

## APPELLATE CRIMINAL.

1928  
Sep., 21.

*Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.*

BISMILLAH KHAN (APPELLANT) *v.* S. SHAKIR ALI  
(COMPLAINANT-RESPONDENT)\*

*Criminal Procedure Code (Act V of 1898), sections 476 and 476B—Application to prosecute a person for giving false evidence—Second appeal against an order consenting or refusing to prosecute—Oudh Courts Act (Local Act IV of 1925), section 40—Order of a Munsif refusing to prosecute whether one passed within section 40—District Judge, whether can transfer an appeal against the order of a Munsif refusing to prosecute under section 193—Civil Procedure Code (Act V of 1908), section 115.*

Where the court of first instance consents or refuses to prosecute, whether the appellate court upholds or reverses his order, there is one appeal, and one appeal only under section 476B of the Code of Criminal Procedure. The right to appeal is created by the Legislature. The Legislature grants one appeal only and no second appeal lies.

The District Judge may transfer to any Subordinate Court under his administrative control any appeals pending before him from the decrees or orders of Munsif. But an order by Munsif refusing to prosecute under section 193 is not an order of a Munsif within the meaning of section 40 of the Oudh Courts Act (Local Act IV of 1925) and so the District Judge had no jurisdiction to transfer an appeal against such an order to the court of the Subordinate Judge and so, where such an appeal was transferred by a District Judge to the court of a Subordinate Judge, the proceedings before the Subordinate Judge were null and void.

Where a Subordinate Judge in an appeal transferred to his court by the District Judge reversed the order of a Munsif and took action under section 476 of the Code of Criminal Procedure, which order was without jurisdiction, the High Court cannot take action under section 439 of the Code of

---

\* Criminal Appeal No. 417 of 1928, against the order of Pandit Damodar Rao Kulkar, Subordinate Judge of Rae Bareilly, dated the 14th of August, 1928.

1928

BISMILLAH  
KHAN  
v.  
S. SHAKIR  
ALI.

Criminal Procedure, as the court of a Subordinate Judge is not a criminal court but it can interfere under section 115 of the Code of Civil Procedure.

*Ranjit Narayan Singh v. Ram Bahadur Singh* (1), dissented from. *Muhammad Idris v. The Crown and another* (2), relied upon.

Mr. *Ale Raza* and Mr. *S. M. Ahmad*, for the appellant.

The Government Advocate (Mr. *G. H. Thomas*) and the Government Pleader (Mr. *H. K. Ghosh*), for the Crown.

STUART, C. J. and RAZA, J. :—This matter has come before us in the form of a criminal appeal. As we shall show later no criminal appeal lies, but Bismillah Khan, the appellant is nevertheless entitled to redress. The case has been referred to a Bench in view of a conflict of opinion between certain High Courts. The facts are very simple. Bismillah Khan was alleged to have identified a certain Shakir Ali at a time when a bailiff of the court was endeavouring to effect service of a summons upon him. Shakir Ali, alleging that at the time when it was stated that the summons had been served upon him he was working in the Santhal Parganas in Behar, applied to the Munsif to prosecute Bismillah Khan under section 193 of the Indian Penal Code. The order in question would have been an order under section 476 of the Code of Criminal Procedure. The Munsif refused to prosecute. Shakir Ali then appealed to the Court of the District Judge. This appeal was under section 476B of the Code of Criminal Procedure. The relevant words are these :—

“Any person on whose application any civil . . . court has refused to make a complaint under section 476. . . may appeal to the court to which such former court is

(1) (1927) I. L. R., 5 Pat., 262.

(2) (1925) I. L. R., 6 Lah., 56.

subordinate within the meaning of section 195, sub-section 3 and the superior court may thereupon, after notice to the parties concerned. . . itself make the complaint which the subordinate court might have made under section 476. ”

1928

---

 BISMILLAH  
 KHAN  
 v.  
 S. SHAKIR  
 ALI.

There is no doubt as to the fact that the Court to which this appeal should have been made was the Court of the District Judge and the appeal was made to the Court of the District Judge, but the District Judge by an order of the 7th of May, 1928, transferred the hearing of the appeal to the Court of the Subordinate Judge. The Subordinate Judge took action in the matter under section 476 of the Code of Criminal Procedure. Bismillah Khan appeals against his order. A preliminary objection was taken to the hearing of this appeal on the ground that no appeal lay under the provisions of section 476B. We consider that no appeal does lie. It is true that a Bench of the Patna High Court is of opinion that in such circumstances an appeal does lie to the High Court. Their decision is reported in *Ranjit Narayan Singh v. Ram Bahadur Singh* (1). But we are unable with great respect to accept the view of the learned Judges, who decided that appeal. It does not appear to us that it is necessary to refer to other reported cases in which the point has been raised as our view, which is the view taken by the Lahore High Court in *Muhammad Idris v. The Crown and another* (2), is that upon reading the words of the section itself it is obvious that no appeal lies to the High Court in such cases. Where the court of first instance consents or refuses to prosecute, whether the appellate court upholds or reverses its order there is one appeal, and one appeal only under this section. It is not the question of what might have been desired but of what the words are. The right to appeal

Stuart, C. J.  
 and Reza, J.

(1) (1927) I. L. R., 5 Pat., 262. (2) (1925) I. L. R., 6 Lah., 56.

1928

BISMILLAH  
KHAN  
v.  
S. SHAKIR  
ALI.

Stuart, C. J.  
and Raza, J.

is created by the Legislature. The Legislature grants one appeal only and no second appeal lies. Therefore we hold that in no such cases can an appeal lie to a High Court. An appeal can only lie to the High Court, which is here the Chief Court, where the original order has been passed by a court from which the appeal ordinarily lies direct to this Court.

This, however, does not conclude the matter. The learned Counsel appearing for Bismillah Khan has very rightly asked us to use our powers, if we are of opinion that the learned Subordinate Judge had no jurisdiction to pass this order. We cannot take action under section 439 of the Code of Criminal Procedure, as the Court of a Subordinate Judge is not a criminal court; but we can take action under section 115 of the Code of Civil Procedure and we propose to do so. Shakir Ali has been served with a notice. He is not represented. We have given him proper notice. The question as to whether the learned Subordinate Judge had or had not jurisdiction turns on the interpretation of section 40 of the Oudh Courts Act (Local Act IV of 1925). A District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsif. In order to justify the transfer we have to see whether this is an order of a Munsif within the meaning of section 40. We are of opinion that it is not such an order, and that the District Judge had no jurisdiction to transfer the appeal. The case then stands as follows. The proceedings before the Subordinate Judge are null and void. They are as if they had not existed. We return the record to the District Judge of Rae Bareilly with a direction that he should re-admit the appeal of Shakir Ali and decide it according to law. There is no order as to costs.

*Case remanded.*