REVISIONAL CRIMINAL.

1931.

May, 20.

Before Macpherson and Dhavle, JJ.

RAMLAKHAN CHAUDHRY

v.

THE KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 439—*dismissal of appeal*—*High Court, whether debarred from enhancing sentence subsequently*—*section* 439(6), whether applies to convicted person whose appeal has *been heard by High Court itself.*

The dismissal of an appeal by the High Court does not debar it from subsequently enhancing the sentence, in the exercise of revisional jurisdiction, after notice to the appellant.

There is nothing in section 439, Code of Criminal Procedure, 1898, to restrict a rule for enhancement to any particular time after the conviction.

Emperor v. *Jorabhai Kisabhai*(1), *Crown* v. *Dhanna Lal*(2) and *Saiyid Anif Sahib, In re*(3), followed.

Sub-section (6) of section 439, Code of Criminal Procedure, 1898, provides :

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

Held, that the sub-section does not apply to a convicted person whose appeal has been heard by the High Court itself.

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

* In the matter of Criminal Appeal no. 64 of 1931.

(1) (1926) I. L. R. 50 Bom. 783.

(2) (1928) I. L. R. 10 Lah. 241.

(3) (1924) 85 Ind. Cas. 727.

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S. N. Sahay (with him *R. Misser* and *P. N. Gaur*), for the appellants.

Government Advocate and *Gopal Prosad*, for the Crown.

DHAVLE, J.—This is a rule calling upon Ramlakhan Chaudhury and Anup Lal to shew cause why the sentences passed upon them by the Sessions Judge of Darbhanga—under sections 148 and 304, Indian Penal Code in the case of Ramlakhan and under sections 147 and 325, Indian Penal Code in the case of Anup Lal—should not be directed to run consecutively, and not concurrently as ordered by the learned Sessions Judge, or otherwise enhanced. We directed the issue of the rule by our judgment of the 22nd April last dismissing the appeal preferred by these two and six other persons. At the hearing of the appeal we asked Mr. S. N. Sahay, who appeared for the appellants, to shew cause why the sentences passed upon these two men should not be directed to run consecutively, but Mr. Sahay was unprepared to meet it and prayed that notice may be issued to the men concerned.

In shewing cause Mr. Sahay has urged at the outset that with the disposal of the appeal on the 22nd April this Bench, and indeed this High Court, is functus officio and has no jurisdiction to hear the matter at all. His argument is that the appellate judgment is under section 430 of the Code of Criminal Procedure final and that the Court has jurisdiction to revise the orders only of inferior criminal courts—(*see* section 439 which must be read with section 435 of the Code of Criminal Procedure), or of courts subject to its appellate jurisdiction—(*see* clause *21* of the Letters Patent of this High Court). It is, however, clear that the contention overlooks the fact that the appellate judgment was not concerned with the question of enhancement of the sentence which only arises in the exercise of our revisional jurisdiction and that the sentence to be revised and enhanced is

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the sentence passed not by this Court but by the court of session in Darbhanga. The point was fully dealt with in *Emperor* v. *Jorabhai Kisabhai*(1), a case in which the Bench that heard a criminal appeal was moved, after the delivery of the appellate judgment dismissing the appeal, to issue a notice to the accused to shew cause why the sentence should not be enhanced. The Bench that disposed of the rule pointed out that the dismissal of the appeal was in no way a decision that the sentences should not be enhanced and that sub-section (*6*) which was added to section 439 by the amendments of 1923 had no application to a case where the appeal of the accused had been heard by the High Court itself. The ruling in *Jorabhai's*(1) case was referred to with approval in *Crown* v. *Dhanna Lal*(2), though the point for decision in the later case was whether the rejection of a petition for revision by the accused debarred him from exercising the right given by sub-section (*6*) of section 439 to shew cause against his conviction. By a somewhat similar train of reasoning it was held by the Madras High Court in *In re Saiyed Anif Sahib*(3) that the dismissal of a revision petition did not prevent the High Court from enhancing the sentence passed upon the petitioner after giving him notice. Mr. Sahay has pointed out that the Lahore and Madras cases are cases where the High Court had not itself heard the appeal. It does not, however, seem to me that this distinction really strengthens Mr. Sahay's argument, for the question of enhancement is entirely foreign to an appeal and can only be dealt with in the exercise of the revisional jurisdiction of the High Court. Mr. Sahay has had to concede that the Bombay decision is against him; but he has urged that in that decision it was overlooked that incomplete judgments cannot be completed in revision. I am not impressed by this. The appellate judgment

(1) (1926) I. L. R. 50 Bom. 783.
(2) (1928) I. L. R. 10 Lah. 241.
(3) (1924) 85 Ind. Cas. 727.

