1878

BEHARI LAL v. SALIK RAM.

stated in s. 216. The issue of the notice is the act of the Court apart from any requisition by the decree-holder to issue it, and I think it cannot be held that this act of the Court, when purporting to be done under the authority of s. 216, is illegal, and the notice issued of no legal effect in consequence, merely because the application filed by the decree-holder, with reference to which the Court acted, may have been irregular in form, or defective in some of the particulars required by s. 212. The fact that the Court treated the application as one for enforcing the decree and issued the notice upon it under s. 216 of Act VIII of 1859 appears to me sufficient.

I find that the rulings of this Court have been conflicting on the points raised in this case. While two rulings (1) have been pointed out against the view now taken, a later one (2) is in favour of it.

The order of the lower appellate Court is reversed, and that of the Court of first instance restored, and this appeal is decreed with costs.

Appeal allowed.

APPELLATE CRIMINAL.

1878. *June* 10.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA v. KARAN SINGH.

Summary Trial—Record in Appealable Case—Judgment—Error or Defect in Proceedings—Act X of 1872 *(Criminal Procedure Code), ss.* 228, 283.

K was tried by a Magistrate in a summary way and convicted. He appealed to the Court of Session, which quashed his conviction on the ground merely that the substance of the evidence on which the conviction was had was not embodied in the

(1) *Franks* v. *Nuneh Mal*, H. C. R., N.-W. P., 1875, p. 79; Misc. S. A., No. 60 of 1876, dated the 14th December, 1876.

(2) Misc. S. A., No. 35 of 1877, dated the 26th June, 1877. In this case the decree-holder applied, on the 31st August, 1870, in the form required by s. 212 of Act VIII of 1859, except that he did not state what was the assistance he desired from the Court. He stated in his application as follows: "Let a notice be issued, and then other applications will be made." A notice was accordingly issued, but as the decree-holder took no further steps in the matter notwithstanding that the Court called on him to do so within three days, the execution-case was struck off the file. Similar applications were made by the decree-holder in March, 1872, and on the 22nd January, 1875, under which notices were issued. The first of these was struck off the file because the decree-holder failed to comply with the Court's order to make any application he had to make within five days. The second was struck off on the decree-holder's application. He applied on the 1st September, 1876, for the execution of the decree, by the arrest of the judgment-debtor. Stuart, C.J., and Pearson, J., held that the decree was capable of execution, observing that "all the applications appear to have been designed to keep in force the decree: the present application was within three years of the last application and *a fortiori* within three years of the notice issued thereunder."

1878

EMPRESS OF INDIA v. KARAN SINGH.

Magistrate's judgment. *Held* that the Court of Session should not have quashed the conviction merely by reason of such defect, but, if it found it impossible to dispose of the appeal because of such defect, it should have required the Magistrate to repair the same by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a retrial with that view.

ONE Karan Singh was tried in a summary way for the offence of receiving stolen property, under s. 411 of the Indian Penal Code, by Mr. C. W. Whish, Joint Magistrate of Basti, and convicted. On appeal by Karan Singh to Mr. J. C. Daniell, Sessions Judge of Gorakhpur, the conviction was set aside by the Sessions Judge on the ground that the Magistrate had failed to comply with the provisions of s. 228 of Act X of 1872, and record a judgment embodying the substance of the evidence on which the conviction was had. The Sessions Judge's judgment was as follows: "In this case the Subordinate Magistrate has disregarded the provisions of s. 228, Criminal Procedure Code, and has not placed on record a judgment embodying the substance of the evidence on which the conviction was had. His judgment contains the points required by s. 227, but omits the additional matter required by the next section. The Subordinate Magistrate says that the evidence that defendant sold the bullocks is 'thoroughly reliable' and 'very respectable eye-witnesses' proved the transaction, that the proof that both the bullocks were stolen is established by 'undoubted proof,' but as no detail or description of the evidence is given by the Subordinate Magistrate as is required by law, and without which this Court can form no independent opinion on the character of, or weight which should be attached to, the evidence thus eulogised by the Subordinate Magistrate, his proceedings cannot but be held to be at variance with the law and prejudicial to the prisoner. The sentence appealed against must therefore be quashed and the appellant is ordered to be released."

The Local Government appealed to the High Court against this judgment.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the appellant, contended that, as the defect on account of which the Sessions Judge had set aside the conviction did not prejudice the accused in his defence, the conviction should not have been set

1878

EMPRESS OF INDIA v. KARAN SINGH

aside—s. 283 of Act X of 1872. The Magistrate has recorded a judgment in accordance with the provisions of s. 228 of Act X of 1872. If the Sessions Judge considered that the Magistrate's judgment was not in accordance with law, he should have ordered a new trial and not have quashed the conviction.

Babu *Dwarka Nath Mukarji* for Karan Singh.

The judgment of the Court was delivered by

PEARSON J.—From the judgment of the Magistrate it may be gathered that it was stated by more than one of the witnesses for the prosecution, first, that the bullocks in question had been stolen; secondly, that they were brought for sale by the prisoner into mauza Amlea; and, thirdly, that he did actually sell them for a a very good price. Nevertheless the Sessions Judge is of opinion that the substance of the evidence on which the conviction was had is not embodied in the judgment, apparently because it does not set forth in detail the deposition of each several witness. It is no doubt important that the evidence should be so set forth in the judgment as to enable the Appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Sessions Judge may have found authority in precedents (1) for the course adopted by him in this case; but we think that, if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution was not sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in his judgment by recording a judgment in which the substance of the evidence should be fully embodied, and, if necessary, re-examining the witnesses for that purpose, or to have ordered a retrial with that view. We therefore cancel the Sessions Judge's order of the 28th January last, and direct him to dispose of the appeal afresh in advertence to the foregoing remarks.

Appeal allowed.

(1) The only reported case touching the matter seems to be *Queen* v. *Kheraj Mullah*, 11 B. L. R. 33, which is apparently opposed to the one under report.