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TILESHAR RAI v. PARBATI.

to appear. In my opinion there is nothing in this contention. I would apply to it the principle recently unanimously adopted by all the Judges of this Court in the case of *Dhonkal Singh* v. *Phakkar Singh* (1), and would hold that as the Court below had not judicially decided that the judgment-debtors' objections to execution were unsound, and had simply struck them off the file of pending cases by reason of the objectors' failing to appear, that Court was quite justified (when those objections were renewed) in afterwards hearing the parties respecting them and in judicially deciding whether they were valid or not. The Court did decide that the objections were valid and that they were fatal to the applications for execution. That decision is in my opinion perfectly right. I therefore dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

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April 25.

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

QUEEN-EMPRESS v. MAULA BAKHSH.

Criminal Procedure Code, ss. 423, 439—*Sessions Judge, powers of as a court of appeal—Commitment.*

It is competent to a Sessions Judge acting as a Court of appeal under s. 423 of the Code of Criminal Procedure, 1882, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session. *Queen-Empress* v. *Sukka* (2) overruled.

This was an application on behalf of Government for revision of an order of the Sessions Judge of Meerut on appeal from an order of a first class Magistrate of the Bulandshahr district, convicting the appellant of an offence under s. 379, read with s. 511 of the Indian Penal Code, and sentencing him to six months' rigorous imprisonment. It appeared that there was reason to believe that the appellant had, when put on his trial before the Magistrate, been four times previously convicted. Only one of such convictions was proved against him, the Magistrate omitting to question him about the others. On appeal the Sessions Judge

(1) I. L. R. 15 All. 84. (2) I. L. R. 8 All. 14.

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quashed the conviction and directed a new trial, adding that care should be taken that all previous convictions are proved under s. 511 of the Criminal Procedure Code. An application for revision of this order was made on behalf of Government on the following grounds:—(1) Because having regard to the rulings of the High Court, the case not being exclusively triable by the Court of Session, the Sessions Judge had no power on the appeal before him to quash the proceedings and order a commitment, and (2) because the learned Judge's direction to the Magistrate to prove certain previous convictions against the accused, in a case to which s. 75 of the Indian Penal Code was not applicable, was illegal.

The Public Prosecutor (*Mr. A. Strachey*), for the applicant.

EDGE, C. J., and AIKMAN, J.—The question which we have to consider here is whether a Sessions Judge sitting as a Court of appeal under s. 423 of the Code of Criminal Procedure 1882 can, having reversed the finding and sentence, order the appellant to be committed for trial to the Court of Session. According to the ordinary English construction of cl. (*b*) of s. 423, we have no doubt that the appellate Court, whether that appellate Court is a Court of Session, or a District Magistrate can, in an appeal from a conviction, having reversed the finding and sentence, order the accused to be committed to the Court of Session. That power is conferred in our opinion by sub-cl. (1) of cl. (*b*) of s. 423, and is not in any way controlled by the prohibition as to enhancing a sentence contained in sub-cl. (3) of cl. (*b*) of s. 423. There can be no doubt that it has been considered by this High Court that when acting under s. 439 of the Code, it had power, having reversed the finding and sentence, to order a committal for trial to a Court of Session. That power could not be exercised under s. 439, read with s. 423, unless the appellate Court referred to in cl. (*b*) of s. 423, had by reason of that latter section such power conferred upon it. It was contended that to hold that a Court of Session had such a power conferred upon it would be inconsistent with the course of legislation. In support of that argument it was pointed out that the power of enhancement which was conferred by s. 280 of Act No. X of 1872

upon all appellate Courts, was taken away by Act No. X of 1882, and that power was by the latter Act restricted to a High Court when acting under s. 439 of Act No. X of 1882. Section 28 of Act No. XI of 1874 amended s. 280 of Act No. X of 1872, and whilst leaving the power of enhancement in the appellate Court, it conferred on the appellate Court a further power of ordering an appellant to be retried, presumably to be retried by the same Court which had originally tried him. Consequently under s. 280 of Act No. X of 1872 before it was amended, or as amended by s. 28 of Act No. XI of 1874, the appellate Court had not under those sections a power to order a commitment to itself or a commitment at all. When we come to Act No. X of 1882, we find a great change in procedure. The power of enhancement which had existed in the appellate Court as such was taken away, but words were introduced which can only be construed as conferring upon the appellate Court a power of ordering the accused appellant to be committed to the Court of Session even where the Court of Session was the appellate Court. The object of the alteration in the procedure may have been to prevent a Court other than a High Court enhancing sentences except upon a fresh trial before itself, and under circumstances which would give the accused a right of being heard, and having his witnesses heard by the Court enhancing the sentence, and would give him an appeal from the conviction under which the heavier sentence was passed. Whatever may have been the object of the Legislature we consider no other construction can be put by us on s. 423 of Act No. X of 1882. In the course of the argument we were referred to the decision of this Court in the case of *The Queen* v. *Seetul Pershad* (1). That was a case which was decided in 1873, and turned upon the construction of the proviso contained in s. 296 of Act No. X of 1872, and in our opinion it has no bearing on this case. We were also referred to the decision of this Court in *Queen-Empress* v. *Sukha* (2). That case is directly in point, but with every respect for the decision of the learned Judge who decided that case we entirely differ

(1) 5 N.-W. P. H. C. Rep. 168. (2) I. L. R. 8 All. 14.

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from his reasonings and conclusions. That decision has also been dissented from in the case of *Queen-Empress* v. *Abdul Rahiman* (1). It has also been contended here that even if the Sessions Judge had power to make the order that the accused be committed to his Court for trial, we ought to set aside that order because it was obviously made with the intention that a heavier sentence should be imposed in the Sessions Court in case of a conviction than had been imposed by the Magistrate. We find nothing in s. 423 of Act No. X of 1882 to limit the power of the Sessions Judge to do any of the acts which he as an appellate Court is empowered to do by sub-cl. 1 of cl (*b*) of s. 423. Although we dismiss this application in revision, we consider that it was a most proper case for the Public Prosecutor to bring before the Court in order to settle the procedure.

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

1893
April 27.

QUEEN-EMPRESS *v.* NARAIN.

Act V of 1876 *s.* 22—*Government Notification* (*India*) *No.* 173 *of the* 14*th March* 1889—*Sentence*—*Reformatory School.*

Where a boy over fourteen, but otherwise of uncertain age, was ordered upon conviction by a Magistrate, to be detained in a Reformatory School for two years. *Held* that such sentence, having regard to the rule made by the Governor-General in Council on the 14th of March 1889, under s. 22 of Act No. V of 1876, was illegal. The proper course for the Magistrate to have adopted with reference to the above-mentioned rules was to have ascertained as near as might be the exact age of the offender and sentenced him to a specified period of detention which should be that elapsing between his conviction and the attainment by him of the age of eighteen years.

This was an application on behalf of Government for revision of an order passed by the Assistant Magistrate of Meerut. The facts of the case sufficiently appear from the judgment of the Court.

The Public Prosecutor (*Mr. A. Strachey*) for the applicant.

EDGE, C. J., and AIKMAN, J.—Narain was convicted of an offence under s. 379 of the Indian Penal Code, and was sentenced to six months' rigorous imprisonment by a Magistrate of the first class.

(1) I. L. R., 16 Bom. 580.