

1913

January, 8.

APPELLATE CRIMINAL.

Before Mr Justice Tudball

EMPEROR v. TULSI RAM AND OTHERS *

*Criminal Procedure Code, sections 35 and 408—Appeal—“Aggregate sentences”
—Concurrent sentences not aggregate.*

Held that the term “aggregate sentences” as used in sub-section (3) of section 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under section 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Muhammad v. Emperor of India* (1), *Emperor v. Tulshidas Lakshman* (2) and *Regina v. Gulam Abas* (3) approved and followed. *Abdul Khalek v. Kanj-Emperor* (4) dissented from.

THE facts of this case were as follows:—

Tulsi Ram, Chotey Lal and others were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and others of offences under sections 325 and 147 of the Indian Penal Code. The persons named above were each sentenced to four years' rigorous imprisonment under section 304, and one year's rigorous imprisonment under section 147, the two sentences to run concurrently. They filed appeals in the High Court, and at the hearing a preliminary objection was raised that, having regard to sections 35 and 408 of the Code of Criminal Procedure the appeals lay to the Sessions Judge and not to the High Court.

Mr. C. Dillon, and Babu Satya Chandra Mukerji, for the appellants.

The Assistant Government Advocate (Mr. R. Mulcomson), for the Crown.

TUDBALL, J:—The appellants in this case were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and some of them under sections 325 and 147 of the Indian Penal Code. Of these, two persons, Tulsi Ram and Chotey Lal, were each sentenced to four years' rigorous imprisonment under section 304 and one year's rigorous imprisonment under section 147, the two sentences to run concurrently.

* Criminal Appeal No. 846 of 1912 from an order of Kunwar Sen, Assistant Sessions Judge of Aligarh, dated the 25th of October, 1912.

(1) *Punj. Rec.*, 1901, Cr. J., 83.

(3) (1875) 12 Bom. H. C. Rep., 147.

(2) (1909) 11 Bom. L. Rep., 544.

(4) (1912) 17 C. W. N., 72.

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These two have filed their appeals here, and the question arises whether these appeals have been rightly filed in this Court or whether they lay to the court of the Sessions Judge. Section 408 says that when in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal shall lie to the High Court. This is in clause (b) of the proviso; otherwise under the opening clause of the section an appeal would lie to the Court of Session. It has been urged that under section 35(3) and section 408 the total of the two sentences passed being five years the appeal lies to this Court. Clause (3) of section 35 lays down that for the purpose of appeal, aggregate sentences passed under the section in case of convictions for several offences at one trial shall be deemed to be a single sentence. It is quite clear to my mind that the words, 'aggregate sentences' and in fact the whole of clause (3), relate to the case of consecutive sentences mentioned in clause (2). The word 'aggregate' implies an adding together of separate items, and where sentences are concurrent there is no such aggregation. As a matter of actual fact the sentences which these two appellants would have to undergo on the decision of the Assistant Sessions Judge are sentences of four years' rigorous imprisonment each, and no more.

My attention has been called to the decision of the Calcutta High Court in *Abdul Khalek v. King-Emperor* (1). The ruling, no doubt, is in the appellant's favour, but the judgement gives no reasons. On the other hand the point was considered in the case of *Sher Muhammad v. Emperor of India* (2) and it was therein held that where two sentences had to run concurrently there could be no aggregation of sentences, and as there was no sentence of imprisonment for a term exceeding four years the appeal lay to the Sessions Court. That was in the case of a decision by an Additional District Magistrate. The same point was considered in *Emperor v. Tulshidas Lakshman* (3). The ruling of the Punjab Chief Court and also an old ruling of the Bombay High Court itself, *Regina v. Gulam Abus* (4), were followed. In my opinion these decisions are perfectly correct, and as these two appellants have not been sentenced to imprisonment for terms exceeding four years by the Assistant Sessions Judge, their appeals will

(1) (1912) 17 C. W. N., 72.

(3) (1909) 11 Bom. L. Rep., 544.

(2) Punj. Rec. 1901, Cr. J., 83.

(4) (1876) 12 Bom. H. C. Rep., 147.

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lie to the court of the Sessions Judge. I therefore direct that the memorandum of appeal be returned to the appellants to be filed in the proper court. The Sessions Judge will no doubt under the circumstances of the case admit the appeal although they may be out of time when presented to him.

Memorandum of appeal returned.

REVISIONAL CIVIL.

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January, 9. 2

Before Mr. Justice Tudball.

ABDUL HAMID KHAN (PLAINTIFF) v. BABU LAL AND OTHERS
(DEFENDANTS).*

Act No. X of 1897 (General Clauses Act), section 3 (25)—Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 13—Court of Small Causes—Jurisdiction—Ferry—“Immovable property”—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry.

Held that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under article 13 of the second schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that court. *Gokal Chand v. Lal Chand* (1) and *Desa Singh v. Narain Das* (2) approved.

THE plaintiff in the case out of which the present application arose was the lessee of a certain ferry from the cantonment authorities of Allahabad. He filed a suit in the Court of Small Causes to recover from certain fishermen sums of money to which he alleged himself to be entitled as lessee of the ferry by way of a toll on their boats. The Court of Small Causes returned the plaint, holding that, by reason of section 3 (25) of the General Clauses Act, 1897, and article 13 of the second schedule to the Provincial Small Cause Courts Act, 1887, the suit was not cognizable by that Court. The plaintiff thereupon applied in revision to the High Court.

Maulvi *Ghulam Mujtaba*, for the applicant.

Babu *Sital Prasad Ghosh*, for the opposite parties.

TUDBALL, J.:—This is an application in revision against the order of the Judge of the Small Cause Court at Allahabad. The plaintiff, who is the applicant here, is a lessee of a ferry from the Cantonment Committee of Allahabad. The defendants are

* Civil Revision No. 113 of 1912.

(1) *Punj. Rec.*, 1897, C. J., 215.

(2) *Punj. Rec.*, 1898, C. J., 278.