

## REVISIONAL CRIMINAL.

1897  
January 6.

*Before Mr. Justice Blair.*

IN THE MATTER OF THE PETITION OF BARKAT.\*

*Criminal Procedure Code, section 342—Perjury—False statement made by a convict in an affidavit in support of an application for revision of the order under which he was convicted.*

*Held* that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently that, if he did tender such an affidavit, he could not be prosecuted for false statements which might be contained therein. *Queen-Empress v. Subhaya* (1) referred to.

THE facts of this case sufficiently appear from the order of Blair, J.

Maulvi *Muhammad Ishaq*, for the applicant.

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

BLAIR, J.— This is a petition for the revision of an order of the Sessions Judge of Ghazipur, directing the prosecution of the applicant for an offence under section 193 of the Indian Penal Code. The applicant had been put upon his trial before a Magistrate of the first class for an offence constituted by section 323 of the Indian Penal Code. He had been convicted and sentenced to pay a fine of Rs. 25, or, in default of such payment, to be imprisoned for three months. Application was made by him to the Sessions Judge to revise this sentence and conviction. This application was to some extent based upon the allegation that the Magistrate, who tried the case, had refused to summon witnesses whom the applicant desired to call in his defence. That allegation in the petition was supported by an affidavit sworn by the applicant. The Sessions Judge found that the allegations of that affidavit were false to the knowledge of its maker, and therefore made the order now sought to be revised.

Mr. *Muhammad Ishaq* for the applicant contends that such an order is bad in law, inasmuch as the applicant, who made the

\* Criminal Revision No. 664 of 1896.

(1) I. L. R., 12 Mad., 451.

affidavit, occupied at the time of such making the status of an accused person. The object, he contended, of the application and the affidavit were to obtain a reversal or modification of the conviction and sentence. It is not disputed that the applicant was incapable in law of being examined, otherwise than under the circumstances and restrictions set forth in section 342 of the Code of Criminal Procedure, upon the original hearing of the case against him. He could not have been called as a witness, either by the prosecution to establish their case, or by himself in his own defence. It is argued that the reason of such disqualification extends to proceedings outside the original trial which may be taken for the purpose of reversing or modifying its result. I confess, I myself am unable to see why the reasons for which the Legislature excluded an accused person from giving evidence upon an original trial should not operate with equal force to preclude his competency as a witness in the appeal from that trial, and I am referred to a case *Queen-Empress v. Subhaya* (1) in which the High Court at Madras so held.

Munshi *Ram Prasad*, Government Pleader, calls attention to the not unusual practice of supporting applications for transfers of cases against accused persons being supported by affidavits made by such persons, but he does not cite any authority or even suggest any practice by which, either in matters of appeals or applications for revision, affidavits have been received made by the person who has been convicted and sentenced upon the original trial.

For my own part, I have no doubt that the Legislature intended to protect an accused person from the ordeal of examination as a witness and to render him incapable, therefore, of being punished for the making of false statements upon oath, or otherwise, so long as his case is *sub judice*. I accede to the contention that there is no substantial difference between the position of a person accused and convicted, supporting by his own evidence a criminal appeal, and a case of an accused person desiring to defend himself by in oath in an original criminal trial. Still less am I able ~~to~~

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any distinction in this respect between the position of a petitioner in appeal and a petitioner in revision. The object is the same, to revise or modify the action of the Court below, and every reason, which would render it not desirable for a petitioner in appeal to be a competent and compellable witness, applies with equal force in revisional proceedings. Following, therefore, in principle the satisfactory ruling cited above, I grant this petition in revision and set aside the order of the District Judge by which it is sought by criminal proceedings to inflict legal penalties for the taking of a false oath under circumstances which render the person so to be charged incompetent to be put upon his oath at all.

### APPELLATE CIVIL.

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January 7.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.*

DAVID HAY (PLAINTIFF) v. RAZI-UD-DIN AND OTHERS (DEPENDANTS)\*.  
*Act No IV of 1882 (Transfer of Property Act), sections 92, 93—Mortgage—Redemption—Decretal money not paid within the time limited—Second suit for redemption barred—Civil Procedure Code, section 13—Res judicata.*

*Held* that a mortgagor, whether under a simple or a usufructuary mortgage, who has obtained a decree for redemption and allows such decree to lapse by reason of his not paying in the decretal amount within the time limited for payment by the decree, cannot subsequently bring a second suit for redemption of the mortgage in respect of which such infructuous decree was obtained.

*Sheikh Golam Hoosein v. Musumal Alla Rukhee Beebee* (1) and *Maloji v. Sagaji* (2) followed; *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet* (3) referred to; *Muhammad Samiuddin Khan v. Mannu Lal* (4); *Sami Achari v. Somasundram Achari*. (5); *Periandi or Angappa* (6) and *Ramunni v. Brahma Dattan* (7) dissented from.

The facts of this case sufficiently appear from the judgment of the Court.

\* Second Appeal, No. 947 of 1894, from a decree of H. B. Finlay, Esq., District Judge of Shahjahanpur, dated the 14th May 1894, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 4th September 1893.

N.-W. P., H. C. Rep., 1871, p. 62.

L. R., 13 Bom., 567.

10 Bom., 461.

I. L. R., 15 Mad., 36

(4) I. L. R., 11 All., 386.

(5) I. L. R., 6 Mad., 119.

(6) I. L. R., 7 Mad., 423.