REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

MENDI LAL, ACCUSED-APPLICANT *v.* RAM ADHIN, COMPLAINANT-OPPOSITE PARTY* 1934 *October*, 22

Criminal Procedure Code (Act V of 1898), sections 439, 476 and 476B—Proceedings under section 476 started by a magistrate —Appeal against magistrate's order—Appellate court in allowing appeal cannot remand case for further enquiry—Revision against order of appellate court lies under section 439, Criminal Procedure Code—Civil Procedure Code (Act V of 1908), section 115—Civil or Revenue Court initiating proceedings under section 476—Revision in such cases lies under section 115, Civil Procedure Code.

Where proceedings under section 476 of the Code of Criminal Procedure are started by the Court of a Magistrate such proceedings must necessarily be governed by the provisions of the Code of Criminal Procedure. Where there is an appeal against the order of the Magistrate and the Judge accepts the appeal under section 476B of the Code of Criminal Procedure, he becomes *functus officio*, and his order remanding the case and directing the Magistrate to make a further enquiry into the alleged commission of the offence under section 193 of the Indian Penal Code is *ultra vires* and absolutely void. There are no provisions in the Code of Criminal Procedure analogous to the provisions relating to the remand of a case under Order XLI, rules 23 and 25 of the Code of Civil Procedure. *Dhanpat Rai* v. *Balak Ram* (1), relied on. *Mahomed Bayetulla* v. *Emperor* (2), and *Surendranath Maiti* v. *Sushilkumar Chakrabarti* (3), referred to.

Where a Civil or Revenue Court has initiated proceedings under section 476 of the Code of Criminal Procedure, the High Court can in revision interfere with an order of the appellate court in such proceedings only under section 115 of the Code of Civil Procedure. Where, however, a criminal court takes proceedings under section 476 of the Code of Criminal Procedure the appellate order of the Sessions Judge can only be revised

*Criminal Revision No. 86 of 1934, against the order of Pandit Tika Ram Misra, Sessions Judge of Lucknow, dated the 11th of May, 1934.

(1) (1931) I.L.R., 13 Lah., 342. (2) (1931) A.I.R., Cal., 3.
(3) (1931) I.L.R., 59 Cal., 68.

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by the High Court under the provisions of section 439 of the Code of Criminal Procedure.

Dr. *J. N. Misra,* for the applicant.

Messrs. *K. P. Misra* and *G. P. Shukla,* for the opposite party.

NANAVUTTY and ZIAUL HASAN, JJ.:—This is an application for revision of an order of the learned Sessions Judge of Lucknow reversing an order of Khwaja Wasiuddin, Special Magistrate of Lucknow, and by an order of remand, directing the Special Magistrate to make a further enquiry under section 476 of the Code of Criminal Procedure into the alleged commission of an offence of perjury by the applicant punishable under section 193 of the Indian Penal Code.

This application for revision first came up before a Judge of this Court sitting singly who by his order, dated the 11th of July, 1934, referred the case to a Bench of this Court, as in his opinion the question of law raised in this application for revision was an important one and there were conflicting rulings of the Calcutta and Lahore High Courts on the point of law involved.

The facts out of which this application for revision arises are as follows:

A complaint under section 500 of the Indian Penal Code was filed by Ramadhin against Ghanshiam and others on the 4th of January, 1932. Some of the accused apologised and entered into a compromise with the complainant and were acquitted under the provisions of section 345 of the Code of Criminal Procedure, but one accused Bhagwant was convicted by the Magistrate on the 31st of December, 1932 of an offence under section 500 of the Indian Penal Code and was fined Rs.200. In appeal the Sessions Judge on the 6th of March, 1933, upheld the conviction under section 500 of the Indian Penal Code but reduced the fine to Rs.100. In revision this Court acquitted Bhagwant on the 20th of July, 1933. In this case of defamation the applicant Mendi Lal was a witness for the defence and

he was examined on the 7th of December, 1932, and in the course of his deposition he made the following statements:

"Puran died childless; it is wrong to say that he had four daughters. Nanhia died two years ago. I was never married in the town of Muttra."