cannot be regarded as incomplete if it did not dispose of the question of enhancement; it was a judgment on a petition of appeal by the convicted persons, and they could not (in the nature of things) ask for an enhancement of their sentences. It is true that the judgment in the present case, by directing the issue of a notice to two of the appellants, did not finally dispose of the question of enhancement but as an appellate judgment it was a complete judgment, and it was only the revisional matter of enhancement that was left to be decided in due course. Mr. Sahay has also urged that on the Bombay view it would be open to an accused person, after the dismissal of his appeal, to come up for a reduction of his sentence as it is open to the Crown to apply for an enhancement of the sentence. I am not impressed by this contention also. It is true that clause (*6*) of section 439 provides that, notwithstanding anything contained in the section, any convicted person to whom an opportunity has been given under sub-section (*2*) of shewing cause why his sentence should not be enhanced shall, in shewing cause, be entitled also to shew cause against his conviction; but in the three decisions that I have already referred to, it has been pointed out that this sub-section does not apply to a convicted person whose appeal has been heard by the High Court itself, and, apart from the sub-section, it is perfectly clear that the High Court will not entertain a revisional application at the instance of an accused person, whose appeal has been disposed of by the High Court itself, only because of the inherent incapacity of any Bench of the High Court to reconsider a criminal matter disposed of by another Bench (except in such circumstances as, for example, where a point of law is reserved for consideration of the Court), and also because of the rule regarding the finality of judgments in criminal cases. There is nothing in section 439 to restrict a rule for enhancement to any particular time after the conviction, and it is difficult to see much point in keeping an appellate judgment of the High

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Court pending merely for the disposal of a rule for enhancement. The hearing of the appeal means hearing all that the appellant desires to say against the conviction and the sentence passed upon him by a lower court, and at the hearing of a rule for enhancement after the disposal of an appeal by the High Court, the appellant is outside section 436(*6*) altogether. I would hold accordingly that the disposal of the appeal by us does not prevent the Court from dealing with the rule.

Mr. Sahay has next urged that even if it be ruled that it is competent to the Court, in spite of the appellate judgment, to deal with the rule for enhancement, the persons against whom the rule has been issued are entitled, under sub-section (*6*) of section 439, in shewing cause, also to shew cause against their conviction; and he has urged that the rule should, therefore, be heard by another Bench. For the reasons already indicated, this contention must be rejected: the sub-section has no application to cases where the appeal has been heard by the High Court itself—(*see* in particular *Emperor* v. *Jorbhai Kisabhai*[1] already cited).

Coming to the merits, Mr. Sahay has urged that an enhancement is unnecessary as the affair was not a onesided riot and injuries, not all of which were trivial, were received by the men on the side of appellants, the prosecution witnesses had not given an unvarnished account, and on the evidence it could not be said with certainty which particular blow had been inflicted by the individual offender. It is, however, perfectly clear that it was Ramlakhan that speared Gursaran on the abdomen, and Anup Lal that fractured the left ulna of Lachmi Misser 4″ above the wrist joint. For the offence of rioting these men have received appropriate sentences along with the other men to whom the offence was clearly brought home. There is, however, no reason to make those sentences

(1) (1926) I. L. R. 50 Bom. 783.

concurrent with the sentences passed upon them for the offence under sections 304 and 325 respectively.

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I would accordingly make the rule absolute and direct that the two sentences passed upon Ramlakhan and Anup Lal run consecutively in each case.

MACPHERSON, J.—I agree.

DHAVLE, J.

Rule made absolute.

PRIVY COUNCIL.*

1931.

June, 11.

KUMAR JAGAT MOHAN NATH SAH DEO

v.

PRATAP UDAI NATH SAH DEO.

Minerals—Khorposh grant by Zamindar—Impartible Zamindari—absence of express grant of minerals.

A khorposh or maintenance grant made by the holder of an impartible zamindari does not convey the sub-soil rights unless they are included expressly or by clear implication.

Sashi Bushan Misra v. *Jyoti Prasad Singh Deo*(1) and *Gobinda Narayan Singh* v. *Sham Lal Singh*(2), followed.

Judgment of the High Court(3), affirmed.

Consolidated appeals (nos. 19 and 20 of 1929) from a decree of the High Court (April 27, 1927) reversing a decree of the Subordinate Judge of Ranchi (February 4, 1925).

The suit was instituted by the first respondent the Maharaja of Chota Nagpur, against his younger brother, the above-named appellant, and licensees from the appellant, for a declaration of the plaintiff's right to the minerals and sub-soil rights in Pargana

* *Present*:—Lord Russell of Killowen, Sir Lancelot Sanderson, and Sir George Lowndes.

(1) (1917) I. L. R. 44 Cal. 585; L. R. 44 I. A. 46

(2) (1931) I. L. R. 58 Cal. 1187; L. R. 58 I. A. 125.

(3) (1927) I. L. R. 6 Pat. 638.