it is necessary that all applications should be described in some form or other, but all the same, I do not think that they ought to be treated as if in fact they were merely matters of private litigation between individual parties. One of the objects of section 476 is to prevent a private person, who happens to be an unsuccessful and disappointed litigant, from captiously revenging himself upon his successful opponent by instituting or seeking to institute criminal proceedings against him. Whether a

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matter of this kind comes before a court upon a complaint or whether a court acts of its own motion, the court ought to deal with it not so much as a piece of litigation between private parties but, as I have already said, as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration of public justice. It is quite true that, in section 476, a right of appeal is given not only to persons against whom an order is made, but also to persons who make an application for an order to be made and whose application has been refused. To that extent undoubtedly the matter must be dealt with in one sense, as being one of private litigation, but I do not think that anything should be done unnecessarily to encourage that view of the matter. With that in mind, I think this court ought to be very reluctant to interfere with the discretion which is undoubtedly conferred upon a court when making a complaint under section 476.

In the particular case before us, as my learned brother Suhrawardy says, it is quite obvious that there is not the slightest justification for putting forward the matter as one arising under section 115 of the Code of Civil Procedure. For the reasons I have given, I agree that the Rule must be discharged.

Rule discharged.

A. C. R. C.