

This concludes the appeal. For the reasons given above we dismiss this appeal, with costs.

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RAM NATH
v.
DEBRAJ
SINGH

Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

SAJJAD HUSAIN (ACCUSED APPLICANT) v. KING-EMPEROR
THROUGH LAUTAN (COMPLAINANT-OPPOSITE PARTY)*

1934
November,
19.

Criminal Procedure Code (Act V of 1898), sections 476 and 476A—Notice, if necessary in proceedings under section 476—Preliminary enquiry, whether to be in the presence of accused—Appellate court's power to order complaint being filed under section 476A—Delay in starting proceedings under section 476, effect of.

In proceedings under section 476 it is not obligatory on the Court to issue notice before taking action under that section but in most cases it would be desirable that such notice should be given in order to give the accused an opportunity to offer any explanation which he might be in a position to give. The preliminary inquiry provided for in that section or the extent of it has been left entirely to the discretion of the Court. It is not essential that the preliminary inquiry, if any, must be made in the presence of the accused or after giving notice to him. *Thakur Dass v. King-Emperor* (1), referred to.

An appellate court in the exercise of its power as superior Court under section 476A has authority to direct a complaint being made in respect of an offence committed in the course of proceedings in a Court subordinate to it.

No hard and fast rule can be laid down that in all cases an order for prosecution under section 476 must be set aside on the ground of delay. *Begu Singh v. Emperor* (2), and *Rahimad-ulla v. Emperor* (3), referred to.

Mr. K. P. Misra, for the applicant.

The Assistant Government Advocate (Mr. H. K. Ghose), for the Crown.

*Section 115 Application No. 78 of 1934, against the order of M. Mohamad Abdul Haq, District Judge of Gonda, dated the 9th of May, 1934.

(1) (1913) 17 O.C., 25.

(2) (1907) I.L.R., 34 Cal., 551.

(3) (1908) I.L.R., 31 Mad., 140.

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SRIVASTAVA, J.:—This is an application for revision of the appellate order of the learned District Judge of Gonda upholding the order of the learned Deputy Commissioner of Bahraich ordering the prosecution of the applicant under section 476 of the Code of Criminal Procedure in respect of offences under sections 193 and 471 of the Indian Penal Code.

The facts of the case so far as they are material for the purpose of this application are briefly these. Mahmud-un-nissa, wife of the applicant, purchased a zamindari share in village Nagraur which included certain plots of land which were in possession of the applicant as a mortgagor. In the course of mutation proceedings on the basis of the aforesaid purchase the applicant, who was also the mukhtar of his wife, put in evidence a *siyaha* showing that certain rents had been realised from one Lautan who was a tenant of the lands included in the aforesaid purchase, in order to prove that his wife was in possession of the property. Mutation was effected in the name of Mahmud-un-nissa on the 16th of June, 1932, and this order was confirmed by the Deputy Commissioner of Bahraich on appeal on the 23rd of August, 1932. On the 10th of June, 1932, the applicant brought a suit for recovery of arrears of rent due from Lautan in respect of the lands of which he was the mortgagor. Lautan pleaded payment and produced two receipts in support of the alleged payment. The applicant admitted his signature upon those receipts, but pleaded want of consideration. In his statement made on oath before the Tahsildar during the trial of the suit he stated that Lautan had never paid the money entered in the receipts but had promised to pay it after he had sold his grain. He further stated that the items shown in the said receipts were entered in the patwari's *siyaha* which he had produced in the mutation case and that the said *siyaha* was *farzi*. The Tahsildar held the receipts to be fictitious and decreed the applicant's claim. This decree was upheld by the

learned Deputy Commissioner. He was, however, of opinion that the applicant was guilty either of fabricating false evidence, namely, the *siyaha* which was produced by him in the mutation case, or of giving false evidence in the Court of the Tahsildar in the suit for arrears of rent. He accordingly in the exercise of his power as a superior Court under section 476A of the Code of Criminal Procedure ordered a complaint to be made against the applicant for fabricating false evidence and using a forged document, namely, the *siyaha*, as genuine in the mutation case under sections 193 and 471 of the Indian Penal Code, or in the alternative for deliberately giving false evidence on oath in the Court of the Tahsildar in the course of the suit for arrears of rent under section 193 of the Indian Penal Code. This order, as stated before, has been upheld by the learned District Judge of Gonda.

