CRIMINAL REVISION.

Before Henderson and Biswas JJ.

1937

April 12.

KISHORI SINGH

v.

EMPEROR.*

Appeal—Appeal in a case submitted to a superior Magistrate, Competency of—Code of Criminal Procedure (Act V of 1898), ss. 349, 380, 480, 413, 415.

The right of appeal in a criminal case is a creature of statute, and this is expressly recognised in the Code of Criminal Procedure in s. 404.

Where in a case the proceedings were submitted by a Sub-Deputy Magistrate to a Magistrate of the First Class under s. 349 of the Code of Criminal Procedure, and the latter passed a sentence of fine not exceeding Rs. 50,

held that no appeal lay under s. 413 of the Code.

Section 408 of the Code mentions the cases in which an appeal is given in distinct categories. Although s. 413 which restricts the right of appeal given by s. 408 does not distinctly specify such categories, s. 413 applies to all such cases.

In considering whether a case is hit by s. 413, what is to be seen is whether the sentence is one not exceeding the limit prescribed and whether it has been passed by a Court of the class specified therein. If these conditions are satisfied, s. 413 would apply, whether the sentence is passed under s. 349 or s. 380 or otherwise.

CRIMINAL REVISION.

The material facts and arguments appear sufficiently from the judgment.

Sudhangshu Shekhar Mukherji for the petitioner.

Nirmal Chandra Das Gupta for the Crown.

Suresh Chandra Talukdar for the complainant.

*Criminal Revision, No. 40 of 1937, against the order of S. N. Guha Ray, Additional Sessions Judge of Howrah, dated Dec. 7, 1936, affirming the order of G. C. Das, Subdivisional Magistrate of Howrah, dated Oct. 17, 1936.

1937

Kishori Singh v. *Emperor.*

BISWAS J. The question in this Rule is whether an appeal to the Court of Sessions was barred under s. 413 of the Code of Criminal Procedure. The facts of the case may be briefly stated. The two petitioners were put upon their trial before a Sub-Deputy Magistrate of Howrah on charges of causing hurt under s. 323 of the Indian Penal Code. The Sub-Deputy Magistrate was of opinion that the petitioners were guilty and further, that they should be required to execute bonds under s. 106 of the Code of Criminal Procedure, but as being a Magistrate of the second class, he was not competent to make an order under this section, he dealt with the case under s. 349 of the Code, and submitted the proceedings to the Subdivisional Magistrate who was a Magistrate of the first class. The Subdivisional Magistrate did not find it necessary to take further evidence, and agreeing with the Sub-Deputy Magistrate, found the accused guilty under s. 323 of the Indian Penal Code, and sentenced each of them to pay a fine of Rs. 25, in default to undergo rigorous imprisonment for 6 weeks, and also made an order under s. 106 of the Code of Criminal Procedure, requiring each to execute a bond for Rs. 100 with one surety of like amount to keep the peace for one year, in default to undergo simple imprisonment for the same period. Against this conviction and sentence, the petitioners appealed to the Court of Session, but the learned Additional Sessions Judge who heard the appeal dismissed it as incompetent. The present Rule is directed against this order of dismissal.

It is well settled that the right of appeal is a creature of statute, and this is expressly recognised in the Code of Criminal Procedure in s. 404, which lays down that no appeal shall lie from any judgment or order of a criminal Court except as provided for by the Code or by any other law for the time being in force. It was, therefore, for the petitioners to show under which section of the Code or of any other law they claimed the right of appeal. The section of the

Code on which they relied for the purpose was s. 408, which may be set out (omitting the proviso which is not relevant) :—

> Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 or in respect of whom an order has been made or a sentence has been passed under s. 380, by a Magistrate of the first class, may appeal to the Court of Session.

The petitioners are persons sentenced under s. 349 by a Magistrate of the first class, and if s. 408 stood alone, they would as such undoubtedly have a right of appeal. The question, however, is as to the effect of s. 413, which provides as follows :—

> Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding Rs. 50 only.

The present case is certainly one in which a Magistrate of the first class has passed a sentence of fine not exceeding Rs. 50 and would obviously, therefore, come within the express terms of this section, and that being so, an appeal would of course be barred, s. 408 notwithstanding.

