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RAJENDRA KISHORE SAHI v. NAND PRASAD

It appears to me that little, if any, distinction can be drawn between cases of disagreement between Judges composing a Bench hearing first appeals or second appeals. The matter, however, does not arise in this particular reference and therefore I prefer to express no opinion upon that question. That matter can only properly be decided in a case where disagreement between Judges hearing a second appeal has actually occurred.

For the reasons which I have given I would hold that where two Judges composing a Division Bench hearing a first appeal have disagreed either in law or in fact, the point or points upon which they have disagreed must be stated and referred to another Judge or Judges and that the point or points must be decided in accordance with the opinion of the majority of the Judges including the two Judges who originally heard the appeal.

BENNET, A.C.J.:—I agree.

COLLISTER, J.:—I agree.

BY THE COURT:—The question submitted is therefore answered as follows: Where two Judges comprising a Division Bench hearing a first appeal have disagreed either in law or in fact, the procedure to be followed is that laid down in section 27 of the Letters Patent of this Court and not that laid down in section 98 of the Civil Procedure Code.

REVISIONAL CRIMINAL

Before Mr. Justice Ismail

EMPEROR *v.* SHEOMANDIL*

1938 *August*, 30

Criminal Procedure Code, section 439—Revision—Party in contempt of court cannot be heard in revision—Practice—Counsel's right of audience.

A party who is in contempt of court cannot be heard in criminal revision, nor is his counsel entitled to an audience.

So, where a criminal appeal was dismissed by the Sessions Judge and the appellant was ordered to submit to his bail bonds, but without complying with that order he filed a

*Criminal Revision No. 663 of 1938, from an order of Mathura Prasad, Sessions Judge of Mirzapur, dated the 20th of August, 1938.

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revision through counsel in the High Court, the High Court refused to entertain the application in revision.

Messrs. *Kumuda Prasad* and *C. S. Saran,* for the applicant.

The Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

ISMAIL, J.:—This is an application in revision on behalf of one Sheomandil who was convicted and sentenced to a term of nine months' rigorous imprisonment and a fine of Rs.500 under section 406 of the Indian Penal Code by a Magistrate of the first class. The order of the learned Magistrate was confirmed on appeal by an order dated 20th August, 1938. The applicant now comes to this Court in revision. It is admitted by learned counsel that the accused has not surrendered himself and is still at large. The concluding portion of the order of the learned Sessions Judge is: "The appeal is rejected. The accused is directed to submit to his bail bonds." This order has not been complied with. Learned counsel for the applicant states that the appellate court had not directed the applicant to be present in court at the time of the delivery of judgment. Reference has been made to the proviso to section 424 which lays down that unless the appellate court otherwise directs the accused shall not be brought up or required to attend to hear the judgment delivered. This section is limited in its operation to the stage when the judgment is pronounced. In the judgment itself the learned Sessions Judge has directed the accused to surrender himself, as he was bound to do, and it was the duty of the applicant to enter appearance as soon as he was apprised of the order of the court. It is not suggested that the accused is unaware of the order of the court below. The fact that he has come to this Court in revision is proof positive of his knowledge of the order that has been passed by the court below. The question for consideration is whether it is open to the applicant or his learned coun-

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sel to move this application until the applicant has obeyed the order of the Judge and has surrendered to his bail bonds. The exercise of powers under section 435 and the sections immediately following it are discretionary. Section 440 of the Criminal Procedure Code provides that no party has any right to be heard either personally or by pleader before any court when exercising its powers of revision. In this instance the applicant has thought fit to remain at large and in my opinion he is in contempt of court. In *Har Narain Prasad* v. *King-Emperor* (1) a learned Judge of this Court declined to entertain the application of an accused person who had absconded after being released on bail. The facts of this case are distinguishable. In *Khairat Ali* v. *Wahed Ali* (2) it was held that a party who was in contempt of court could not be heard in revision. In that case a warrant was issued for the arrest of the petitioners. The petitioners without appearing before the trial court moved the Sessions Judge and prayed for an order of stay of further proceedings. The application was dismissed by the Sessions Judge and thereupon the petitioners moved the High Court for the same order. The Court discharged the rules on the ground that the petitioners had not appeared in pursuance of the warrant issued by the Magistrate. It seems to me that as long as the applicant does not enter appearance in obedience to the order of the court below this Court will not be justified in exercising its discretionary powers in favour of the applicant. Further, until the order of the court below is complied with learned counsel representing the applicant will not have a right of audience. I have fully considered the argument of learned counsel and I am of opinion that this application cannot be entertained at present. It is accordingly rejected. This order will not stand in the way of the applicant if he comes to this Court in revision after surrendering to his

(1) A.I.R. 1923 All. 327 (2) A.I.R. 1928 Cal. 241.

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bail bonds. As copies of the judgments of the courts below have been filed it will not be necessary for the applicant to file fresh copies of the judgments.

APPELLATE CIVIL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

1938 *September*, 12

DAMODAR DAS (APPLICANT) *v.* SECRETARY OF STATE FOR INDIA (OPPOSITE PARTY)*

Land Acquisition Act (I of 1894), sections 3(a), 18—Acquisition of building, the land being claimed as Government property —Question of title to the land as between the claimant and the Government—Jurisdiction—Burden of proof—Cantonments area—House thereon—Owner of house has no interests in the land and cannot claim compensation for trees, gardens, etc.—Regulation of 12th September, 1836, paragraph 6—Crown Grants Act (XV of 1895), sections 2, 3—Valuation—House valued at 8 1/3 times annual rental.

Cases where the Government claims that the land itself belongs to it and desires to acquire the building standing on the land come within the operation of the Land Acquisition Act. If in such a case the owner of the building claims any interest in the land, the District Judge is competent to decide the question of title in a reference under section 18 of the Land Acquisition Act. The burden of proof is on the claimant to show that he has any rights in the land.

The definition of "land" in section 3(*a*) of the Land Acquisition Act also shows that a building is included in the definition of land, and the case lies under the Act where compensation is to be awarded for the building only, the Government claiming ownership of the land.

Regulation of 12th September, 1836, and prior to it General Order of the Governor-General in Council dated 28th September, 1807, shows that persons who built or purchased houses in Cantonment areas were owners of the materials of the houses only and had no right or interest in the land; and that Government, who had authorised such houses to be built, could at any time resume the land, upon paying the value of the building. Grants of land within Cantonment areas, made by Government for building purposes, were therefore subject to the con-

*First Appeal No. 389 of 1935, from a decree of R. L. Yorke, District Judge of Meerut, dated the 21st of February, 1935.