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subdivision of the tenure and apportionment of the rent on the ground that the property described in what would have been the *hawalgi lagan khewat*, if apportionment of rent had been made before the preparation of the record-of-rights, must also be brought to sale.

The appeal is allowed with costs, the order of the Judicial Commissioner is set aside and the order of the Deputy Collector is restored.

DHAVLE, J.—I agree.

Appeal allowed.

S. A. K.

REVISIONAL CRIMINAL.

Before Varma and Rowland, JJ.

KUNJO CHAUDHARY

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 476 and 476B—appellate court, whether empowered to order a remand—provision of section 476B, whether exhaustive—failure to appeal against order resulting in complaint under section 476—accused, whether entitled to question the legality of complaint after conviction.

[The provision of section 476B, Code of Criminal Procedure, 1898, as to the powers of the appellate court not being exhaustive, the appellate court has power to order a remand and to direct the trial court to make a preliminary enquiry to find out if there are sufficient materials to file a complaint.]

* Criminal Revision no. 193 of 1937, against an order of H. Whittaker, Esq., I.C.S., Sessions Judge, Monghyr, dated the 3rd March, 1937, affirming that of K. M. Kunar, Esq., Assistant Sessions Judge, Bhagalpur, dated the 23rd December, 1936.

Nasaruddin Khan v. Emperor(1), *Surendranath Maiti v. Sushilkumar Chakrabarti*(2), *Baidyanath Giri v. King-Emperor*(3), *Krishnamachari v. Emperor*(4) and *Janardana Rao v. Prattipati Lakshmi Narasamma*(5), followed.

Dhanpat Rai v. Balak Ram(6), *Mendi Lal v. Ram Adhin*(7), *Sami Vannia Nainar v. Penasami Naidu*(8) and *Manir Ahamed Chaudhury v. Jogesh Chandra Roy*(9), dissented from.

Muhammad Bayetulla v. Emperor(10), referred to.

A person who has not appealed against an order resulting in a complaint under section 476, Code of Criminal Procedure, 1898, cannot subsequently question the legality of the complaint after his conviction by the trial court and its confirmation by the appellate court.

Jabbar Ali v. Emperor(11) and *Jugeshwar Singh v. Emperor*(12), followed.

Ali Ahmud v. Emperor(13), referred to.

Application in revision by the accused.

The facts of the case material to this report are set out in the judgment of Varma, J.

Baldeva Sahay and Harinandan Singh, for the petitioner.

The Advocate-General, for the Crown.

VARMA, J.—This is an application on behalf of one Kunjo Chaudhry who has been convicted under sections 467/109 and 471 of the Indian Penal Code.

- (1) (1926) I. L. R. 53 Cal. 827.
- (2) (1931) I. L. R. 59 Cal. 68.
- (3) (1930) 12 Pat. L. T. 336.
- (4) (1933) A. I. R. (Mad.) 767.
- (5) (1934) A. I. R. (Mad.) 52.
- (6) (1931) I. L. R. 13 Lah. 342, F. B.
- (7) (1934) I. L. R. 10 Luck. 395.
- (8) (1927) I. L. R. 51 Mad. 603.
- (9) (1928) I. L. R. 55 Cal. 1277.
- (10) (1930) I. L. R. 58 Cal. 402.
- (11) (1929) A. I. R. (Cal.) 203.
- (12) (1936) A. I. R. (Pat.) 346.
- (13) (1932) A. I. R. (Cal.) 545.

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He was sentenced to three years' rigorous imprisonment under each of the sections, the sentences to run concurrently, but on appeal it has been reduced to eighteen months under each count, and the sentences are to run concurrently.

