HUSSAIN SAHEB, IN RE.

drafting grounds of appeal is guilty of professional misconduct if he is not prepared to argue the appeal at the time of presentation of the appeal papers is not correct. It is well known that a memorandum of appeal containing all possible grounds (some of which may be ultimately untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas for arguing the questions of fact, the depositions have to be carefully studied.

In *Rangacharlu* v. *Emperor*(1), it is pointed out that, if questions of fact are argued in the appeal, the appeal ought not to be disposed of even under section 421 without sending for the original records of the Court below containing the depositions. I agree with this.

The result is, the dismissal of the appeal by the Subdivisional Magistrate is set aside and the appeal is remanded to him for rehearing and disposal according to law.

D.A.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1924, October 13.

APPICHI GOUNDAN, OF UNSOUND MIND, REPRESENTED BY HIS MOTHER PONGI AMMAL (PETITIONER),

v.

KUTTIYAMMAL (RESPONDENT.)*

Criminal Procedure Code—Sec. 488—Maintenance claim—Counter-petitioner's plea of insanity—Procedure.

When maintenance under section 488 of the Code of Criminal Procedure (Act V of 1898) is claimed and the plea of insanity is set up on behalf of the counter-petitioner, the Magistrate must hold a judicial enquiry into his sanity and put him, if necessary, under medical observation. If he is found insane

(1) (1905) I.L.R., 29 Mad., 236.

* Criminal Revision Case No. 269 of 1924.

and incapable of understanding questions put to him, the Magistrate must postpone further proceedings until he is satisfied that the counter-petitioner can understand the same.

The proceedings under section 488 are wholly governed by the provisions of the Criminal Procedure Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure Code, praying the High Court to revise the order of I. A. PIR MUHAMMAD, Subdivisional Magistrate of Gobichettipalaiyam, in M.C. No. 44 of 1923.

The facts of the case are set out in the judgment.

K. Aravamuthu Ayyangar for *T. M. Krishnaswami Ayyar* for the petitioner.

P. R. Janakirama Ayyar for the respondent.

Public Prosecutor for the Crown.

JUDGMENT.

The question that arises in this revision petition is one of some difficulty. The counter-petitioner claimed maintenance from the petitioner, under section 488 of the Criminal Procedure Code, before the Subdivisional Magistrate of Gobichettipalaiyam. It was pleaded on the petitioner's behalf that he is insane and that therefore the Divisional Magistrate ought to have followed the procedure laid down in Chapter XXXIV of the Criminal Procedure Code. The Magistrate on 9th January 1924, on a petition by the petitioner's mother, apparently held the petitioner to be insane and appointed the mother as his guardian *ad litem* but, when the case came into Court on 24th January 1924, the Magistrate considered from his own observation of the petitioner that he was not insane or incapable of understanding the proceedings. He then, without cancelling his order appointing the mother as the guardian *ad litem*, heard the case and passed an order that the counter-petitioner was entitled to separate maintenance.

APPICHI GOUNDAN v. KUTTIYAMMAL.

On the petitioner's behalf it is claimed that he is really insane and incapable of understanding the proceedings and that therefore the Magistrate's proceedings are void.

It may be pointed out at once that the Magistrate had no power under the Criminal Procedure Code to appoint a guardian *ad litem* for a lunatic. The proceedings under section 488 may be *quasi* civil but they are also criminal and are wholly governed by the provisions of the Criminal Procedure Code alone. The Magistrate made no sort of enquiry and got no medical opinion on the insanity of the petitioner but, merely because the petitioner "stood speechless" before him, concluded apparently that his previous information that he was insane was erroneous. Such a casual settlement of the important question whether the petitioner was insane or not indicates to my mind that the Magistrate merely thought it best to come to that conclusion because he did not know how to treat the case if he came to any other conclusion.

Clearly such a perfunctory enquiry will not do. It is the Magistrate's duty to hold a judicial enquiry into the sanity of the petitioner, and put him, if necessary, under medical observation. If, as a result of that enquiry, he is satisfied that the petitioner is sane and capable of understanding the proceedings, then that matter is simple; but if he concludes that the petitioner is insane and not capable of understanding the proceedings, the question is what is the proper procedure to be followed, and that is a matter of some difficulty. The procedure laid down in Chapter XXXIV will not strictly apply because the petitioner, under the amended section 488, is not an "accused" person. The word "accused" used in the old section 488 has been avoided in the new section, evidently with deliberation. However, the

provisions of section 464 at least are those which a Court of equity and good conscience would naturally follow ; that is, if it finds that the petitioner is insane and incapable of understanding questions put to him and giving rational answers, it must postpone further proceedings until it is satisfied that the petitioner is capable of so understanding the proceedings. This is all the more necessary in a maintenance case as the counter petitioner in such a case is an important witness on his own behalf and has the right of offering terms to the petitioner therein ; and, if he cannot understand the proceedings and cannot give evidence on his own behalf, the Court is not able to hear both sides of the case and cannot, therefore, come to a judicial conclusion. To proceed to pass an order in such a case would have the result, for example, that, if the Court makes the order against a lunatic for maintenance and the lunatic does not obey it, he is liable to imprisonment, a result which no one can reconcile with justice, equity and good conscience.

I have emphasised above that the Court must find not only that he is a lunatic but that he is prevented by his lunacy from understanding the questions put to him and making rational answers to them. This is with regard to the provisions of section 118 of the Indian Evidence Act.

It is true that to postpone further proceedings indefinitely postpones also the wife's prospect of relief under section 488; but this seems an inevitable result of the omission of the legislature to legislate for such a case. She is not without remedy as she can sue for maintenance in the Civil Court.

I reverse the order under revision and direct the Magistrate to re-hear the case in the light of the above remarks.

D.A.R.
