

1886  
 MUHAMMAD  
 HUSAIN  
 v.  
 SHUBHALO.

EDGE, C. J.—I have always understood the law to be that in those cases in which an action would abate upon the death of the plaintiff before judgment, the action would not abate if final judgment had been obtained before the death of the plaintiff, in which case the benefit of the judgment would go to his legal representative. Whether the deceased plaintiff's representative can enforce the whole of the judgment in this case is a different matter—see *Phillips v. Homfray* (1). When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added.

STRAIGHT, J.—I concur in the view expressed by the learned Chief Justice, and I am not aware that it is at variance with anything said by me in the case mentioned in the referring order.

OLDFIELD, J.—I concur. I think the answer to this reference should be that the right to sue in this case is not a personal right only, but one which would survive to the legal representative of the plaintiff.

BRODHURST, J.—I concur with the learned Chief Justice.

TYRRELL, J.—I concur with the learned Chief Justice.

[See *Chapman v. Day* (49 L. T. 436).—REF.]

1886  
 November 25.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. BALWANT.

*Criminal Procedure Code, ss. 423 (a), 439—Order of acquittal—High Court's powers of revision—Order by High Court for re-trial after acquittal on appeal.*

The High Court has power under s. 439 of the Criminal Procedure Code to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction.

In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such order and direct a re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal.

THIS was a reference to the Full Bench by EDGE, C. J., and STRAIGHT, J. of the following questions:—

“1 Has the Court power, under s. 439 of the Criminal Procedure Code, to revise an order of acquittal?

(1) L. R., 24 Ch. D. 439.

“2. If it has, in reference to orders of acquittal passed on appeal, what has it power to order to be done?”

The Hon. Pandit *Ajudhia Nath*, for the applicant.

The *Government Pleader* (*Munshi Ram Prasad*), for the Crown.

The following judgment was delivered by the Full Bench:—

EDGE, C. J., and STRAIGHT, OLDFIELD, BRODEHURST, and TYRRELL, JJ.—We are of opinion that the first question put to us by this reference must be answered in the affirmative.

By the first paragraph of s. 439 of the Criminal Procedure Code, which confers revisional jurisdiction on the High Court, it is in terms declared, among other matters, that in its exercise we may use any of the powers entrusted to a Court of appeal by s. 423 *id.* Now, by clause (e) of this section,—a clause, be it observed, which concerns High Courts alone,—we can in appeal from orders of acquittal, either (i) reverse the order and direct that further inquiry be made, or (ii) that the accused be tried, or (iii) committed for trial, or (iv) find him guilty and pass sentence according to law. The terms of s. 439, paragraph one, therefore, unless barred or limited by anything to be found in the latter portion of that section, or in any other part of the Act, leave no room for doubt that this Court may revise orders of acquittal, and may do on the revision side exactly what it can do in its appellate jurisdiction. By the last paragraph of s. 439, however, one limitation is placed upon our powers, which has reference to the fourth of those mentioned above: that is to say, we are forbidden to “convert a finding of acquittal into one of conviction.” It was argued before us that this is a clear and conclusive intimation that the Legislature intended to restrain us from entertaining applications to revise orders of acquittal. But it appears to us that the presence of these words in the section indicates that, short of determining the questions of fact in the case when revising such orders, as we may do when sitting as a Court of appeal, all the other powers conferred by clause (a) of s. 423, read in conjunction with the first paragraph of s. 439, are left unimpaired. We are then of opinion that the High Court has power to revise an order of acquittal made by any of the Courts exercising original or appellate jurisdiction subordinate to us.

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Proceeding to the second branch of the reference, we are asked what order can be made with reference to a person convicted by a Magistrate, but acquitted by the Court of Session in appeal, such order of acquittal being reversed by the High Court under s. 439 of the Criminal Procedure Code. Clearly, the order must be one directing the re-trial of the proceedings wherein the final order has been found to be bad, and has in consequence been reversed. And as to the Court to which our order of re-trial should be sent, the scope for selection is limited to three tribunals, that is to say, the High Court, the Sessions Court of appeal, or the Magistrate.

It cannot be the High Court, because the limitation imposed by the last clause of s. 439 would restrict the result to a re-affirmation of the finding of acquittal. Similarly, it would be idle, as well as unreasonable, to direct a re-trial by the Magistrate, whose proceedings, the order of the appellate Court having been reversed, so far stand good, and who would, presumably, as a matter of course, re-affirm the conviction.

The Sessions Court of appeal then is the proper tribunal for re-trial of the appeal, or such other Court of equal jurisdiction as we might entrust, under s. 526 of the Code, with the trial of the appeal. This is our answer to the second question.

1886  
December 2.

## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

MUHAMMAD ABDUL KADIR (DEFENDANT) v. KUTUB HUSAIN  
(PLAINTIFF).

KAMAL-UD-DIN AHMAD (DEFENDANT) v. KUTUB HUSAIN (PLAINTIFF).\*

*Sale in execution of decree—Sale of rights and interests in mauza consisting of two mahals—Submersion of mahal at time of sale—Sale certificate not specifically mentioning submerged mahal—Passing of rights in submerged mahal to purchaser.*

The rights and interests of certain judgment-debtors in a mauza consisting of two separate mahals, respectively known as the *Uparwar Mahal* and the *Kachar Mahal*, were brought to sale in execution of the decree. At the time of the sale, the *Kachar Mahal* was submerged by the river Ganges, and in the sale-

\* Second Appeals Nos. 154 and 155 of 1886 from decrees of F. E. Elliot, Esq., District Judge of Allahabad, dated the 24th September, 1885, confirming decrees of Pundit Indar Narain, Munsif of Allahabad, dated the 22nd December, 1883.