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It appears that on the 10th of Baisakh one Nathu Mandal executed a handnote in favour of the petitioner for Rs. 65-7-0. The case for the prosecution was that in Chait, 1337, Nathu Mandal paid Rs. 77-8-0 to the petitioner in full satisfaction of the debt but the petitioner refused to return the handnote because Nathu Mandal refused to pay an additional sum of Rs. 5. On the 27th of March, 1935, the petitioner instituted a suit (no. 208) in the Court of Small Causes at Bhagalpur, on the basis of the handnote in question, and he is alleged to have altered the date of the handnote from 10th of Baisakh 1337 to 10th of Baisakh 1339 so as to avoid the bar of limitation. The suit was later on dismissed for default and the petitioner took no steps for restoration of the case. On the 4th of October, 1935, Nathu Mandal filed an application before the Small Cause Court Judge, under section 476 of the Code of Criminal Procedure asking the Judge to file a complaint against the petitioner for having abetted commission of forgery with respect to the handnote in question and for dishonestly using the handnote as genuine knowing or having reason to believe it to be a forgery. That petition, it now appears, was rejected by the first court on the ground that the suit in question had been dismissed before the petition was filed. Then there was an appeal to the District Judge, who set aside the order of the Small Cause Court Judge, holding that he had erroneously refused to exercise the jurisdiction vested in him by law, and directed the Small Cause Court Judge to hold a preliminary inquiry to find out if there were sufficient materials to file a complaint against the petitioner. This order was passed on the 20th of March, 1936. The Small Cause Court Judge held

an inquiry and filed the complaint on the 11th of May, 1936. In due course the petitioner was committed to the Court of Session for trial and convicted and sentenced as already stated. The present application is directed against the conviction of the petitioner as the result of the trial.

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The rule issued by this Court was of a limited character in the following terms :

" Let a rule be issued on the District Magistrate of Bhagalpur to show cause why the conviction of the petitioner should not be set aside on the ground that there was no proper sanction for his prosecution inasmuch as the complaint filed by the learned Munsif (Small Cause Court Judge) was after remand by the District Judge who had no power to order such a remand."

Mr. Baldeo Sahay, appearing on behalf of the petitioner, urges that section 476B of the Code of Criminal Procedure empowers the appellate court either to " 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 ". He argues that the complaint made by the Small Cause Court Judge was illegal inasmuch as there is no power given to the appellate court to make an order of remand in a case under section 476.

In support of his contention Mr. Baldeo Sahay has cited various decisions. He refers to the Full Bench decision of the Lahore High Court in *Dhanpat Rai v. Balak Ram*(1), where in answer to the question " Can the Appellate Court order a remand and direct the trial Court to make a preliminary enquiry and come to a fresh decision on the question of making or not making a complaint?", it was held that the procedure on appeal under section 476B of the Criminal Procedure Code is procedure on an appeal under that Code, and as that Code provides for no remand the Appellate Court cannot make a remand

(1) (1931) I. L. R. 13 Lah. 342, F. B.

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to the trial Court, but the Appellate Court may itself make an enquiry in a case where it comes to the conclusion either that the trial Court has made no preliminary enquiry at all or has made a defective enquiry. That was a case in which the defendant in a suit filed a petition for prosecution of the plaintiff on the ground that a false affidavit had been sworn by the latter. The petition was rejected, and the defendant appealed to the Senior Subordinate Judge who held that the trial Court had given no notice to the other side and had given the defendant no opportunity of showing the falsity of the affidavit and had summarily dismissed the petition. He held that on the facts of the case a preliminary enquiry was necessary and the want of such enquiry was a material irregularity. He, therefore, set aside the order of the Court dismissing the petition and remanded the case for passing a proper order after giving the petitioner an opportunity of establishing the allegations.

The next case referred to by Mr. Baldeo Sahay is the decision in *Mendi Lal v. Ram Adhin*⁽¹⁾ in which the decision in *Dhanpat Rai v. Balak Ram*⁽²⁾ has been relied upon, and it was held that the order of an appellate Court remanding the case and directing further enquiry into the alleged commission of the offence under section 193, Indian Penal Code, was ultra vires and absolutely void. That was also a case in which an application for revision was filed against an order of the Sessions Judge who reversed the order of the Special Magistrate and remanded the case to the Special Magistrate with a direction to make further enquiry under section 476 of the Code of Criminal Procedure.

The next case referred to by the learned Advocate is a single Judge decision of the Madras High Court

(1) (1934) I. L. R. 10 Luck. 935.