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These statements were alleged to be false and in respect of these statements an application was made by Ramadhin on the 28th of October, 1933, in the Court of the Magistrate who tried the defamation case, namely, Khwaja Wasiuddin, Special Magistrate, that proceedings under section 476 of the Code of Criminal Procedure be taken against Mendi Lal and a complaint under section 193 of the Indian Penal Code be filed by the Magistrate against him. Accordingly Khwaja Wasiuddin by his order, dated the 26th of February, 1934, directed that a complaint under section 193 of the Indian Penal Code be made against Mendi Lal. An appeal was filed by Mendi Lal under section 476B of the Code of Criminal Procedure in the Court of the Sessions Judge of Lucknow and the learned Sessions Judge passed an order on the 11th of May, 1934, accepting the appeal of Mendi Lal but remanding the case to the lower Court for further inquiry under section 476 of the Code of Criminal Procedure. It is this order of remand, dated the 11th of May, 1934, which is the subject-matter of revision in the present application before us.

It is contended before us on behalf of the applicant Mendi Lal that the order of the learned Sessions Judge is illegal and *ultra vires,* as after he had accepted the appeal of Mendi Lal the learned Judge was *functus officio* and could not direct that a further enquiry be made into the matter by the Magistrate, Khwaja Wasiuddin. In our opinion the contention urged on behalf of the applicant by his learned Counsel Dr. Jaikaran Nath Misra is sound in law. It was held by a Full

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Bench of the Lahore High Court in *Dhanpat Rai* v. *Balak Ram* (1) that the procedure on appeal under section 476B of the Code of Criminal Procedure was procedure on an appeal under that Code, and as the Code of Criminal Procedure provided for no remand the Appellate Court could not make a remand to the trial court, but that the appellate court might itself make an enquiry in a case where it came to the conclusion either that the trial Court had made no preliminary enquiry at all or had made a defective enquiry. It was further held in that Full Bench ruling that the appellate court could not take additional evidence under section 428 of the Code of Criminal Procedure, because that section was specifically limited to appeals under Chapter 31 of the Code of Criminal Procedure in which it occurs, but that the appellate court could take all evidence necessary for making or completing the preliminary enquiry under the provisions of the very section 476-B of the Code. There is no doubt a difference of opinion between the Calcutta High Court and the Lahore High Court on the question whether, where a Civil Court refuses to make a complaint and the appellate court accepts the appeal, a revision lies to the High Court under section 115 of the Code of Civil Procedure or under section 439 of the Code of Criminal Procedure. The view of the Calcutta High Court is expressed in *Surendranath Maiti* v. *Sushilkumar Chakrabarti* (2) in which it was held that section 115 of the Code of Civil Procedure applies to an application in revision against an appellate order arising out of an order under section 476 of the Code of Criminal Procedure, *passed by a civil or revenue court* and that section 439 of the Code of Criminal Procedure has no application to such proceedings, and that all applications under sections 476, 476A and 476B filed in civil courts should be dealt with according to the provisions of the Code of Civil

(1) (1931) I.L.R., 13 Lah., 342. (2) (1931) I.L.R., 59 Cal., 68.

Procedure. In *Mahomed Bayetulla* v. *Emperor* (1) it was held that appeals under section 476-B of the Code of Criminal Procedure are subject to all the provisions applicable to criminal appeals as laid down in section 419 of the Code of Criminal Procedure and the following sections.

It is to be noted that the view of the Calcutta High Court laid down in *Surendranath Maiti* v. *Sushilkumar Chakrabarti* (2) was in respect of proceedings initiated by a civil or revenue court under section 476 of the Code of Criminal Procedure. In the case before us proceedings under section 476 of the Code of Criminal Procedure were started by the Court of the Special Magistrate of Lucknow and obviously such proceedings by a Magistrate must necessarily be governed by the provisions of the Code of Criminal Procedure. There are no provisions in the Code of Criminal Procedure analogous to the provisions relating to the remand of a case under order XLI, rules 23 and 25 of the Code of Civil Procedure. The learned Sessions Judge of Lucknow, when he allowed the appeal of Mendi Lal under section 476-B of the Code of Criminal Procedure and set aside the order of the Special Magistrate directing that a complaint be filed against the applicant Mendi Lal in respect of an alleged offence of perjury under section 193 of the Indian Penal Code, had no power to direct a further enquiry once he had passed an order accepting the appeal of Mendi Lal. The learned Counsel for the respondent opposite party is unable to point out to us any provision of the Code of Criminal Procedure, which would justify the passing of such an order by the learned Sessions Judge. Once the learned Judge accepted the appeal of Mendi Lal under section 476-B of the Code of Criminal Procedure, he was *functus officio*, and his order directing the Special Magistrate to make a further enquiry into the alleged commission of the offence under section 193 of the Indian Penal

(1) (1931) A.I.R., Cal., 3. (2) (1931) I.L.R., 59 Cal., 68.

