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THAKDHARI SINGH v. KUMAN DAS.

JWALA PRASAD, J.

homestead plot and has left the village and is residing elsewhere.

The result is that the appeal should be dismissed. In this view of the matter it was not necessary to decide the question referred to the Full Bench, namely, " Is there a presumption that *belagan* homestead lands are not part of a raiyati holding ", but for a decision of this Court in *Ramji Prasad Sahu* v. *Muhammad Anwar Ali Khan*(1) according to which the *belagan* homestead plot, although entered as a part of the holding in the survey record-of-rights, is not really a part of it because no rent is payable for it. This definition of ' holding ', as already shown, is contrary to the definition of it given in the Bengal Tenancy Act and is misleading and in fact, as submitted by Mr. Manuk, his client was misled and instituted two separate suits for ejecting the defendants from the homestead land and the agricultural plots included in the same khata. In order to clear up the position created by the aforesaid decision of this Court in 1917 it was necessary to decide the question referred to us.

The result is that the appeal is dismissed with costs.

ROSS, J.—I agree.

WORT, J.—I agree. *Appeal dismissed.*

REVISIONAL CRIMINAL.

1930.

February, 5, 6.

Before Adami and Scroope, JJ.

DEVAL MAHTON

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 421—*appeal, summary dismissal of, without hearing*

*Criminal Revision no. 704 of 1929, from an order of A. Tuckey, Esq., I.C.S., Deputy Commissioner of Hazaribagh, dated the 20th November, 1929, confirming the order of M. A. Mahmood, Deputy Magistrate, 2nd Class, dated the 9th November, 1929.

(1) (1917) 3 Pat. L. W. 299.

appellant after record called for—pleader heard when appeal presented—dismissal, whether illegal.

It is not illegal to dismiss summarily an appeal without hearing the appellant after the receipt of the record which has been called for, if, as a matter of fact, the appellant or his pleader is heard at the time of the presentation of the appeal.

Emperor v. *Basavaneppa Basava* (1), followed.

Jagdeo Rai v. *Kali Rai* (2), not followed.

Lalit Kumar Sen v. *King-Emperor* (3) and *Surendranath Ghose* v. *King-Emperor* (4), distinguished.

The facts of the case material to this report are stated in the judgment of Adami, J.

B. C. De, for the petitioner.

The Assistant Government Advocate, for the Crown.

ADAMI, J.—The petitioners were convicted under section 379, Penal Code, by a Deputy Magistrate of the 2nd class and sentenced to pay a fine of Rs. 30 each, or in default rigorous imprisonment for thirty days.

The case for the prosecution was that Churan Gope, the recorded tenant of a holding under the petitioners, who were the landlords of the village, having died, the complainant came into possession of the holding. The petitioners, however, were not ready to recognise him as a tenant and set up two of their servants, Puna and Khedua, to claim that they were entitled as heirs of Churan in preference to the complainant. Eventually the names of these two persons were entered in the sarishta and the landlords refused the rent from the complainant.

On the day of the occurrence the two petitioners entered the field cultivated by the complainant and looted away his makai crop. The Deputy Magistrate found that though the petitioners had done their best to influence the prosecution witnesses, the

(1) (1927) 29 Bom. L. R. 488.
(2) (1917) 39 Ind. Cas. 1007.
(3) (1925) 42 Cal. L. J. 551.
(4) (1925) 42 Cal. L. J. 554.

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possession of the complainant was proved and also the theft by the petitioners, and he therefore convicted the petitioners as I have stated above.

An appeal was made before the Deputy Commissioner of Hazaribagh, who, having heard the pleader for the petitioners, then sent for the record of the case. After perusal of the record he passed the following order:—

"I have gone through the record of this case carefully. I agree with the lower Court in thinking the case a true one, and the evidence is sufficient to support the conviction. The appeal is summarily dismissed."

Against that order this Court was moved. It was contended that the order was not according to law, first, because the case was one in which there should have been no summary dismissal, and secondly, that having called for the record, the Deputy Commissioner was bound again to hear the pleader which he failed to do. It is also urged that as there was a bona fide dispute as to title between the parties, the appeal should have been heard in the ordinary way.

The application was heard by a single Judge of this Court, who disagreed with a decision of Chapman, J. in the case of *Jagdeo Rai* v. *Kali Rai* (1) in which it was held that after perusal of a record the Appellate Court is again bound to hear the appellant's pleader. The learned Judge, considering that this was a point which should be decided by a Bench, has referred the case to us.