(2) (1931) I. L. R. 13 Lah. 342, F. B.

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in *Sami Vannia Nainar v. Penasami Naidu*⁽¹⁾ where it was held that in an appeal under section 476B of the Code of Criminal Procedure, the appellate Court has no jurisdiction to take additional evidence for the disposal of the matter coming up before it under the section, whether or not there was any objection to the reception of that evidence, and that section 428 of the Code, which empowers the appellate Court to take evidence, has no application to proceedings under section 476B. There a petition was filed by the defendant against the plaintiff under section 476. The Court refused to file a complaint and the defendant then appealed to the District Court under section 476B of the Code. The appellate Court admitted an affidavit for the disposal of the matter, and relying on the affidavit finally dismissed the application. Against this order a petition was moved before the High Court which after expressing the views above stated, remanded the case to the District Judge for disposal in accordance with law.

The next case relied upon is that of *Manir Ahmed Chowdhury v. Jogesh Chandra Roy*⁽²⁾ where it was held that in an appeal under section 476B, Criminal Procedure Code, the Appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself. In this case also the petitioner approached the High Court after the order of remand was made by the appellate Court under section 476B.

The next case referred to is *Muhammad Bayetulla v. Emperor*⁽³⁾ where it was held that appeals under section 476B of the Code of Criminal Procedure are subject to all the provisions applicable to Criminal appeals as laid down in section 419 and the following sections, and it was therefore open to an appellate Court to dismiss the appeal summarily under

(1) (1927) I. L. R. 51 Mad. 603.

(2) (1928) I. L. R. 55 Cal. 1277.

(3) (1930) I. L. R. 58 Cal. 402.

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section 421. Their Lordships did not interfere in a case in which the appellate Court summarily dismissed an appeal against an order by a lower Court to file a complaint.

The learned Advocate-General has drawn my attention to various cases in which it has been held that the powers of the appellate Court mentioned in section 476B, Criminal Procedure Code, are not exhaustive. He has referred to the decision in *Nasaruddin Khan v. Emperor*⁽¹⁾. The point raised in that case was that the District Judge had no jurisdiction whatever to dismiss the appeal of the petitioner without looking into the record and considering the same. It appears that when an application was filed under section 476B an Advocate appeared on the first date and he was absent on the second date. The District Judge thinking that this was an abandonment of the appeal he dismissed the application. Their Lordships held that that was not a matter in which the High Court could interfere under section 115 of the Code of Civil Procedure. They held further that the procedure governing such cases is to be sought in the four corners of the Civil Procedure Code, and having come to that conclusion they held that the District Judge was fully competent to dismiss the appeal.

In *Baidyanath Giri v. The King-Emperor*⁽²⁾ we have a single Judge decision which says that the provision of section 421, Criminal Procedure Code, applies to all appeals unless it is specifically provided otherwise. This decision is of importance as indicating that section 476B is not exhaustive.

The case reported in *Surendranath Maiti v. Sushilkumar Chakrabarti*⁽³⁾ is another decision of the Calcutta High Court which following its previous decisions held that the provisions of section 115 of the Code of Civil Procedure apply to applications under

(1) (1926) I. L. R. 53 Cal. 827.

(2) (1930) 12 Pat. L. T. 336.

(3) (1931) I. L. R. 59 Cal. 68.

section 476A and 476B originating in civil courts. Here also the question was whether the lower appellate Court could order a remand. It was observed in that case that section 476B is not intended to be exhaustive. In this case also the petitioner moved against the order of the appellate Court sending back the case on remand for further inquiry.

In *Krishnamachari v. Emperor*⁽¹⁾ it was held that as section 476B is not exhaustive as to the powers of the appellate Court in the case of a complaint under section 476, it has power of remand and also of summary dismissal in such cases. But in this case the ground that was taken at the time of admission that the powers of an appellate court under section 476B were exhaustive was not pressed at the time of hearing. This application also was made against an order of the Sessions Judge refusing to direct the withdrawal of a complaint preferred by a Magistrate.