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Code is in our opinion *ultra vires* and absolutely void. Under section 476 of the Code of Criminal Procedure it is laid down that the superior Court (that is to say, the appellate court) may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or as the case may be, itself make the complaint which the subordinate Court might have made under section 476 and if it makes such complaint the provisions of that section shall apply accordingly. It is clear that nowhere in this section 476-B of the Code is there any power given to the appellate court to direct the Magistrate to hold a further enquiry into the alleged commission of the offence under section 476 of the Code. The powers of this Court under section 439 of the Code of Criminal Procedure to revise an appellate order of the learned Sessions Judge passed under section 476-B of the Code have not been challenged before us by the learned Counsel for the respondent opposite party, and it seems to us that proceedings under section 476 of the Code of Criminal Procedure initiated by a Magistrate can only be revised by the High Court under section 439 of the said Code. The conflict of opinion between the Calcutta and the Lahore High Courts as to whether proceedings under section 476 of the Code of Criminal Procedure initiated by a Civil Court can be revised by the High Court under section 115 of the Code of Civil Procedure or under section 439 of the Code of Criminal Procedure does not affect the decision of the present case, because all the High Courts in India are at one in holding that where proceedings under section 476 of the Code of Criminal Procedure were initiated by a Magistrate, the High Court could only revise the order of the Sessions Judge under section 439 of the Code of Criminal Procedure. For the purposes of deciding this application for revision it seems to us that it was unnecessary to have referred it to a Bench of this Court; but since the matter has been fully argued before us, we are of opinion that where a civil or

revenue court has initiated proceedings under section 476 of the Code of Criminal Procedure, the High Court can in revision interfere with an order of the appellate court in such proceedings only under section 115 of the Code of Civil Procedure. We are also clearly of opinion that where a criminal court takes proceedings under section 476 of the Code of Criminal Procedure the appellate order of the Sessions Judge can only be revised by the High Court under the provisions of section 439 of the Code of Criminal Procedure. That is our decision on the question of law referred to us under section 14(2) of the Oudh Courts Act.

Coming now to the merits of the case we are clearly of opinion that this application for revision should be granted. The learned Sessions Judge in his order of the 11th of May, 1934, agrees entirely with the contention of the applicant that the order of the Special Magistrate that a prosecution for perjury could only have been launched if it was found by the Magistrate taking proceedings under section 476 of the Code of Criminal Procedure that it was expedient in the interest of justice that an enquiry should be made into the alleged offence of perjury. The learned Sessions Judge writes in his order of the 11th of May, 1934, that "it does not appear whether this point was or was not considered by the lower court when it directed the prosecution of the appellant." He has also observed in his order of the 11th May, 1934, that "it is not stated how if at all the three statements for which the prosecution of the appellant has been directed were material to the case in which he was a witness." The learned Sessions Judge has also noted the fact that the alleged perjury was committed on the 7th of December, 1932, and the application by Ramadhin asking the Special Magistrate to file a complaint of an alleged offence of perjury against Mendi Lal was only made on the 28th of October, 1933. This inordinate delay in moving the Magistrate to take action under

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section 476 of the Code of Criminal Procedure has not been satisfactorily explained. In *Suraj Lal and others* v. *Sheo Shanker Lal* (1) it was held by one of us that it is incumbent upon a Magistrate who receives an application requesting that a complaint be filed by the Magistrate against certain persons charging them with offences under sections 211 and 193 of the Indian Penal Code to record a finding that it is expedient in the interests of justice that an inquiry should be made into the offences of sections 193 and 211 of the Indian Penal Code said to have been committed by those persons. Practically every point urged on behalf of the applicant before the learned Sessions Judge was accepted by him and that was the reason why he accepted the appeal and set aside the order of the Special Magistrate. We are also clearly of opinion that in the circumstances of this case, which we have set forth at the commencement of our judgment, no complaint under section 193 of the Indian Penal Code ought to have been filed by the Special Magistrate against Mendi Lal.

We accordingly allow this application for revision, set aside the order of the learned Sessions Judge, dated the 11th of May, 1934, withdraw the complaint filed by the Special Magistrate in respect of an offence under section 193 of the Indian Penal Code and direct that the case initiated on that complaint be consigned to the record-room without any further proceedings being taken in respect thereof.

Application allowed.

(1) (1934) I.L.R., 10 Luck., 14-11 O.W.N., 683.