First, with regard to the question whether the Deputy Commissioner was bound again to hear the pleader, the case which was chiefly relied upon was the case of *Jagdeo Rai* v. *Kali Rai* (1) above cited. Chapman, J., in that case decided that where a District Magistrate, on a criminal case coming before him in appeal sends for the record and on receipt of the record dismisses the appeal without hearing the appellant or any legal practitioner engaged on his

(1) (1917) 39 Ind. Cas. 1007.

behalf, the procedure adopted by him is not in accordance with law and the appellant must be given an opportunity to be heard.

There are two other cases which have also been relied on; they are *Lalit Kumar Sen* v. *King-Emperor*(1) and *Surendra Ghose* v. *King-Emperor*(2). These two cases were both decided by the same Judges and the decision in both is to the effect that after a record has been sent for, the pleader must be heard.

Now in the first of the three cases, Chapman, J. remarked that the record was sent for after giving "some sort of hearing to the mokhtear at the time of the presentation of the appeal". In the other two cases there is nothing to show that a pleader had been heard before the record was sent for.

In the present case the learned Deputy Commissioner gave a full hearing to the pleader before he decided to send for the record. If we turn to section 421 of the Code of Criminal Procedure we find that, though it is provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same, the Court has power, before summarily dismissing an appeal, to call for the record but is not bound to do so. There is nothing in that section requiring that the pleader should be heard again if a record is sent for. All that the section requires is that the pleader shall have a reasonable opportunity of being heard in the Court of Appeal before there is a summary dismissal.

In the present case the pleader had been fully heard and had the reasonable opportunity which the section demands. It may be that in some cases after perusing the record the Court may desire to hear the pleader on a point which the perusal of the record makes it necessary to have explained; but I can find nothing in the law requiring this second hearing of the pleader.

(1) (1925) 42 Cal. L. J. 551. (2) (1925) 42 Cal. L. J. 554.

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In the case of *Emperor* v. *Basavaneppa Basava*(1) Fawcett and Patkar, JJ. held that ordinarily, if the Court does send for the record, it is preferable to hear the pleader when the record is before the Court; but there is nothing in section 421 to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if the appellant's pleader desires that course, and if the Court desires to send for the record then it is not illegal summarily to dismiss the appeal without giving a further opportunity of the pleader being heard. That decision coincides with my view on the point. If after hearing a pleader and sending for the record it is necessary to hear the pleader again with the record before the Court, the dealing with the appeal would hardly be a summary dealing, for the appeal would practically have to be heard fully and there would be no reason for the sub-section (*2*) of section 421 allowing for the calling for the record before summarily dismissing an appeal. I would hold that though in many cases it may be useful to hear the pleader again to elucidate some point raised by a perusal of the record, there is no illegality in summarily dismissing the appeal without hearing the pleader again after the record is called for.

With regard to the reasonableness of the summary dismissal in this case, it has to be remembered that there was really no bona fide dispute as to the right to hold the land between the petitioners and the complainant in the case. Any such dispute, if it existed, was between the complainant and Puna and Khedua; the landlord in no case could claim that they had a right to enter a tenant's holding and cut and take away his crop: so that the contention that this case should have been heard fully as any ordinary appeal and a judgment should have been delivered on the ground that there was a bona fide dispute can have no support. The Deputy Magistrate came to a finding that he believed the complainant and his

(1) (1927) 29 Bom. L. R. 488.

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witnesses on the question of possession and as to the theft of the crop by the petitioners and the learned Deputy Commissioner states in his order that he has carefully read through the record and finds that the Deputy Magistrate's finding on this point was correct.

ADAMI, J.

The order of the Deputy Commissioner is a proper order under section 421. It was unnecessary for him to write a judgment if he found that the case was one which could be dismissed summarily.

I can see no reason to interfere in this case and the application should be rejected.

SCROOPE, J.—I agree. Section 421 of the Code of Criminal Procedure contemplates that a reasonable opportunity of being heard should be given to the appellant or his pleader in support of the appeal, no more and no less; and if after hearing the pleader at the time of presentation of the appeal, as admittedly the Deputy Commissioner did in this case, he then sends for the record and dismisses the appeal without hearing the pleader further, then I do not consider that he infringes the section in question. In fact my view entirely coincides with that expressed on this question in the case of *Emperor* v. *Basavaneppa Basava* (1).

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

RAI BIPIN BEHARI BOSE

1930.

February, 13.

v.

RAI PROMOTHO NATH MITRA.*

Partition Suit—costs, each party to bear its own, up to the passing of preliminary decree—absence of exceptional circumstances.

*Appeal from Original Decrees no. 58 and 59 of 1928, from a decision of Maulvi Amir Hamza, Subordinate Judge of Gaya, dated the 12th December, 1927.

(1) (1927) 29 Bom. L. R. 488.