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January 5

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS v. SHEODIN.

Criminal Procedure Code, s. 395—Imprisonment in lieu of whipping—Court not authorized to inflict fine in lieu of whipping.

A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c.

The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine.

In this case one Sheodin was convicted by Mr. G. Bower, a Magistrate of Mirzapur, under ss. 457-380 and 75 of the Penal Code, and sentenced to two years' rigorous imprisonment and to receive thirty stripes. Subsequent to the passing of sentence, the Magistrate recorded the following order:—"The Civil Surgeon reports that Sheodin is unfit to be whipped. I therefore amend the sentence and strike out the whipping, and in its place inflict a fine of Rs. 30, or in default six months' more rigorous imprisonment, in accordance with the provisions of s. 395 of the Criminal Procedure Code."

The District Magistrate reported the case to the High Court, with the following observations:—

"S. 395 of the Criminal Procedure Code allows the Court which inflicted a punishment of whipping, which punishment cannot be executed, to (at its discretion) either remit the sentence of whipping, or sentence the offender in lieu of whipping to imprisonment for any term not exceeding twelve months. Nothing, however, in the section authorizes the Court to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Can this section be read as permitting a sentence of fine to be inflicted in lieu of the whipping, and then to commute that fine to one of alternative imprisonment?"

“Now, Mr. Bower is only competent to inflict a sentence of two years’ imprisonment as a Magistrate of the first class (s. 32, Criminal Procedure Code). This sentence he has already inflicted upon Sheodin. He can also inflict a fine, and, in lieu of fine, he can, under s. 33 of the Criminal Procedure Code, inflict a further maximum term of six months’ imprisonment. But if s. 395 be held not to include in the words “to imprisonment” such imprisonment as is inflicted in lieu of fine, then in this case Mr. Bower could not inflict any further imprisonment upon Sheodin, because he had already sentenced him to the full term of imprisonment he was competent to inflict.

“Suppose Sheodin paid up his fine of Rs. 30. Then he would not have undergone any imprisonment in lieu of the original sentence of whipping, but s. 395 only contemplates remission of the sentence of whipping altogether, or imprisonment in addition to any other punishment inflicted.

“At the same time it seems contrary to common sense that a man who is sentenced to a term of imprisonment and to a whipping in addition, as is allowed by law, should get off the additional sentence of whipping altogether because he is declared unfit to be whipped, and at the same time because the term of imprisonment inflicted upon him happens to be the full term of imprisonment *per se* the Court sentencing him is competent to inflict.

“I am therefore inclined to read the words ‘to imprisonment,’ taken along with the concluding paragraph of s. 395, as meaning imprisonment of any kind, whether original or alternative, a Court is competent to inflict, and that for the purposes of this case, Mr. Bower’s Court may be held to be competent to inflict a term of two years and six months’ imprisonment.

• “As I am in doubt, I submit the case.”

STRAIGHT, J.—In my opinion the convicting Magistrate had no power under s. 395 of the Criminal Procedure Code to revise his sentence of whipping by inflicting a fine of Rs. 30 on Sheodin in lieu of such whipping. Consequently it follows he had no power to

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direct any imprisonment for default in payment of such fine. All he could do was—

(1) to remit the whipping altogether,

(2) to sentence the offender in lieu of whipping, or of so much of the sentence of whipping as was not executed, to *imprisonment*, &c.

In my opinion "*imprisonment*" there means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. If the Legislature had intended otherwise it could easily have declared that a Court revising its sentence under s. 395 could substitute a fine for a whipping that could not be inflicted, but it has not done so, and I must presume that having expressed itself clearly as to the power it gives, it intended to exclude every other power. Mr. Bower's order must be quashed to the extent that it ordered a fine of Rs. 30 or, in default, six months' rigorous imprisonment.

Order quashed.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RADHA AND OTHERS (PLAINTIFFS) v. KINLOCK (DEPENDANT).*

Principal and surety—Omission by creditor to sue principal debtor within period of limitation—Discharge of surety—Act IX of 1872 (Contract Act), ss. 134, 137.

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance.

Section 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence.

Hajavimal v. Krishnarav (1) and *Krishto Kishori Chowdhraim v. Radha Romun Munshi* (2), dissented from. *Hazari v. Chummi Lal* (3) referred to.

* Second Appeal No. 826 of 1887, from a decree of A. Sells, Esq., District Judge of Meerut, dated the 18th March, 1887, reversing a decree of Babu Brijpal Das, Subordinate Judge of Meerut, dated the 24th December, 1886.

(1) I. L. R., 5 Rom., 647. (2) I. L. R., 12 Calc., 330.
(3) I. L. R., 8 All., 259.

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