

APPELLATE CIVIL.

Before Mr. Justice Maung Ba.

MA ON KHIN

v.

N.K.M. FIRM.*

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June 8.

Criminal Procedure Code (Act V of 1898), s. 476B—Second appeal whether maintainable against order for complaint by lower appellate Court.

Held, that where the trial Court refused to lay a complaint under the provisions of section 476 of the Criminal Procedure Code and the lower appellate Court on appeal ordered such complaint, an appeal does not lie to the High Court against such order.

Muhammed Idris v. The Crown, 6 Lah. 56; *Somabhai Vallabhbai v. Aditibhai Parshottam*, 48 Bom. 401—*followed*.

Faujdar Rai v. Emperor, Criminal Revision No. 5 of 1925 (Patna High Court)—*dissented from*.

Tun Aung—for Appellant.

P. B. Sen—for Respondent.

MAUNG BA, J.—This is an appeal under section 476B of the Criminal Procedure Code to direct the withdrawal of the complaint made by the learned District Judge of Pyinmana in relation to Civil Regular Suit No. 77 of the Subdivisional Court of Pyinmana.

In that suit N.K.M. firm sought to recover the balance of principal and interest due on a promissory-note executed by Ma On Khin and her husband.

Ma On Khin constested the suit and pleaded payment of a certain sum of money. In support of her defence she produced a document, Ex. 1, showing entries of different payments made on different occasions. The last entry relates to an alleged payment of Rs. 550, on the 17th November 1924. But the Chettyar contended that the amount paid on that occasion

* Civil Miscellaneous Appeal No. 51 of 1927.

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was Rs. 50, only and that the entry had been altered. The document bears clear evidence of alteration.

The plaintiff's clerk Supaya Chettyar deposed that the entry was made by him, that he wrote Rs. 50 in words and that the entry had been erased. He also deposed that the date entered by him was 17th and that it now appeared as 2nd.

The Subdivisional Judge, who tried the suit, held that the last payment was only Rs. 50 and not Rs. 550. The Chettyar in consequence applied to the Subdivisional Judge to make a complaint under section 476, Criminal Procedure Code. The learned Judge declined to do so, although he was of opinion that the entry appeared to have been forged or fabricated. The reason given for his refusal to make such a complaint was that the Chettyar appeared to be dishonest in that he retained a promissory-note which had already been discharged. I quite agree with the learned District Judge that the reason given by the Subdivisional Judge was not sufficient.

A legal objection has been raised that the present appeal does not lie. On examining the language of section 476B, I am of opinion that the objection is well founded. That section provides for an appeal from an order passed under section 476 or section 476A. Section 476 refers to the original Court and 476A to a superior Court to which an appeal lies from the abovementioned Court. Section 476B does not provide for an appeal from an order passed by the superior Court on appeal.

In the present case the complaint was made by the learned District Judge on an appeal preferred to him under section 476B. If he had made a complaint on his own motion, his order would come under section 476A and from such an order an appeal would lie to this Court under section 476B. This view has also

been held by the Bombay and Allahabad High Courts in *Somabhai Vallabh v. Aditbhai Parshottam* (1) and *Muhammed Idris v. The Crown* (2), respectively.

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The Bombay case was heard by a Bench of two Judges. In that case the Subordinate Judge of Umreth made a complaint under section 476, Criminal Procedure Code, but on appeal the complaint was withdrawn by the Sessions Judge of Ahmedabad. There was a second appeal to the High Court and their Lordships, Sir Norman Macleod and Mr. Justice Shaw, held that "an order passed by a lower appellate Court under section 476B of the Criminal Procedure Code is not appealable to the High Court."

The Lahore case was also decided by a Bench of two Judges where the facts were almost parallel to those in the present case. The Subordinate Judge of Delhi declined to make a complaint. On appeal the District Judge as in the present case made a complaint. The matter went before the High Court and their Lordships, Mr. Justice Martineau and Mr. Justice Zafar Ali, held that "no appeal lies under section 476B of the Code of Criminal Procedure to the High Court from an appellate order of the District Judge making a complaint under section 476, which the Subordinate Judge might himself have made but refused to make."

It is true that a single Judge of the Patna High Court in Criminal Revision No. 5 of 1925 (*Faujdar Rai v. Emperor*) held a contrary view. The learned Judge, Sir B. K. Mullick, held that "section 476B of the Criminal Procedure Code contemplates that if an Appellate Court sets aside the order of the Original Court, the party prejudicially affected by the order of the Appellate Court has a right of appeal to the

(1) (1924) 48 Bom. 401.

(2) (1924) 6 Lah. 56.

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Court to which appeals from such Appellate Court ordinarily lie."

With due deference to that learned Judge I disagree with him. Section 476B does not seem to provide for a second appeal. Of course a High Court in cases where justice demands can exercise its revisional powers ; but that power will not be exercised except on exceptional grounds.

In the present case the record of Civil Regular No. 77 of 1926, is not quite complete. No attempt has been made to find out when the alteration took place. The document was produced by Ma On Khin's pleader on the 9th of August. Several adjournments intervened before the trial commenced and when Ma On Khin was examined, she simply said that she could not say who made the erasures. It is essential that it should be established that erasures existed at the time when the document was produced. Unless that point is made certain, it is not possible to say what may have happened after its production. Such matters should be left to the Criminal Court which may have to try the case. As matters stand I do not think that any good case is made out for interference in revision although, if necessary, I can convert the present appeal into one of application for revision.

For the above reason the appeal is dismissed.