In *Janardana Rao v. Prattipati Lakshmi Narasamma*⁽²⁾ it was held that the provisions of chapter 31 can be applied to the hearing of an appeal under section 476B. The calling for further evidence is not permissible under section 428, but a remand for proper disposal is competent under clauses (c) and (d), section 423, and that in an appeal under section 476B in a civil proceeding the appellate Court has power to remand the matter back to the lower court for disposal. In the course of the judgment it is said that as section 476B does not provide for dismissal of appeals and as that power is inherent in all appellate courts it must be held that powers under section 476B are not exhaustive.

From a review of these cases it is clear that opinion is divided as to whether an appellate court under section 476B has or has not the power to remand a case to the lower court for purposes of enquiry. The Lahore and Lucknow High Courts in some of the later

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(1) (1933) A. I. R. (Mad.) 767.

(2) (1934) A. I. R. (Mad.) 52.

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decisions hold that the powers under section 476B are exhaustive, whereas most of the recent decisions of the Madras High Court are to the effect that the powers are not exhaustive. I would prefer to adopt the Madras High Court view and hold that the appellate court can exercise all the powers contemplated by the Criminal Procedure Code, except those which are expressly excluded.

But the matter does not end here. These are cases in which the petitioner went to the High Court in revision immediately after the order was passed. But in this case the Munsif filed a complaint on the 11th May, 1936: it is on that complaint and not on the District Judge's order, that the present prosecution started. Assuming the District Judge's order to be a nullity, was there any want of power in the Munsif to file the complaint? It is said he could not do so because he had previously declined to do so. No doubt it is a fundamental principle that a person once acquitted of an offence cannot again be tried for that offence (section 403, Criminal Procedure Code). But this is no such case. Dismissal of a complaint or discharge of an accused in a warrant case is no bar to his being thereafter tried on the same facts and Mr. Baldeo Sahay has not been able to show us any provision of law by which the filing of this complaint was barred.

Even if there had been a legal defect, no steps were taken against that complaint. No appeal was presented to the District Judge under section 476B. In the trial Court, so far as appears, no objection was made. There is nothing in the judgment to indicate that any special objection was raised against the validity of the complaint, nor was that matter agitated in the appeal before the Court of Session. The question is whether the validity of the complaint can now be questioned by the petitioner after his conviction by the trial court and its confirmation by the lower appellate court. In *Jabbar Ali v.*

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Emperor⁽¹⁾ Rankin, C. J. held that a person who has not appealed against an order resulting in a complaint under section 476, cannot argue before the Magistrate whether the complaint is a good complaint or made by a proper officer or so forth. It was argued in that case that although there was an appeal against every order made under section 476, it is open to the person complained against not to exercise his right of appeal at all and to argue before the Magistrate or the Sessions Judge whether the complaint was a good complaint or made by a proper officer. His Lordship observed as follows: "In my opinion this contention cannot be too formally rejected. What the Criminal Procedure Code requires is that certain proceedings shall not be instituted unless there is a complaint. Whether there is a complaint or there is no complaint in my judgment is a question which can only be agitated in the manner provided". In our own High Court it has been held in *Jugeshwar Singh v. Emperor*⁽²⁾ that an objection to initiation of proceedings must be taken at an early stage and where the case is triable by Sessions, and is initiated on the complaint by a Magistrate under section 476, once the commitment is made it is too late for the accused to take an objection against the initiation of the proceedings on the ground of want of jurisdiction in the Magistrate or the person functioning as such, and reliance was placed by their Lordships on the decision in *Jubbar Ali v. Emperor*⁽¹⁾ and on the decision in *Ali Ahmad v. Emperor*⁽³⁾.

In this view of the matter, this application must be rejected. The petitioner must surrender to his bail to serve out the remainder of his sentence.

ROWLAND, J.—I agree.

S. A. K.

Rule discharged.

(1) (1929) A. I. R. (Cal.) 203.

(2) (1936) A. I. R. (Pat.) 346.

(3) (1932) A. I. R. (Cal.) 545.