Mr. Sudhangshu Shekhar Mukherji, appearing on behalf of the petitioners, has, however, made an ingenious attempt to avoid this effect by referring to the wording of s. 408 as compared with that of s. 413. Before examining his argument, we might at once point out that the fact that the sentence of fine here was combined with an order under s. 106 of the Code would not affect the question of appealability at all. See s. 415, which expressly lays down that no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace. Nor would an order under s. 106 be appealable by itself. The question as to whether an appeal would lie would, therefore, have to be determined solely with reference to the sentence of fine which was passed in the case.

1937

Kishori Singh v. *Emperor.*

Biswas J.

Now, as to this, Mr. Mukherji's argument is as follows: He recognises the force of the opening words of s. 413,—"notwithstanding anything herein before "contained,"—as apt enough to limit the right of appeal given by s. 408, but argues from a comparison of the language used in the two sections that the later section hits the earlier only partially, and not in its entirety, or to be more precise, that s. 413 takes away the right of appeal only in those cases which are referred to in the earlier part of s. 408, and not to cases under s. 349 or under s. 380. It is pointed out that s. 408 mentions the cases in which an appeal is given in distinct categories. It first refers to any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, and then in a separate clause, to any person sentenced under s. 349, and then, again, also separately, to any person in respect of whom an order has been made or a sentence has been passed under s. 380. There are thus three classes of cases, each described separately which are made appealable by s. 408. Turning now to s. 413 which seeks to restrict the right of appeal in certain cases, it is argued that the words used are apposite only to the first category of cases mentioned in s. 408, cases under s. 349 or 380 not being mentioned at all. This shows, according to Mr. Mukherji, that the right of appeal in cases dealt with under s. 349 or s. 380 is left unaffected.

Plausible as this argument may seem to be, we are wholly unable to accept it. We do not think it is possible to restrict the scope of s. 413 in the manner suggested. In construing the provisions of s. 413 it is no doubt permissible to refer to the words used in s. 408, but the language of s. 413 is so clear, expressed as it is in general terms, that it would in our opinion be wholly wrong to try and limit it by reference to the wording of s. 408. Having regard to the form in which s. 408 is expressed, it is not difficult to see why cases under s. 349 or under

s. 380 are separately mentioned in it. *Ex hypothesi*, in such cases the trial is held, partly, or it may be wholly, by one Magistrate, and the sentence is passed by another Magistrate of a higher class, who may or may not take further evidence. The words used in the first part of s. 408 would, therefore, be hardly appropriate to cases of this description. It is not necessary to examine whether s. 408 might or might not have been expressed in a form which might make it correspond more closely to the wording of s. 413, or *vice versa*. Taking the words as they stand, the difference in form in which the two sections are expressed would not, in our opinion, justify any narrowing down of the plain meaning and effect of the words in s. 413. These words (and in the present case, we are concerned with the words in the last portion of the section) are clear enough and wide enough to include cases under s. 349 or s. 380, though these are not specifically and distinctly mentioned, as in s. 408. What has to be seen, in considering whether a case is hit by s. 413, is whether the sentence in question was one not exceeding the limit prescribed, and whether it was a sentence passed by a Court of the class mentioned therein. If these conditions are satisfied, s. 413 would apply, whether the sentence was passed under s. 349 or s. 380 or otherwise. We hold, accordingly, that the learned Additional Sessions Judge was right in the view he took, rejecting the appeal of the petitioners.

We may add that a faint attempt was made by Mr. Mukherji at one stage to bring his case under s. 407 of the Code, suggesting that it was a case of a trial held by a Magistrate of the second class, being the Sub-Deputy Magistrate of Howrah before whom the prosecution had started, and that the petitioners had an absolute right of appeal under that section, and that this would not be affected at all by the provisions of s. 413. We are not at all impressed by this argument. In the first place, s. 407 would give a right of appeal to the District Magistrate, and

1937

Kishori Singh v. *Emperor.*

Biswas J.

not to the Court of Session. Secondly, even if it held that the trial here was held by a Magistrate of the second class, seeing that the Subdivisional Magistrate to whom the proceedings were submitted passed sentence without taking further evidence, the fact remains that the sentence was passed by a Magistrate of the first class, and the case would consequently come within the express words of s. 408, and an appeal, if it could be claimed at all, would be under this section and not under s. 407. In any case, we do not see how it can escape the mischief of s. 413 which in terms would apply.

Finally, we may state that Mr. Mukherji also attempted to bring the case under the proviso to s. 413 which is embodied in s. 415, but had to concede that there was no room for the application of this proviso.

The result is that this Rule is discharged.

HENDERSON J. I agree.

Rule discharged.

A. C. R. C.