The first contention urged on behalf of the applicant is that the Deputy Commissioner when he heard the appeal in the suit for arrears of rent had no jurisdiction to take action for the making of a complaint in respect of any offence which the applicant may appear to have committed in connection with the mutation case. Stress has been laid upon the words "any offence referred to in section 195, sub-section 1, clause (b) or clause (c) which appears to have been committed in, or in relation to, a proceeding in that Court" used in section 476 of the Code of Criminal Procedure in support of his argument. This argument seems to me to be sufficiently answered by the provisions of section 476A of the Code of Criminal Procedure which provides that the power conferred by section 476, sub-section (1) may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate. It cannot be denied that the Court of the Tahsildar when dealing with the muta-

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tion case was subordinate to the Court of the Deputy Commissioner. In fact an appeal was made to the Deputy Commissioner against the order of mutation. Thus I am of opinion that the Deputy Commissioner in the exercise of his power as a superior Court under section 476A had authority to direct a complaint being made in respect of an offence committed in the course of mutation proceedings in a Court subordinate to him. It is not disputed that he had similar power of ordering a complaint being made in respect of any offence committed in relation to the suit for arrears of rent which was tried by the Tahsildar as an Assistant Collector of the second class. I therefore overrule the contention.

Next it was argued that the order of the Deputy Commissioner was illegal inasmuch as he had passed the order without giving the applicant any opportunity to show cause against it. It is argued that no order under section 476 can properly be passed without previous notice being given to the party concerned. The contention is supported by the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Thakur Dass and others v. King-Emperor* (1) in which it was held that the lower Court was wrong in ordering prosecution without giving the persons concerned an opportunity of showing cause against such order. I am unable to discover anything in the provisions of section 476 making it obligatory on the Court to issue notice before taking action under that section. No doubt in most cases it would be desirable that such notice should be given in order to give the accused an opportunity to offer any explanation which he might be in a position to give. The applicant has failed to make out any grounds which might show that he has in any way been prejudiced in the present case for want of notice. I am not therefore prepared to set aside the order of the lower Court on this ground. It might be

(1) (1913) 17 O.C., 25.

mentioned in this connection that though section 476 does not require a notice being given to the accused yet it makes provision for a preliminary inquiry. It should however be noted that the making of this preliminary inquiry or the extent of it has been left entirely to the discretion of the Court. Nor does it appear essential that the preliminary inquiry, if any, must be made in the presence of the accused or after giving notice to him.

Lastly it was argued that the complaint in so far as it relates to the alleged offence of fabricating evidence in the mutation case is a belated one and ought therefore to be set aside. In this connection reliance has been placed on two Full Bench decisions, one of the Calcutta High Court in *Begu Singh v. Emperor* (1) and the other of the Madras High Court in *Rahimadulla Sahib v. Emperor* (2). In the former of these cases it was held by the majority of the Full Bench that the summary power conferred by section 476 of the Code of Criminal Procedure is exercisable only at or immediately after the conclusion of the trial. Similarly in the latter case the majority of the Full Bench were of opinion that it was the intention of the Legislature in enacting section 476 that an order under this section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceedings. MILLER, J., who was also a member of the Full Bench dissented from this view. With all respect for these decisions, I do not think that any hard and fast rule can be laid down that in all cases an order for prosecution under section 476 must be set aside on the ground of delay. The section itself does not limit the time within which action should be taken. The facts of the present case afford the best argument against the reasonableness of laying down any rigid rule on the subject. As stated before the mutation case was decided in favour of the applicant's wife. Evidently the

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(1) (1907) I.L.R., 34 Cal., 551.

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siyaha was accepted as affording good evidence of her possession. The Court at that time could have had little reason to think that it had been fabricated. It is only when the subsequent suit for arrears of rent was instituted and the plaintiff deposed on oath that he had not received the money and had got the entry made in the *siyaha* fictitiously that the commission of the alleged offence in the mutation case came to light. It would only defeat the ends of public justice if the order of the lower Court in respect of the alleged offence in the course of the mutation proceedings were to be set aside on the ground of delay.

For the above reasons I dismiss the application.

Application dismissed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, and
Mr. Justice E. M. Nanavatty*

1934
November,
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BABU JUGUL KISHORE (DECREE-HOLDER APPELLANT) *v.*
PANDIT SATYA NARAIN SHUKLA (JUDGMENT-DEBTOR
RESPONDENT)*

Execution of decree—Executing court, powers of Executing court cannot go behind the decree unless it was passed without jurisdiction—Decree must be corrected by court which passed it—Civil Procedure Code (Act V of 1908), order XXI, rules 37 and 40—Money decree—Execution by arrest of judgment-debtor—Discretion of court to disallow execution by arrest.

A court executing a decree must take the decree as it stands and cannot go behind it except in cases where the Court passing the decree had no jurisdiction to pass it, and the decree is a mere nullity or incapable of execution. Unless the decree is corrected by the Court which passed it, it is not open to the executing court to go behind it. *Ram Narain v. Suraj Narain* (1), followed.

Where a judgment-debtor appears in pursuance of a notice under order XXI, rule 37 of the Code of Civil Procedure and

*Execution of Decree Appeal No. 58 of 1933, against the order of S. Shankat Husain, Subordinate Judge of Unao, dated the 11th of August, 1933.